IN THE SUPREME COURT OF THE STATE OF NEVADA

SHANNA MARIE BALTAR, D.O., and MIRIAM SITHOLE, APRN,
Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT, of the State of Nevada, in and for the County of Clark; and THE HONORABLE TARA CLARK NEWBERRY, District Judge,
Respondents,

and

BARRY HEIFETZ, individually, SPRING VALLEY HEALTHCARE, LLC, a foreign limited-liability company d/b/a SPANISH HILLS WELLNESS SUITES
Real Parties in Interest.

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PETITIONER'S APPENDIX – VOL. III 1-121

District Court Case No. A-20-808436-C

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DISTRICT COURT

CLARK COUNTY, NEVADA

BARRY HEIFETZ, an Individual, Plaintiff, v. SPRING VALLEY HEALTH CARE, LLC, a foreign limited-liability company, d/b/a SPANISH HILLS WELLNESS SUITES; SHANNA MARIE BALTAR, DO; an individual, MIRIAM SITHOLE, APRN; an individual, DOE DOCTOR I, an Individual; DOE NURSE I, an individual; DOES I through X; ROE BUSINESS ENTITIES XI through XX, inclusive, Defendants.	Case No. A-20-808436-C Dept. No. XXI **PLAINTIFF'S OPPOSITION TO DEFENDANT SPANISH HILLS WELLNESS SUITES' JOINDER TO DEFENDANTS SHANNA MARIE BALTAR, D.O. AND MIRIAM SITHOLE, APRN'S AMENDED MOTION FOR PARTIAL SUMMARY JUDGMENT**

Plaintiff hereby submits this opposition to Defendant Spanish Hill's Joinder to Defendant Dr. Baltar and APRN Sithole's Motion for Partial Summary Judgment. Plaintiff incorporates the opposition on file herein by reference. To the extent that Spanish Hills seeks summary judgment on direct claims against it, it has not provided any memorandum of points and authorities explaining why it would be entitled to summary judgment. Any such request must be denied.

DATED this 27th day of December, 2021.

CLAGGETT & SYKES LAW FIRM

/s/ Shannon L. Wise
Shannon L. Wise, Esq.
Nevada Bar No. 014509
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CLAGGETT & SYKES LAW FIRM

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of December, 2021, I caused to be served a true and correct copy of the foregoing **PLAINTIFF'S OPPOSITION TO DEFENDANT SPANISH HILLS WELLNESS SUITES' JOINDER TO DEFENDANTS SHANNA MARIE BALTAR, D.O. AND MIRIAM SITHOLE, APRN'S AMENDED MOTION FOR PARTIAL SUMMARY JUDGMENT** on the following person(s) by the following method(s) pursuant to N.R.C.P. 5(b) and N.E.F.C.R. 9:

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DISTRICT COURT
* * *
CLARK COUNTY, NEVADA

BARRY HEIFETZ, an individual, Plaintiff, v. SPRING VALLEY HEALTH CARE, LLC, a foreign limited liability company, d/b/a SPANISH HILLS WELLNESS SUITES; SHANNA MARIE BALTAR, DO; and individual, MIRIAM SITHOLE, APRN, an individual, DOE DOCTOR 1, and individual, DOE NURSE 1, an individual, DOES I through X, and ROE BUSINESS ENTITIES XI—XX, inclusive, Defendant(s).	Case No.: A-20-808436-C Dept. No.: 21 **DEFENDANTS SHANNA MARIE BALTAR, DO AND MIRIAM SITHOLE, APRN'S REPLY IN SUPPORT OF DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON PLAINTIFF'S PRAYER FOR PUNITIVE DAMAGES AND PLAINTIFF'S SECOND CLAIM FOR RELIEF**

Defendants SHANNA MARIE BALTAR, DO and MIRIAM SITHOLE, APRN (hereinafter "Defendants"), by and through their counsel of record, John H. Cotton, Esq. and Brandon C. Verde, Esq., LL.M. of John H. Cotton & Associates, and pursuant to Rules 26 and 33 of the Nevada Rules of Civil Procedure, hereby submit the following Reply in Support of

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Defendants' Motion for Partial Summary Judgment on Plaintiff's prayer for Punitive Damages and Plaintiff's Second Claim for Relief 41.1395 Vulnerable Persons Statute.

This Reply is supported by the following Memorandum of Points and Authorities, the attached exhibits thereto, and all pleadings and papers on file herein.

DATED this _12th_ day of January 2022.

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By: */s/ Brandon C. Verde*
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MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

Plaintiff's Opposition fails to identify any allegation that would warrant a request for an enhancement of damages pursuant to the elder abuse statute. This is not a case involving an intentional tort, or a case involving the withholding of care. The facts of this case are grounded in professional negligence, and Plaintiff's second claim for relief for Violation of NRS 41.1395, Vulnerable Persons Statute, against all Defendants cannot survive.

What is currently before this Court is Defendants' Motion for Partial Summary Judgment for elder abuse and Plaintiff's prayer for punitive damages. The factual allegations do not support Plaintiffs' claim for elder abuse or prayer for punitive damages.

II.

ARGUMENT

A. THE COURT SHOULD GRANT DEFENDANTS' MOTION AS PLAINTIFF FAILS TO DEMONSTRATE THAT DEFENDANT CAPANNA, M.D. ACTED WITH MALICE, FRAUD, OR OPPRESSION

"A plaintiff is never entitled to punitive damages as a matter of right." *Dillard Department Stores v. Beckwith,* 115 Nev. 372, 380, 989 P.2d 882, 887 (1999) (quoting *Ramada Inns v. Sharp,* 101 Nev. 824, 826, 711 P.2d 1, 2 (1985). NRS §42.005 provides for the award of exemplary and punitive damages "where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud or malice express or implied…" See NRS § 42.005(1). "Clear and convincing evidence means evidence establishing every factual element to be highly probable or evidence which must be so clear as to leave no substantial doubt." *Wynn v. Smith,* 117 Nev. 6, 17, 16 P.3d 424, 431 (2001) (emphasis added).

In Plaintiff's Opposition, Plaintiff has failed to demonstrate that a genuine issue of material fact exists, or that he will be able to produce ***clear and convincing*** evidence which will be highly probable and/or so clear as to leave no substantial doubt in the minds of the jurors that Defendant is guilty of one or more of these elements. Plaintiffs present no fact or allegation outside of the alleged deviations from the standard of care by Dr. Baltar and APRN Sithole to support his prayer, which is not sufficient to implicate punitive damages. *See Maduike v. Agency Rent-A-Car*, 114 Nev. 1, 3, 953 P.2d 24, 25 (1998). To recover punitive damages, a plaintiff must plead facts to

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show how a defendant "has been guilty of oppression, fraud or malice." *Dillard Dept. Stores, Inc. v. Beckwith*, 115 Nev. 372, 380 (1999). A "plaintiff's conclusory characterization of a defendant's conduct as intentional, willful, and fraudulent is a patently insufficient statements of 'oppression, fraud or malice, express or implied,'" within the meaning of a punitive damages statute. *Brousseau v. Jarrett*, 73 Cal. App. 3d 864, 872, 141 Cal. Rptr. 200, 205 (1977). Plaintiff's Opposition fails to provide any set of facts evidencing the requisite culpability justifying an award of punitive damages. While Plaintiff's repeat unsupported trigger words of "malice" or "conscious disregard," the Opposition fails to identify even a singular specific act that Dr. Baltar or APRN Sithole did with malice. Conscious disregard is defined as "the knowledge of the probable harmful consequences of a wrongful act and a ***willful and deliberate*** failure to act to avoid those consequences." NRS 42.001(1). A physician's decision as to how to carry out a course of treatment does not on its face show any intentional, conscious disregard for the patient's health. Rather, the conduct described by Plaintiff indicates a physician or provider exercising their medical judgment and sounds solely in medical negligence surrounding the medical judgment exercised in providing care to Mr. Heifetz. Plaintiff fails to set forward any set of actions that rises to the level necessary for punitive damages. Therefore, Defendants' motion for partial summary judgment on Plaintiff's prayer for punitive damages must be granted.

a. Plaintiff May Not Recover Punitive Damages Because Defendant's Conduct was Neither Intentional nor a Conscious Disregard for the Safety of Others

In Plaintiff's Opposition, Plaintiff has failed to set forth any material facts to demonstrate fraud, malice, oppression or the conscious disregard required to maintain an allegation of punitive damages. Plaintiff relies on *Countrywide Home loans, Inc. v. Thitchener,* to support his punitive damages claim. Although *Thitchener* applies the correct standard, Plaintiff has failed to meet this standard. NRS 42.005 states in pertinent part that punitive damages are only available when "it is proven by clear and convincing evidence that the defendant has been guilty of ***oppression***, ***fraud***, or ***malice***." (Emphasis added.) NRS 42.001 defines "oppression" as "***despicable conduct*** that subjects a person to ***cruel and unjust hardship*** with conscious disregard of the rights of the person." (Emphasis added.) NRS 42.001 further defines "conscious disregard" as "the knowledge of the probable harmful consequences of a wrongful act and a ***willful and deliberate*** failure to act to avoid those consequences." Nevada Courts have stated that conscious disregard can be implied

when a plaintiff presents "evidence of multiple ignored warning signs" and evidence indicating that the opposing party proceeded "despite knowing of the probable harmful consequences of doing so." *See Country Home Loans, Inc. v. Thitchener*, 192 P.3d 243, 255 (Nev. 2008).

As such, Plaintiff does not meet the burden set forth in *Thitchener*. In Plaintiff's Opposition, he makes numerous baseless assertions against Defendants Baltar, M.D. and Sithole, APRN. For Example, Plaintiff asserts that Defendants ignored Plaintiff's conditions and failed to order any sort of turning or repositioning of Barry. However, as shown from the medical records this was proven false. Dr. Baltar ordered Mr. Heifetz to be repositioned every two hours. *See* Spanish Hills Wellness Suites Medical Records, at SHWS000049, attached hereto as **Exhibit "A."** Additionally, Dr. Baltar ordered a pressure-relieving mattress for Mr. Heifetz. *Id*. at SHWS000112. She further ordered weekly skin checks for him. *Id*. at SHWS000122. Plaintiff's asserts a futile attempt to paint a picture that Dr. Baltar and APRN Sithole's actions were "egregious." Furthermore, Plaintiff attempts to attack APRN Sithole's knowledge regarding Braden scales. However, as APRN Sithole testified, the Braden scale is not within her functions as an APRN. This was clarified in Miriam Sithole, APRN's deposition:

BY MS. WISE

Q: Okay. Let me ask you this. Are you familiar with the Braden Scale?

A. No, not in my scope of practice…

(*See* Deposition Transcript of Miriam Sithole, APRN, pg. 87, lns. 23-25, attached hereto as **Exhibit "A.")**

Plaintiff argues that "these providers ignored these red flags and assumed that nursing staff would take care of turning and repositioning Barry." *See* Plaintiff's Opposition to Defendants' Motion for Partial Summary Judgment, pg. 12, lns. 12-14. Plaintiff's argument makes a far leap in logic and insinuates that Dr. Baltar and APRN Sithole should have repositioned the patient themselves. Again, this shows a lack of understanding of the functions of the medical staff. Plaintiff argues that physician orders are to be part of the care plan, so therefore they must be part of the helping create the care plan. This bizarre leap of logic is contrary to the functions of Dr. Baltar and APRN Sithole and again lacks the understanding of Defendants' obligations.

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Plaintiff further argues that no one from Spanish Hills Wellness Suites, or Dr. Baltar or APRN Sithole removed the compression stockings for Mr. Heifetz. However, there was no evidence that Mr. Heifetz arrived at the facility with the compression stockings, other than his own testimony. Therefore, it cannot be assumed that Mr. Heifetz arrived at the facility with compression stockings on since his discharge from the prior facility. This is evidently shown by the Medications Administration History report, that showed an "X" for the dates January 14, and January 15, 2019, likely because of the patient not having compression stockings on for those dates.

He further argues that Dr. Baltar let APRN Sithole "run wild" with the treatment of her patient without supervision. However, Dr. Baltar was still involved in Mr. Heifetz's care as shown from her orders in response to his blister on January 23, 2019. *Id*. at SHWS000423. As shown from the medical records, there has been no evidence or material facts to support a prayer for punitive damages. NRS 42.005 allows for an award of punitive damages "where it is proven by ***clear and convincing evidence*** that the defendant has been guilty of oppression, fraud or malice express or implied…" (Emphasis added.) Plaintiff has failed to set forth any set of material facts that have shown by clear and convincing evidence, that Defendants Dr. Baltar or APRN Sithole are guilty of oppression, fraud, or malice. As such, Defendants' Motion for Partial Summary Judgment on Plaintiff's prayer for Punitive Damages should be granted.

A. PLAINTIFF FAILS TO ESTABLISH A CLAIM FOR NEGLIGENCE PER NRS 41.1395 VULNERABLE PERSONS STATUTE

This is not an elder abuse case, as the facts are rooted and grounded as a medical malpractice case. Plaintiff's claim of "Violation of NRS 41.1395" was designed to punish defendants whose actions rose beyond simple negligence and not serve as an automatic enhancement of damages in all cases involving an older or vulnerable person. *See Brown v. Mt. Grant Gen. Hosp.*, 2013 U.S. Dist. LEXIS 120909, *18, 2013 WL 4523488 (D. Nev. Aug. 23, 2013). NRS 41.1395 was not intended to be plead as a separate cause of action but rather must be pled "specifically" in the complaint for ***double damages*** and ***attorneys' fees.*** *Findlay Mgmt. Grp. v. Jenkins*, 131 Nev. 1278 (2015). The facts of this case are grounded in professional negligence rather than in willful abuse or the failure to provide a service. NRS 41.1395 was not intended to allow the party to assert an additional claim for relief in addition to professional negligence. Plaintiff has not specifically plead for double damages and attorney's fees.

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Moreover, Plaintiff's Opposition fails to identify any actions of Dr. Baltar or APRN Sithole that constitutes elder abuse under NRS 41.1395. From the outset of Plaintiff's Opposition, it is clear that none of the alleged "elder abuse" conduct pertains to Dr. Baltar or APRN Sithole. Plaintiff mischaracterizes Dr. Baltar and APRN Sithole's functions of a floor nurse. Furthermore, Plaintiff has failed to set forth any actions that indicate Dr. Baltar or APRN Sithole ***willfully and unjustifiably*** inflicted pain, injury or mental anguish upon Mr. Heifetz. Under NRS 41.1395, Plaintiffs must allege that Defendant Dr. Young willfully and unjustifiably inflicted pain, injury, or mental anguish upon Decedent, or willfully and unjustifiably deprived Decedent of food, shelter, clothing, or services. *See* NRS 41.1395(4)(a). NRS 41.1395 requires that Plaintiff must show that Defendant Dr. Baltar and APRN Sithole failed to provide food, shelter, clothing, or services to Decedent. *See* NRS 41.1395(4)(c). Generally, "the word ['willful'] denotes an act which is intentional, or knowing, or voluntary, rather than accidental." *Fine v. Nev. Comm'n on Judicial Discipline* (In re Fine), 116 Nev. 1001, 1021, 13 P.3d 400, 413 (2000) (*citing U.S. v. Murdock*, 290 U.S. 389, 394, 54 S. Ct. 223 (1933)).

Moreover, there are not sufficient actions set forth that Defendant Dr. Baltar or APRN Sithole intentionally, knowingly, or voluntarily inflicted pain upon Mr. Heifetz. Additionally, there are not set of actions of Dr. Baltar and APRN Sithole that show they intentionally, knowingly, or voluntarily deprived Decedent of food, shelter, clothing, or services. *See* NRS 41.1395(4)(a). Ultimately, Plaintiff's argument is that Dr. Baltar or APRN Sithole did not provide Mr. Heifetz with adequate care. The allegations against Dr. Baltar and APRN Sithole amount to no more than professional negligence, if that. A claim for professional negligence is incompatible with NRS 41.1385. Therefore, Defendant's Motion for Partial Summary Judgment on Plaintiff's claim for Elder Abuse must be granted.

Plaintiff would like this Court to redefine "neglect" and "abuse" under NRS 41.1395 in such a way that every case involving a vulnerable or elderly person where negligence is alleged is subject to an enhancement of damages pursuant to NRS 41.1395. The purpose of the statute was "to encourage private attorneys to take up the fight on behalf of elder[ly] victims," therefore allowing "attorneys to assist senior citizens when they are at a stage in their lives where they cannot

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help themselves." History of S.B. 80: Comm. On the Judiciary, 69th Regular Sess., pp. 5 (N.Y.1997). The legislative history also indicates that it was previously difficult "to prove ***criminal abuse*** due to the victim's inability to testify and some other evidentiary problems." *Id*. at 24. Because the burden of proof in a civil action was not as high as in a criminal case, it was hoped that the statute "would help victims to recover their losses, both in terms of damages from abuse and neglect, but especially when financial exploitation occurred." *Id*.

Nevada's Attorney General proposed the elder abuse statute incentivizing private attorney generals to enforce criminal prohibitions against elder abuse. *See* Minutes of the Nev. State Legislature: Hearing on Senate Bill No. 80 Before the Senate Comm. On Judiciary, 1997 Leg., 69th Sess. (April 15, 1997). The Attorney General explained, "The burden of proof required in a civil action is not as high as that in a criminal trial, so it is hoped that this will help victims to recover for their losses." *Id*. The double-damages recovery and an additional attorney's fees provision were designed to encourage private attorneys "to prosecute [elder abuse] cases when criminal prosecutors cannot." *Id*. As such, the conduct necessary to establish elder abuse requires a level of intent and exceeds mere negligence. *Id*. In this matter, Plaintiff has not alleged, or has demonstrated through discovery, any conduct that rises to the level of neglect as defined by NRS 41.1395.

Moreover, Plaintiff does not even attempt to address the ruling in *Carter*, but instead simply argues that California's standard for neglect and abuse is clear and convincing evidence. *See* Plaintiff's Opposition to Defendants' Motion for Partial Summary Judgment, pg. 18. The standard of proof does not change the overarching ruling of the case, which provides that a plaintiff must show the complete withholding of care, rather than simple or gross negligence to prove neglect under the elder abuse statute. *Carter v. Prime Healthcare Paradise Valley LLC*, 198 Cal. App. 4th 396, 410 (Cal. App. 4th Dist. 2011). This is consistent with the findings in *Brown v. Mt. Grant Gen. Hosp.* and Nevada's legislative history of the statute. The Court in *Brown* acknowledged that the elder abuse statute was not designed to serve as an automatic enhancement of damages in all cases involving an older or vulnerable person. 2013 U.S. Dist. LEXIS 120909, *18, 2013 WL 4523488 (D. Nev. Aug. 23, 2013). The statute was designed to punish defendants whose actions rise beyond simple negligence. *Id*. (stating "the elder abuse statute was not intended

as a remedy for torts that sound in medical malpractice…") In furtherance, the legislative history makes it evident that the conduct necessary to invoke the elder abuse statute is essentially: conduct that would be considered criminal, which requires intent. *See* Minutes of the Nev. State Legislature: Hearing on Senate Bill No. 80 before the Senate Comm. on Judiciary, 1997 Leg., 69th Sess. (June 4, 1997) (HOS Defendants' Motion, p.6). When contemplating the language of NRS § 41.1395 the judiciary committee referenced back to the language and definitions contained with the existing criminal statutes. *See* Minutes of the Nev. State Legislature: Hearing on Senate Bill No. 80 before the Senate Comm. on Judiciary, 1997 Leg., 69th Sess. (April 15, 2997), ("Ms. Roberts noted the background of putting such language into the bill originated form the elder abuse and neglect statutes"; "Ms. Berger informed the committee NRS 200.5095 defined terms for purposes of the elder abuse statutes. The term 'mental anguish' was used under the definition of abuse of an older person and also in the definition of neglect of an older person").

Plaintiff's counsel has been planting the seed for an elder abuse claim since the inception of the case. The use of the phrase "vulnerable adult" has been found throughout Dr. Bolhack's affidavit, and subsequent expert reporting. For example, attached to Plaintiff's Complaint, Dr. Bolhack's expert affidavit opines about the following regarding "vulnerable adult":

1. Failure to prevent the occurrent of pressure injuries in a ***vulnerable adult***;
2. Failure to prevent the progression of pressure injuries in a ***vulnerable adult***;
7. Failure to acknowledge that Mr. Heifetz was a ***vulnerable adult*** requiring assistance in repositioning due to his hip surgery…
8. Failure to acknowledge that Mr. Heifetz was a ***vulnerable adult*** requiring assistance in positioning his lower extremities with elevation to counter the effects of edema…

See Plaintiff's Compl., Dr. Bolhack's affidavit.

However, when we deposed Dr. Bolhack and asked him whether he uses the term vulnerable persons in any of his charting he responded as follows:

BY MR. COTTON:

Q. You're familiar with the term vulnerable person; it's throughout your report.

A: Yes.

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Q. Do you put vulnerable person on any of the charting you do in any of the facilities you're involved in?

A. ***That's not, that's not something that I go out of my way to do, no***.

Q. That's not a medical term to you, is it?

A. It is, ***it is not necessarily a medical term***.

Q: I mean, if I went and looked at all the charts you've made notes in the last five years, how many times would I find the words vulnerable person?

A. ***I would say very infrequently***.

Q. Less than ten?

(*See* Deposition of Dr. Bolhack, pg. 25, lns. 11-25, attached hereto as **Exhibit "B."**)

. . .

A. Very infrequently. I don't know a number.

Q. It's not a term you use, is it?

A. ***It is not***.

(*Id.* at pg. 26, lns. 1-3.)

This is not an elder abuse case; this is a medical malpractice case that Plaintiff has alleged facts that Defendants are prepared to zealously argue against. As shown above, Defendants' standard of care expert, Mr. Jeong is prepared to defend Dr. Baltar and APRN Sithole's standard of care at trial. Should this Court adopt Plaintiff's argument that these facts should be considered as elder abuse, essentially entitles plaintiff to make a request for an enhancement of damages under the elder abuse statute and would be highly prejudicial to Defendants. Plaintiff has not alleged any conduct that rises to the level of neglect or abuse as defined by NRS § 41.1395.

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III.

CONCLUSION

Based on the foregoing, Defendants respectfully request this Court to grant summary judgment on Plaintiff's prayer for punitive damages and Plaintiff's Second Claim for Relief 41.1395 Vulnerable Persons Statute.

DATED this _12th__ day of January 2022.

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/s/ Brandon C. Verde

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CERTIFICATE OF SERVICE

I hereby certify that on this _12th_ day of January 2022, I served the foregoing **DEFENDANTS SHANNA MARIE BALTAR, DO and MIRIAM SITHOLE, APRN's REPLY IN SUPPORT OF DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON PLAINTIFF'S PRAYER FOR PUNITIVE DAMAGES AND PLAINTIFF'S SECOND CLAIM FOR RELIEF** through the Clerk of the Court using the Electronic Filing and Service system upon all parties with an email address on record in this action:

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An Employee of John H. COTTON & ASSOCIATES, LTD.

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Exhibit A

the treatment of a patient, do you expect the medical staff to communicate with you change in conditions of your patients?")

MR. ROURKE: It will be the same objections.

MS. TURPEN: Join.

THE WITNESS: Nursing would do -- report change in conditions.

BY MS. WISE:

Q. To you, correct?

A. Yes.

Q. Do you agree that risk assessment scales must be used in evaluating a risk for pressure injury?

MR. ROURKE: Object to the form of the question.

MS. TURPEN: Form and scope.

THE WITNESS: I didn't give access to risk -- I don't know the risk assessment form that you are talking about, so.

BY MS. WISE:

Q. Okay. Let me ask you this. Are you familiar with the Braden Scale?

A. No, not in my scope of practice. We

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DISTRICT COURT

CLARK COUNTY, NEVADA

BARRY HEIFETZ, Plaintiff, vs. SPRING VALLEY HEALTH CARE, LLC, Defendant.	CASE NO. A-20-808436-C DEPT. XXI

BEFORE THE HONORABLE TARA CLARK NEWBERRY,
DISTRICT COURT JUDGE

FRIDAY, FEBRUARY 18, 2022

TRANSCRIPT OF HEARING
ALL PENDING MOTIONS

APPEARANCES:

For the Plaintiff:	SHANNON L. WISE, ESQ.
For the Defendant Shanna Marie Baltar, DO and Miriam Sithole:	KATHERINE L. TURPIN, ESQ. BRANDON C. VERDE, ESQ.
Spanish Hills Wellness Suites:	T. CHARLOTTE BUYS, ESQ

RECORDED BY: ROBIN PAGE, COURT RECORDER

TRANSCRIBED BY: MANGELSON TRANSCRIBING

Las Vegas, Nevada, Friday, February 18, 2022

[Case called at 9:40 a.m.]

THE COURT: This is the time and place for Motion in Limine hearings on Barry Heifetz versus Spring Valley Health Care, LLC, et al; A-20-808436-C. Counsel for the Plaintiff.

MS. WISE: Shannon Wise for Barry Heifetz.

THE COURT: Thank you. And Counsel for Dr. Baltar.

MS. TURPIN: Good morning, Judge. Katherine Turpin and Brandon Verde this morning on behalf of Defendant Dr. Baltar and APRN Sithole.

THE COURT: All right. Thank you. And Counsel for Spring Valley.

MS. BUYS: Good morning, Your Honor. Charlotte Buys, Bar Number 14845, on behalf of Defendant Spanish Hills Wellness.

THE COURT: All right. Thank you.

All right, Counsel, we've got several motions here today. I'll be honest, after doing the reading and going through it, I'll be surprised if we can get this all done by noon, but we're going to get through as many of them as we can. I want you all to be able to make the record that you all need to make, and also for myself to be fully informed so that I can make the right decision.

So if we don't get through all of these, since your trial date's been moved, we'll just do another special setting. We'll figure that out around 11:50, where we're at and what needs to be

reset and pushed out. Hopefully that won't be too onerous of a task for us to do but keep that in mind if there's any other Counsel you think need to weigh in on any of these things, you might want to get their calendars of availability for us to do the special setting. If it's just going to be you all, then I'm sure you all can manage that.

With regards to the trial itself, I think we had a stip and order that had been submitted and then a motion that was granted. So right now I believe our calendar date -- or calendar call date is June 8th, the pretrial conference is May 25th. So I want to get this reset far before any of those dates, allow you an opportunity to also have time to prepare the orders.

I would offer to go into this afternoon; unfortunately, I'm on the advocacy -- the Virtual Advocacy Commission and we have a meeting this afternoon and so that's why I'm restricting you all to this morning. So that being said, let's get started.

We'll start with -- well, let's start with the Rule 37 Sanctions Motion. I'm sure you are all anxious to get that determined and especially since it may require some additional actions on the go forward before trial. So Ms. Wise, why don't you go ahead and present your motion and then I'll give the -- Ms. Buys an opportunity to respond. Go ahead.

MS. WISE: Thank you, Your Honor. In this case, sanctions are appropriate under Rule 37, for violation of NRCP 16.1, 26, and 34. The *Young* and the *Bahena* decisions allow this Court to grant sanctions such as striking an answer and using those cases as

support, striking an answer is appropriate here.

The issue we have is there is a lot of untimely disclosed policies and procedures that should have been disclosed pursuant to 16.1, which requires a party to disclose all relevant evidence due that it will use to support its claims and Defenses. Not only was it not disclosed initially but then we propounded four different sets of written discovery starting in December 2020, that all the way through June of 2021, specifically asking for these applicable policies and procedures.

We were just referred back to what was already produced, the bare bones, a couple policies and procedures. Then we -- during that time we took the depositions of the 30(b)(6)s and numerous witnesses, the 30(b)(6)s told us there's no other policies other than these ones that I looked at. And then, you know, there was -- we asked about specific policies. Hey, is there a policy about incident reporting? Nope, sure is not. Well, now we know there was and that was already produced.

New Counsel associated in, in this case in August. Still, it was waited until after the close of discovery on December 10th, to disclose these policies and procedures. These again, should have been produced, Plaintiff's position, under 16.1, or at least under 34 when requested, or at the very least supplemented under Rule 26.

Each of these policies that were produced are relevant to Plaintiff's claims in this case and Defendants will likely try to use them for their Defenses as well. So Plaintiff was forced to take

about ten depositions without this info; we just blindly asked questions hoping that somebody would give us something different on these policies and procedures. Plus, what's even more egregious is they're still producing stuff as of -- within the last few weeks, we're still getting relevant information that should have been produced initially.

It's Plaintiff's position that this is just trial by ambush. We were unable to conduct the necessary discovery on these items and we will be prejudiced by it at the time of trial. In this case, striking the answer is the appropriate remedy. Numerous District Courts have taken a stand against Defendants for this type of behavior recently because it's becoming really an egregious thing that we're seeing in a lot of cases.

For example, I just had a case with Judge Krall, and she struck an answer for spoliating a video and kind of trying to hide it. This is so much worse because we specifically asked for it and we were told it just didn't exist.

Moreover, the Nevada Supreme Court routinely affirms these judgments. We've been seeing it in numerous cases as well, most recently in the *McCarran* case. While this Court can entertain other sanctions, I think the *Young* factors weigh in favor of striking the answer here.

The degree of willfulness. This was obviously willful. They knew of the policies; witnesses were instructed to talk -- to say that the policies didn't exist. They were never produced and then

all of a sudden now that discovery is closed, they're like oh yeah, here you go.

The second factor; Plaintiff is prejudiced, as I outlined before.

The severity of the sanction relative to the abuse. I mean, here the sanction is appropriate. This was not a situation where, you know, discovery was not produced for like a couple months and then it was produced, and Plaintiff was able to conduct discovery on it. Here, discovery had closed for nearly a month.

Then, you know, they'll -- the fourth factor, which is the loss of evidence; that doesn't apply because this evidence was found.

And the fifth factor; Plaintiff doesn't believe this sanction would operate to penalize the party for the conduct of its attorneys. First of all, the client chooses its attorney, so for any argument that they're going to blamed prior Counsel, the client chooses their attorney. Second, this couns -- second, the new Counsel associated in as of August, and waited still until December to produce this evidence.

This sanction's appropriate because it's needed to deter this type of behavior in the future. And so I believe that striking the answer is appropriate in this case and that Plaintiff should be awarded fees for having to bring this motion.

THE COURT: All right. Thank you. I do have a question. You indicated that during the depositions of some of the 30(b)(6)

witnesses for Spanish Wellness, they were directly asked whether P&P existed?

MS. WISE: Right.

THE COURT: And they responded that there were no policies and procedures?

MS. WISE: Yes. So the -- Ms. Intravaia, I might be butchering her name, she was the Director of Nursing, it was my understanding who's asked: Did you by chance do any kind of review to see whether or not the policies and procedures that we have in Exhibit 3, whether that's everything that's relevant to the issues in this case, specifically pertaining to pressure wounds?

Answer: I did look at some policies and procedures pertaining to that.

Question: Do you know if there's any other policies and procedures, clinical policies and procedures available at Spanish Hills pertaining to topics such as pressure ulcers, Braden scales, offloading procedures, other than what's in the file that's been produced in the case. So in other words, I'm asking you if there's any policies that you know but -- exist but we don't have copies of?

Answer: There aren't any that I know of.

And that's in her deposition, page 13 through 14.

The other 30(b)(6), Ms. Tanella, I believe her name is, when specifically asked: In preparation of incident reports, does Spanish Hills have some type of a policy and procedure as to when an incident report should be complete?

She said: Again, I don't know. We don't have like a standard format.

And so then she was asked: Well, what is the criteria for when a Spanish Hills incident report should be filled out?

She said: I guess it's judgment. I mean, I can't say.

Well, we know there is a specific policy on this and so there is actually a standard.

THE COURT: And during the deposition, what did you establish as to their -- each of those witnesses' roles at Spanish Hills with regards to administration?

MS. WISE: The first witness was a Director of Nursing. The second witness was the Administrator of Spanish Hills.

THE COURT: Ms. Tanella?

MS. WISE: Yes. And she went on to testify that there wasn't any type of responsibility or policy and procedure for supervision, where we now know that there is a direct policy on point regarding supervision. And that is in her deposition, pages -- page 46.

THE COURT: Thank you, Ms. Wise.

All right, Ms. Buys, go ahead with your response.

MS. BUYS: Thank you so much, Your Honor.

The whole purpose of this motion is to harass the Defense. Plaintiff is trying to take advantage of a new Counsel becoming involved in this litigation. The Defense has appropriately provided its policies and procedures, as requested by Plaintiff's

Counsel, in response to Plaintiff's Fifth and Sixth Sets of Requests for Production, which the deadline in which to respond was agreed to by Plaintiff's Counsel. Defense Counsel has tried and attempted to extend discovery, which Plaintiff's Counsel had denied.

Additionally, Defendant made an NRCP 30(b)(6) -- two witnesses available for Plaintiff's Counsel just last week regarding the topics of policies and procedures, which Plaintiff's Counsel deposed in their office on February 10th, 2022. Plaintiff's Counsel has been afforded several opportunities regarding these policies and procedures to ask questions and depose the witnesses.

THE COURT: Well, let me --

MS. BUYS: And in fact, I'm sure --

THE COURT: -- stop you there, Ms. Buys.

First off, I need an explanation for how these two individuals testified that these policies did not exist when in fact they were later produced. Let's address that first.

MS. BUYS: Certainly, Your Honor. The question that was asked was whether they knew about policies and procedures after taking a look at something in a deposition. We were not there as Counsel -- as prior Counsel, Your Honor, but it's our understanding, based on the deposition transcript that they were asked a broad question and they responded that this is what they know. They did not know about other policies and procedures. They were not instructed to not answer the question; that is their testimony.

And certainly at the time of trial, that's something that

could be brought up by Plaintiff in cross-examination; I'm sure they will. But in this case, policies and procedures -- and this is a theme that will come up later -- do not establish the standard of care. And Plaintiff's request for case-ending sanctions is not only inappropriate, it's against Nevada law.

Per *Fire Insurance Exchange versus Zenith Radio Corporation*, generally --

THE COURT: I'm familiar with all those cases, Ms. Buys. I need an explanation for how these [inaudible; static].

You're not speaking [inaudible; static].

All right. Ms. Buys, I think [inaudible; static] feedback from your microphone. If you could turn your speakers down a little bit. Thank you.

MS. BUYS: Is this better, Your Honor?

THE COURT: Yes, thank you.

I need an explanation; it's very simple. There's a request that's made -- of course there's the burden under 16.1 to produce this information, there's a specific request for production. I understand you weren't Counsel at the time. There's a request for those documents, they're not produced. They're inquired about during the deposition and the deposition responses allude to the fact that they don't exist; that there isn't anything else.

And then, I understand your office diligently produced them once they were located. I'm not putting it on you as to why it didn't happen, but you need to advocate for your client and explain

why these two 30(b)(6) witnesses, a Director of Nursing, as well as the Administrator, don't know their policies and procedures exist. I need an explanation for that. Because it does --

MS. BUYS: Certainly, Your Honor.

THE COURT: It appears to be willful.

MS. BUYS: Certainly, I can answer that, Your Honor.

The policies and procedures that were requested and provided to -- by -- to Plaintiff's Counsel, prior to those initial 30(b)(6) depositions were in response to the written discovery. They provided a -- they propounded additional discovery after the fact that asked different questions about different policies and procedures.

That is why when the Fifth and Sixth Sets of Requests for Production came in, it was produced at that time because prior to that, they had propounded just sort of overly broad requests and --

THE COURT: Plaintiff's Production Number 7: Please produce copies of any policies, procedures, guidelines, rules, protocols, statements pertaining to prevention of pressure wounds, ulcers, blisters, sores, injuries, wound care, inventory, and related wounds in effect at Spanish Hills at the time of the subject incident.

That's too broad?

MS. BUYS: Well, eight policies and procedures were provided in response to that, Your Honor.

THE COURT: But not the one that you ultimately did produce. So the question becomes did the policies and procedures

that were later produced exist at the time of this request?

MS. BUYS: Yes, Your Honor. However, those policies are regarding more documentation. The policies and procedures that were at issue are pressure ulcer, which was produced to Plaintiff's Counsel. That policy was produced and --

THE COURT: And that goes to Number 11, any and all policies and procedures effective at the time of the subject incident pertaining to the process of reporting an adverse incident event at Spanish Hills. That was Number 11.

MS. BUYS: Yes, there's also wound documentation, wound evaluations, physician and other communications of change in condition. Those policies and procedures were all produced back on March 2nd.

THE COURT: March 2nd, in response to this initial -- First Set of Request for Production?

MS. BUYS: Yes, Your Honor.

THE COURT: All right.

MS. BUYS: There were eight policies and procedures that were produced, and four additional policies and procedures produced June 2rd, 2021, which is documentation for physician requirements, documentation license nursing, documentation guidelines and documentation charting of -- correcting of charting errors, excuse me.

So those policies and procedures were all produced --

THE COURT: Right.

MS. BUYS: -- to Plaintiff's Counsel --

THE COURT: I understand that. It looks like there's another request, Number 14, that says policies and procedures related to the photo documentation of pressure sores, ulcers, blisters, wounds, and injuries from admission through the date of discharge.

Then there's another -- it's clear that there was an effort to seek this information and these documents, and your client didn't produce them timely in response. And then during a deposition, misstated the existence of those policies.

MS. BUYS: No, Your Honor. The policies that were produced were wound documentation, staging of pressure ulcers, pressure ulcers, use of the Braden assessment tool, wound documentation, wound evaluations, wound measurement. All of those were previously produced. And in fact, the policies that were produced later on, several of them were duplicative policies and procedures.

So the ones that came in response to the Fifth and Sixth Sets of Requests for Production, which were responded to timely per the agreement of Counsel, were documentation, license nursing, documentation guidelines, correcting of charting errors. A lot of those were already previously produced and they were produced again in order to clarify.

THE COURT: All right. Continue on with your argument.

MS. BUYS: Thank you, Your Honor.

Generally, sanctions may only imposed where there's been a willful violated of a court order. There has not been a willful violated of a court order in this case. Using Plaintiff's argument set forth in Plaintiff's motion, documents included in Plaintiff's own Supplemental 16.1 Disclosure should be stricken and dismissed.

For example, Plaintiffs waited until the Fifth 16.1 Supplement to produce copies of receipts of out-of-pocket expenses and waited until the Third and Thirteenth Supplement to produce photos of his alleged that existed prior to this lawsuit being filed.

In bringing a professional negligence action, Plaintiff was required to retain an expert before discovery even opened in this matter. The disclosure of policies and procedures pursuant to Plaintiff's written discovery request, did not affect their decision to retain an expert who provided the standard of care. In Nevada, the standard of care is a national standard.

There has been no prejudice to Plaintiff who has been offered the avail -- the chance to go and take 30(b)(6) depositions, they were provided the policies and procedures that were requested pursuant to the First, Second, and Third Requests for Production. When Fifth and Sixth Requests for Production came in, they were responded to. They had asked for additional documentation; that documentation was provided.

And a facility's policies and procedures --

THE COURT: But Ms. Buys --

MS. BUYS: -- won't --

THE COURT: -- you're ignoring -- you're completely informing the central point here. There was a failure to disclose it at the time that it was initially requested. I understand if your argument is well, we eventually did so don't strike our answer. That doesn't explain why it wasn't produced.

MS. BUYS: Well, not to speak to prior Counsel but understanding is he responded to the written discovery, pursuant to how it was written. He provided the wound -- pressure wound --

THE COURT: So you're saying it was intentionally withheld?

MS. BUYS: No, Your Honor.

THE COURT: Well, they ask for --

MS. BUYS: No, Your Honor.

THE COURT: -- any and all policies. And usually there's a P&P Manual that's, you know, two or three binders stacked high and instead the Counsel decided well, these two binders don't count, they didn't specifically ask for it so I'm just going to give you these. Is that essentially what you're saying?

MS. BUYS: No, Your Honor. He provided the policies and procedures regarding pressure wounds which is the issue of this case. He did that during -- in response to the First Set of Requests for Production. He provided four additional --

THE COURT: Including the --

MS. BUYS: He provided --

THE COURT: -- independent contracts -- contractor's agreements that were requested. Those individuals were deposed and then produced a year later, those two? Because they weren't speci -- I mean, there's a problem here, Counsel. Your approach to this is not addressing the problem that I see, that Plaintiff's Counsel has brought up and seems to be supported the record.

Prior Counsel and/or your client failed to produce documents that were warranted to be produced, pursuant to 16.1. So they didn't even have to be specifically requested, but certainly once Plaintiff did start making these specific requests, your client was under a burden to produce their policies and procedures and they didn't do it timely. There needs to be a sanction for that. I'm trying to decide what it's going to be.

I need an explanation and simply a, well, they didn't specifically ask for it, that doesn't address your duties under 16.1, nor does it address your duties with regards to supplementation.

MS. BUYS: They were supplemented, Your Honor.

THE COURT: After the close of discovery.

MS. BUYS: Well, pursuant to the agreement of -- between Plaintiff's Counsel and Defense, to provide that documentation, which was after the close and Defendants tried to go and see if Plaintiffs would --

THE COURT: And --

MS. BUYS: -- agree to an extension --

THE COURT: And you know what --

MS. BUYS: -- of discovery.

THE COURT: -- if this was a situation where you felt they were privileged and you listed them and put them in a privilege log and didn't disclose them because of whatever those reasons may have been and then it was curative or handled at the Discovery Commissioner level, and then it was produced in that situation that you're speaking of, I wouldn't take issue with that.

There are certainly instances where Counsel believes there is a privilege and later they are overruled, and those documents are produced. You never even identified these. So this isn't --

MS. BUYS: Well --

THE COURT: This isn't failure to produce over objection, this is just absolutely willful withholding of documents that are relevant.

MS. BUYS: No, Your Honor. It's not willful. If anything it was --

THE COURT: It is based on what I've heard so far. Ms. Buys, you're saying yes, they existed, yes, we knew they existed, but because they weren't specifically requested in a manner that we thought we had to respond, we didn't produce them. And then our witnesses misled Counsel during their depositions that there weren't anything else. This is a problem.

MS. BUYS: No, Your Honor. They were not being with -- intentionally withheld. The Defense and Spanish Hills Wellness

tried to go and produce its policies and procedures it thought it was being requested to provide. When additional, more specific requests came in later, they provided additional documents --

THE COURT: You're not addressing --

MS. BUYS: -- that were --

THE COURT: -- the 16.1 obligation to produce it. So are you saying you're not going to use any of these documents at trial?

MS. BUYS: Well, Your Honor, if it's --

THE COURT: Well, let me start there; you're not. But go ahead and tell me if that was your intention to use them because pursuant to 16.1, Plaintiff doesn't have to ask for them, you have to produce them.

MS. BUYS: Right. And policies and procedures do not establish the standard of care. The standard of care is the national --

THE COURT: Ms. Buys --

MS. BUYS: -- standard --

THE COURT: -- I understand what the standard of care is. You're obligated under 16.1, to produce any and all relevant documents, including policies and procedures. You didn't do that. Why?

MS. BUYS: We were not aware that this was relevant and being requested and certainly when it became to our attention that these were being requested, they were provided to Plaintiff's Counsel as soon as we were aware of it.

THE COURT: Anything else you'd like to add?

MS. BUYS: Certainly, Your Honor. This case should be decided on its merits. The attempt to try and take advantage of new Counsel getting involved and trying to supplement and provide these policies and procedures should not be the cause of case-ending sanctions against Spanish Hills Wellness Suites.

It's not sufficient to go and try and strike the Defense's answer, when they attempted to provide Plaintiff's Counsel with this documentation, they gave them multiple 30(b)(6) witnesses, after the close of discovery, pursuant to Plaintiff's request, on the topic of policies and procedures, which Plaintiff deposed last week.

Plaintiff has been provided this information and there has not really been prejudice to Plaintiffs, Your Honor, since they have been given an opportunity to go and take a look at these documents and depose the witnesses.

THE COURT: All right. Any other Counsel want to weigh in on this before I let Ms. Wise have the final word?

MR. VERDE: No, Your Honor.

MS. TURPIN: No, thank you, Judge.

THE COURT: All right. Ms. Wise.

MS. WISE: Thank you, Your Honor. I'll be brief.

So I just kind of want to address a couple of the things. First of all, we did request additional policies and procedures. A lot of them were a regurgitation because we're trying to ask things a bunch of different ways in our Fifth and Sixth Requests for

Production. Saying that we allowed them to wait until after the close of discovery to produce relevant information is false.

We, as a professional courtesy -- which we keep getting hurt by in this case, but we keep doing it. We as a professional courtesy allowed them additional time to respond to the written discovery because they kept saying hey, we're trying to coordinate this witness, we're trying to get this information, can we please have more time? Can we please have more time? Can we please have more time?

We were being nice and letting them respond to that written discovery. That doesn't address all of the other stuff that we requested, and Your Honor already went through it with every time you already requested these policies and procedures.

Then the issue of the 30(b)(6), that was of the continued deposition, that's a whole nother issue. They showed up with new -- brand new witnesses. After we had spoken about the topic, it was understood between all Counsel, via email that this was a continued 30(b)(6), not they get a whole new crack at everything, to ask all the topics again. This was a continued 30(b)(6) because the prior 30(b)(6) had to leave for a doctor's appointment.

So it was Plaintiff's understanding we were just finishing up the last couple topics as to the 30(b)(6). That's exactly what we did. We did not re-depose brand new witnesses.

THE COURT: And Ms. Wise --

MS. WISE: So --

THE COURT: -- let me ask you this.

MS. WISE: Go ahead.

THE COURT: During the deposition of the administrator, when you asked if there were any relevant policies and procedures that she had reviewed, and I believe your -- her response was that there were some she looked at, but nothing else that she knew of, you showed her what had been disclosed in response to the RFPs?

MS. WISE: Right. It was Exhibit 3 that we had attached. I'm going to pull it up real quick, Your Honor, so that I don't --

THE COURT: If you could direct me --

MS. WISE: -- miss --

THE COURT: -- to where that is in your motion. I know it's 350 pages. If you could help me out --

MS. WISE: Yes.

THE COURT: -- I would like to see that.

MS. WISE: Yes. Bear with me, Your Honor. I will pull it up.

THE COURT: I have the depositions, but I don't think I have the attachments.

MS. WISE: Yeah, I'm pulling them up right now.

Candidly, Your Honor, I did not take the deposition, so I can't speak --

THE COURT: It looks like --

MS. WISE: -- to you exactly -- yeah.

THE COURT: Well I think you took one of the depositions.

MS. WISE: I did take a 30(b)(6)'s. That -- they were actually conducted in the same day --

THE COURT: Okay.

MS. WISE: -- and they were both taken by Ms. Blazich.

THE COURT: Right. So there was a disc that was attached, so I don't have --

MS. WISE: Yes.

THE COURT: -- the actual exhibits to the deposition.

MS. WISE: Okay.

THE COURT: So that's why --

MS. WISE: I'm happy to --

THE COURT: -- I'm trying to figure out -- quite frankly, I'm trying to figure out what was disclosed and what was actually examined by these witnesses to figure out if it's ignorance or willfulness.

MS. WISE: Right. We can -- we'd be happy to get Your Honor a copy of the exhibit.

THE COURT: Yeah, I need to --

MS. WISE: I'm having a hard time --

THE COURT: I need to see the policies that were shown to these witnesses because that is going to make a difference in how I rule on this.

MS. WISE: We can definitely get that to Your Honor. How would you prefer we get that to you?

THE COURT: It can be filed as a supplement.

MS. WISE: Okay. And just to clarify --

THE COURT: And of course I'll give Ms. Buys an opportunity to respond to that. I certainly would imagine as Officers of the Court, you're not going to attach something that's not actually part of the certified deposition.

MS. WISE: That's correct, Your Honor.

MS. BUYS: And just to clarify, I just wanted to make sure, this was for the 30(b)(6) depositions for Ms. Tanella Valenzuela and Ms. Intravaia or for the other two 30(b)(6)s --

THE COURT: I'd like to see --

MS. BUYS: -- that were for last week.

THE COURT: -- what all of these 30(b)(6) witnesses were shown as the universe of policies and procedures and compare that with what ultimately was produced.

MS. BUYS: Thank you, Your Honor.

MS. WISE: I will absolutely do a supplement for Your Honor.

THE COURT: All right. And based on that, of course, I'm not going to rule on this today. We'll proceed with some of these other Motions in Limine.

So let me set forth exactly what I would like to see from both sides. I would like a supplement and -- not with argument, just simply laying out this witness was shown the following exhibits and attach them. This witness was shown the following exhibits and attach them. And then make reference to the page and line

number that's relevant in the deposition transcript that I already have.

You don't have to attach the deposition transcript again, but I want to see what they were shown and then also provide the -- I'm not sure how your disclosures were provided, Ms. Buys, but certainly if you did a running disclosure, that's fine, you can use that, the final and last one, with, you know, the Bates Number, I would imagine that correlate to what those exhibits were that were produced, wherever they were produced in that final supplement.

So I want the last 16.1 Supplement from Defense. And then from Plaintiff's Counsel, if you could point out when each of the policies were disclosed in a timeline.

MS. WISE: Yes, Your Honor.

THE COURT: Provide that supplement and then I will consider your argument here today, those supplements, and I'll make a decision in chambers when I can actually sit and go side by side with the depositions and the documents.

So it's not submitted. I will give you all two weeks to provide those supplements, Ms. Wise. And then I'll give the other side a week to file its response to that. And in that response, Ms. Buys, make sure you put the disclosures we just discussed.

And then Ms. Wise, I'll allow you an opportunity to respond to Ms. Buys. So it's really just a complete supplementation of briefing. So it could be a Supplement to the Motion, Supplement to the Opposition, Supplement to the Reply.

[Colloquy between the Court and the Clerk]

THE CLERK: So two weeks for the Supplement will be March 2nd.

One week for the Response will be March 9th.

The week after for the Reply, March 16th.

And it will be set in chambers, March 23rd.

THE COURT: All right. Thank you, Counsel.

All right. We'll move on to Plaintiff's Motion to Pre-Instruct the Jury on Burden of Proof, Types of Evidence to be Considered, Duty, Proximate Cause, and Other Preliminary Information.

Go ahead, Ms. Wise.

MS. WISE: This is a simple motion, Your Honor. Plaintiff has -- you know, our firm's done a lot of trials and we've noticed that it's helpful for a jury to be acclimated to what they're doing there. So just preliminary information. Case-specific instructions should not be given but just kind of like this is a medical -- well, this is a professional negligence case. This is what professional negligence requires, you know, Plaintiff to show. These are the burdens of proof.

You know, juries are generally specific with the beyond a reasonable doubt, they're not very specific with civil law. We've just found that it is helpful for the jury to get just general instructions and most courts usually give -- they have their own set of pre-instructions that they give, and we just ask that, you know,

general acclimating instructions be given at the outset.

THE COURT: All right. And this is anticipated to be a two-to-three-week trial?

MS. WISE: I would -- it's probably not going to be three weeks. I would say two weeks is probably more than sufficient --

THE COURT: Okay.

MS. WISE: -- depending upon if we have full or half days. But still two weeks is probably more than sufficient in this case.

THE COURT: Okay. All right. And the theory of that is that they start off on Monday of the first week, by the time they get to the second Friday, they can hardly remember what they were there to do. Is that pretty much what your argument is?

MS. WISE: Well, not only that it's just -- you know, when a jury comes in, they're not pros like we are so they may not understand what professional negligence means. So as they hear the evidence, they have no idea what they're doing with the evidence. So they're not -- they don't know, you know, oh, okay, so this is professional negligence which means Plaintiff has to, you know, show the doctor fell below the standard of care.

They don't know what standard of care means. They're hearing that word a lot, you know. Also the burdens, right, so they're thinking oh, well they have to prove this beyond a reasonable doubt, well that's not the civil standard. And so just kind of what is, what is not evidence, you know, arguments of Counsel are not evidence, this is evidence. That's just -- we find

that's helpful to a jury.

And obviously we are willing to work with Defense on what type of pre-instruction should be given if they have any specific ones. Again, nothing case-specific; just very general instruction.

THE COURT: All right. Would you propose then that these pre-instructions would be read to them by myself or presented in paper form? What is your proffer?

MS. WISE: We're generally -- we've had it done where the Judge reads it to them. I'm not sure how your department works, but I know generally you give some general initial things, most judges do. That's generally when these kind of pre-instructions have been given.

THE COURT: Well I think reading it to them is -- would be beneficial. The only problem is, will they retain them? And so that's why I'm asking about the printed form and certainly it would require, to a certain degree, the language would have to be crafted in a way that it was fair to both the Defense and Plaintiff and thus I would expect there to be some collaboration in that regard.

I could see actually pre-instructions being beneficial to both sides with regards to having a jury -- you know, it's no different them coming to the first day of class and a professor just starting off a lecture and you're not real sure when's the quiz, do I have to draft an essay, what do I have to do with this. You get to the end of the semester, and they surprise, tell you something that

if you had known, you'd have been a better student. That's kind of how I'm viewing this.

As a complex case, it's a roadmap, if you will, but it needs to be extremely focused on the rules and an understanding of those rules and completely devoid of any factual assertions.

All right. Ms. Buys, I'll let you go ahead and respond first.

MS. BUYS: Thank you, Your Honor.

You know, while we sort of contended it was confusing and prejudicial to parse out certain jury instructions, without the context of the other instructions because it indicated or gave special weight to those instructions over the rest, the main issue with the Plaintiff's motion was that the proposed jury instructions that were attached contains incorrect and inapplicable law.

For example, there was one regarding clear and convincing evidence standards that a Plaintiff needs to win a claim of fraud, even though the Plaintiff hasn't pled fraud in the case. And the corporate negligence instruction, which is erroneous under the *Renown versus Vanderford* case, which said there is an imposition of an non-delegable duty over a medical facility for physician care.

So it was really primarily -- to a certain extent, if it's narrowly tailored to just, you know, don't do your own investigation, don't talk about it with other people, that's one thing but the ones that were attached to the motion seemed to contain some more inapplicable law than this professional negligence

action.

THE COURT: Well I guess let me first hear from you though on whether or not there are certain jury instructions that you think would be beneficial in laying a foundation or setting some level of expectations and understanding of the jurors as to what a professional negligence case really is because it is a unique animal and it is not the same as a personal injury case. Don't you see a benefit to the Defense with some of those instructions as well?

MS. BUYS: There could be, Your Honor; it just wasn't with the proposed jury instructions that were provided. Certainly perhaps if it's the -- you know, you can't do your own investigation, don't talk to other people, those instructions which the Court sort of provides at the onset of the case and repeated throughout the case, there may be a benefit on that one and the preponderance of the evidence. It's just the ones that were proposed and attached --

THE COURT: Well let's go through --

MS. BUYS: -- to the Complaint --

THE COURT: Let's go through them and let's see which ones you agree with and which ones you don't. Which is what should have happened at your 2.47. But I digress, we'll move on.

What is and what is not evidence. Defense has a problem with that?

MS. BUYS: I apologize, Your Honor. I'm pulling up the copy.

MS. TURPIN: Judge, may I be allowed to chime in?

THE COURT: Yeah. I'm going to give you a chance. I will.

MS. TURPIN: Okay.

THE COURT: I'm just going to let Ms. Buys run through it and figure out which ones she agrees with and doesn't agree with and then I'm going to move to each of you in the same manner.

It's the initial motion. I'm sure you guys have binders and binders for today, so I'll give you a chance to find it. The -- me too. The -- mine's just all electronic and on two computers here and then my notes.

So I think it's a BAJI-102.

MS. BUYS: Thank you, Your Honor.

THE COURT: All right. So what is and what is not evidence.

MS. BUYS: Generally, Your Honor, I don't have a specific objection to this one --

THE COURT: I usually --

MS. BUYS: -- at this time.

THE COURT: -- read this one at the beginning of just any trial.

MS. BUYS: Right. So I do not have a specific objection --

THE COURT: No specific --

MS. BUYS: -- to this one.

THE COURT: -- objection. All right.

Then let's move across the list and we'll have Ms. Turpin?

MS. TURPIN: [Inaudible] Judge and so if I could expound

on what our position is and it's not necessarily specific to the jury instructions that the Plaintiff has attached to her brief. Our issue is it's not necessary in this medical malpractice action. Your Honor will already be instructing the jury as you typically do at the start of all jury trials. And we believe that your instructions, Judge, that you would have already given had this motion not be filed is what's appropriate at the start of this medical malpractice trial.

I don't believe it's necessary to give them additional parsed out jury instructions at the beginning of trial for a variety of reasons. Foremost, it's unnecessary and it's duplicative. I believe it puts an undue emphasis on certain jury instructions over other jury instructions. When you're going to -- because what Plaintiff is asking to have done is to have certain jury instructions be given to the jury twice and I think that's inappropriate and duplicative because it puts an undue influence or -- not an undue influence, Judge, undue emphasis on certain instructions over others.

And there is not one jury instruction that is necessarily more important than others, so that's why they are given at the close of the trial, after the experts have given their testimony, establishing what they believe the standard of care is or is not, and then we instruct the jury at the close of evidence when we're all done.

And we give all of the instructions at once, after the instructions have been settled, after all evidence has been admitted, after all witnesses have testified, and after all parties have closed

their cases in chief.

So my position and my objection is not necessarily to well what specific one do I like or not like, but I think it's inappropriate to parse out certain instructions and give them to the jury twice. That's an un --

THE COURT: Well I think it depends on --

MS. TURPIN: -- I think it unnecessarily --

THE COURT: -- how it's presented, Ms. Turpin.

MS. TURPIN: -- emphasizes them.

THE COURT: And I'm totally appre --

MS. TURPIN: I'm sorry, Judge.

THE COURT: Ms. Turpin, I --

MS. TURPIN: I --

THE COURT: -- appreciate your understanding of how trials work and how jury instructions work at the end. And just because that's the way we've always done it or presumably have always done it, doesn't mean it's always the best way to do it.

MS. TURPIN: I agree.

THE COURT: I see a benefit to both sides, and I can tell you after being on this side, as opposed to sitting where you all are, we make a lot of assumptions about what jurors know, understand, and what they pay attention to, and I think Defense is missing an opportunity to also garner some benefit from some pre-instructions.

And I understand that you're viewing it as we're

emphasizing one over the other and essentially, it's no different than a professor at the beginning of the semester saying you're going to have a quiz, you're going to have a quiz, you're going to have to write a paper, and then you're going to have to take an exam.

When we get to the exam, I'm going to give you all the instructions about how that exam's going to work but this is the things we're going to learn and do during the course of the semester. Then you do -- conduct the trial, you fill in all the information. Then when those exam instructions come in, you understood and paid attention to all of these different things so that you understood what you needed to capture and retain. That is how I view it.

I'm not saying that I adopt the -- I'm not going to present these as these are your jury instructions and I'm going to read them and to -- again these are the most important ones. I think what the Plaintiff is saying, and maybe not, maybe I'm looking at it from my own eyes having sat at the bench and watched how jurors perceive trials but certainly having a roadmap to even know what it's about or how a trial works or some of these procedural issues that are benign to both sides, such as what is and what is not evidence.

This one's already going to be read and that's why I'm using this as an example. I already read those. It's part of our script. Every judge is supposed to read them because they don't --

MS. TURPIN: And that's part of my --

THE COURT: -- know what evidence is and so we're telling them you need to evaluate all this evidence. We're not going to tell you what the evidence is, we're not going to tell you what an expert is, we're not going to tell you what any of these things are; we're just going to give you all this information.

Then we're going to explain -- I mean, it's backwards reasoning as far as this don't give them too many instructions up front because it does -- it's very confusing, especially for someone who's never set foot in a courtroom and the only experience they have with the criminal justice system at all is Law and Order.

So, you know, it's -- I think there's a happy --

MS. TURPIN: I understand.

THE COURT: -- medium here that's beneficial to both sides, especially when you're sitting through a trial for two weeks and your ability to retain particulars is going to be heavily dependent on what instructions you're given up front. And I --

MS. TURPIN: I --

THE COURT: That's kind of how I'm viewing it. So I understand you have --

MS. TURPIN: Okay.

THE COURT: -- a wholesale objection to it because it's not the way -- it's not how it used to be done and I get it. But I do see some prudence in it, and I think it is fair to both sides and certainly it would be an instruction no different than the admonition I give them for breaks and why do I read it to them every single break

because we need to make absolutely certain that they remember not to do those things.

I don't think it would be prejudicial to either side for certain instructions and that's why I do want to go through them -- and I'm not going to present them as jury instructions, they're going to be court instructions with regards to how to do their job as a juror. It's just a brief explanation of what they're about to hear and what's going to happen in the case from a 30,000-foot view that would apply in any medical malpractice case, not just this one.

MS. TURPIN: Understood, Judge. I appreciate your position.

THE COURT: All right.

MS. TURPIN: So that being said, if Your Honor was already going to give an instruction in your typical pretrial instructions about what evidence is, I think then that particular one the Plaintiff is proposing is moot. That's something Your Honor would already say.

THE COURT: Right. But I want to hear your -- since it's been lodged, it's a motion, you all have the opposed it, I need to figure out --

MS. TURPIN: Right.

THE COURT: -- what your oppos -- if it's a wholesale opposition, as you have shared, I understand --

MS. TURPIN: Yes.

THE COURT: -- that. Based on my determination that

some of these are proper, let's go through them and I systematically want to give --

MS. TURPIN: Okay.

THE COURT: -- you all an opportunity to make a record and for me to hear your point of view on it as to why it may not be appropriate. All right?

MS. TURPIN: Understood.

THE COURT: So as to what it and what is not evidence, does anyone actually object to that being read to the jury?

MS. TURPIN: No, Judge.

THE COURT: No, okay.

Ms. Buys?

MS. BUYS: No, Your Honor.

THE COURT: All right. Great. Let's move on to the next one. Jurors must use every day common sense.

MS. TURPIN: No objection, Judge.

THE COURT: Ms. Buys?

MS. BUYS: No objection.

THE COURT: All right. Number of witnesses.

MS. BUYS: No objection, Your Honor.

MS. TURPIN: No objection, Judge. I was just trying to follow along on the exhibits.

THE COURT: Okay. I'm going to go slower.

All right. The next one would be jurors forbidden from making any independent investigation. That's already in the script

for trial.

MS. TURPIN: Correct.

THE COURT: Okay. So far, we're all in agreement.

MS. TURPIN: Though in that instance, Judge --

THE COURT: What's that?

MS. TURPIN: In that instance, Judge -- in that instance, are you going to give it twice or are we just giving it once.

THE COURT: Just once.

MS. TURPIN: Okay.

THE COURT: I think Plaintiff was just being overly inclusive and not assuming that I would follow the script. Some of us don't, so that's fair.

All right. Moving on to the next one, duty of a physician and surgeon.

MS. TURPIN: This is -- Judge, I think that this -- if we're going to pre-instruct, that's fine. I don't know that this is the specific one. I would prefer to use the medmal jury instruction from the standard med -- Nevada Medmal J.I.s.

THE COURT: Yep.

MS. TURPIN: And I think that that would be appropriate. And it also needs to be adjusted or at least modified to include -- because we have a variety of different providers in this case, not just a general practitioner or surgeon. What we have is we have a geriatrician, we have a midlevel provider --

THE COURT: Right.

MS. TURPIN: -- who's an advance nurse practitioner, and we have a variety of RNs. So I think what we need to do, if we're going to do this, is we need to use the medmal instructions and modify it so that it's inclusive to all appropriate Defendants.

THE COURT: And that's where I expect Counsel to work together because what's going to happen is we're going through this list and then I would like for you all to submit a Joint Approved Pre-Instruction List. They will not be read as jury instructions; they will be just like the normal court instructions that happen at the beginning of the trial.

Then when we get to actual jury instructions, maybe we'll have a shorter litigation period over what those are going to be because we'll already have some of them already decided.

MS. TURPIN: Okay.

THE COURT: Then they will be --

MS. TURPIN: Fair enough.

THE COURT: -- proffered as true jury instructions. Just for purposes of the record and for your understanding, these are all being treated as court instructions. They will not be specified and quite honestly, I don't think the majority of the jurors would even know the difference between what the instructions are at the beginning being a court instruction, versus jury instructions that the parties have agreed upon and is presented in the close because I don't think it's every fully explained to the jurors how that works.

MS. TURPIN: Understood and agreed, Judge. And I'm

much more comfortable with the idea that these are going to be presented as court instructions.

THE COURT: Yes.

All right. So keep moving through. Medical negligence, evaluation of expert testimony as to the standard of care.

MS. TURPIN: Again, Judge, I believe that we need to use the Medmal J.I. So I think that's something that when we settle these together ahead of time, we can -- I can present Opposing Counsel with what at least we typically use in a medmal trial.

THE COURT: All right. So Ms. Wise, before I go too much further, these medmal jury instructions that are state-specific, any issues with using those over the BAJI instructions?

MS. WISE: No, not generally. And --

THE COURT: Okay.

MS. WISE: -- as to modifying them to include, you know, the types of providers, we have no objection to that either.

THE COURT: All right. We'll keep moving.

Requirement of standard of care of proof *Res Ipsa* not applicable. That's based on NRS 41A.100.

MS. TURPIN: Right. No, and I think I would propose that we modify it to remove death. This is not a death case.

THE COURT: Okay.

MS. BUYS: Agreed.

THE COURT: I doubt Ms. Wise would object to that.

MS. WISE: No objection from me.

THE COURT: All right. So I'm going to put it on you all to get that one verbally appropriate.

Corporate negligence.

MS. BUYS: Yes, Your Honor, I just wanted to object to that one. Again, with regards to *Renown versus Vanderford,* it -- Nevada has not specifically adopted corporate negligence and notwithstanding that, there is not a nondelegable duty. That's what the Nevada Supreme Court has stated for a facility for negligent medical care provided by a physician at the facility.

THE COURT: Well and here's the position --

MS. BUYS: So I would object.

THE COURT: -- that I kind of take on this one too, Ms. Buys, in addition to that commentary is, I think giving an instruction like this could tip the expectations of the jury towards the Plaintiff with regards to establishing corporate negligence, so I think that this one's more appropriate to be reserved until the conclusion of evidence.

MS. BUYS: Thank you, Your Honor.

THE COURT: All right. So that one's out. Of course when we go to settle jury instructions, bring it back. You guys can argue over which one to use. But I'm not going to give a pre-instruction on corporate negligence.

All right. Next, burden of proof. I would hope --

MS. TURPIN: I'm not opposed, per se to --

THE COURT: -- you all would address this in your opening

statements but --

MS. TURPIN: Agreed, Judge. I'm not opposed to a burden of proof in this instance. I do think off the top of my head, I would like to discuss this one when we meet and confer on it because I do think there's a more specific medical malpractice one that we could use.

THE COURT: All right. And again --

MS. TURPIN: But burden of proof, per se, I don't have a problem with it.

THE COURT: And again, the premises of this is, is it's the Court's instruction to the jury as to what their duties are during the trial, so I think there's a --

MS. TURPIN: Right.

THE COURT: -- way you can verbalize it where the jury instruction itself would be more directive.

MS. TURPIN: Understood.

THE COURT: All right. So I'll leave that to you all to resolve.

Clear and convincing evidence. With regards to the standards of proof, or the elements, I suppose, is there a way that you all could write this that would be beneficial to both sides as far as -- you know, I've heard wonderful analogies with regards to what standards of proof are.

And attorneys can't really agree on it so I'm sure it's kind of hard to get jurors to understand the difference between, you

know -- 50 percent plus a feather, I think that's one of my favorite I've heard; that if all things are considered equal, it's 50/50, if you just place a feather on this side, then that's the way you have to treat that evidence. Then we have beyond a reasonable doubt and then we have everything that falls in between, and I think it is hard for lay people to understand those nuances.

So if you all want to craft something that you can agree upon, I'm inclined, but if you're not going to agree on it, then I'm going to reserve it for a jury instruction.

MS. TURPIN: I --

MS. WISE: I can --

MS. TURPIN: -- yeah, I think this is --

MS. WISE: I'm sorry.

MS. TURPIN: -- something that -- go ahead, Shannon.

THE COURT: Go ahead --

MS. WISE: I'm sorry.

THE COURT: Ms. Wise, go ahead.

MS. WISE: I was going to say on the clear and convincing one, obviously there's a typo in it. There's -- fraud claim is not applicable in this case.

THE COURT: Sure.

MS. WISE: However, there are punitive damages, so this might be an applicable burden for us to discuss.

THE COURT: Okay. I'm going to leave this -- this one I'm not convinced is necessary and until or unless I saw how it would

be written and proffered, I'm not going to make a decision on this. I will leave it for you all for pretrial discussion. And if you can agree on something -- I do see a way that it could be beneficial to both sides but if you all can't agree on it, then I'm more inclined to just let that be a jury instruction at the end, once we resolve our jury instruction issues.

All right. Were there any other pre-instructions, Ms. Wise?

MS. WISE: No, Your Honor.

THE COURT: All right. So the motion's granted in part and denied in part with regards to these specific instructions, as we have just articulated. In the future, if you all agree on some other additional pre-instruction language, write it up as though I am reading it, agree upon it and submit it to the Court and we will incorporate that into our trial script, all right?

MS. TURPIN: And if I could just clarify, Judge. So what we're looking for us is you're looking for us to write it in a way that is more verbalizing versus -- verbalizing to the jury from the Judge's instructions, versus our traditional jury instructions, is that it?

THE COURT: That's correct. So that it's informative --

MS. TURPIN: Okay.

THE COURT: -- no different than the admonishment of don't do your own --

MS. TURPIN: Okay.

THE COURT: -- investigation and use Google during the break. Yes, exactly like that.

MS. TURPIN: It's informative, not instructive.

THE COURT: That's right.

MS. TURPIN: Okay. All right. Thank you, Judge.

THE COURT: I think it gives them a roadmap and some understanding of what they should be doing during the course of the trial, as opposed to telling them after the fact.

MS. BUYS: Thank you, Your Honor.

THE COURT: All right. Moving on. Now I have to figure out what we want to attack next.

All right. Plaintiff's Motion to Strike Improper Objections. We'll do that one.

Go ahead, Ms. Wise.

MS. WISE: Thank you, Your Honor. I have outlined most of every argument in the motion, so I will be brief. Proper objections are form foundation. Saying words like speculation, beyond their scope, and where the witness is going like this and they hear scope and they look up and they say it's beyond my scope, it's simply a coaching objection and it's improper.

THE COURT: Was this raised --

MS. WISE: Ease of these objections --

THE COURT: -- with the Discovery Commissioner, Ms. Wise?

MS. WISE: No, it was not. It was just raised at the time of

the deposition.

THE COURT: Okay. Keep going.

MS. WISE: But that's it. I mean, these objections are improper. They must be stricken. These witnesses -- and I can provide the Court a copy of the testimony when she sees -- especially APRN Sithole, when she sees and hears the objection, her body language and her eyes change. It was -- coaching objections and speaking objections are improper. That's why we have the form foundation objections.

And that's pretty much it. I've outlined all of the specific -- or most of the specific instances in the motion for your review.

THE COURT: Well and how do you see that playing out during the course of trial. You're putting this witness on, you're examining them, the other side's going to object to their testimony. How would granting this motion change the way that it's presented at trial?

MS. WISE: Well I guess that would be --

THE COURT: Because the deposition is for impeachment purposes. You're not offering the depositions in substitute of testimony, at least not that I know of at this time, right?

MS. WISE: Not that I know of at this time.

THE COURT: Okay. And certainly if some of these witnesses fail to appear or had an untimely passing, then that would be the only circumstance you can see putting the deposition in as evidence, correct?

MS. WISE: Correct. But, you know, a foundation objection can lead to issues at trial if the proper foundation is not laid at the time of deposition. So by striking an objection that was a string objection that was supposed to be a foundation objection then Plaintiff could then offer or ask these witnesses that -- those questions and elicit that testimony at the time of trial.

You know, that's why [indiscernible] as far as the motion says the objection's to be stricken or any other remedy the Court finds proper. Just, you know -- it would have to be -- each question's probably a specific instance but just not allowing these type of objections at the time of trial also.

THE COURT: I just don't know how I can provide a limiting instruction or preclude the Defendants from being able to object to questions at the time of trial, when it's -- these were form -- I understand -- and taken as true that they were coached in this manner, the appropriate mechanism would have been to sought sanctions through the Discovery Commissioner for their behavior and conduct at the time of the deposition. That didn't happen.

Instead, it's now on the time of trial to essentially handcuff Counsel to the table and not let them object and the -- and I think there's -- it's too difficult because which one of these questions and how is Counsel supposed to sit there with a reminder, oh, this is the question I can't really -- I just -- I don't see pragmatically how I could make a limiting instruction that would address this issue in a

way that wasn't prejudicial to the Defense Counsel. So I'm not inclined to grant it.

I do think that it was inappropriate at the time of the deposition and then potentially if you had filed a motion with the Discovery Commissioner, there could have been some sanctions imposed and/or retaking of these depositions. But as a -- I simply cannot issue an order striking objections before they've even happened and/or provide an instruction for a way in which those objections could or could not come out. I just think that is fraught with fear as to the -- well mistrial. I mean, that's really what I'm looking at is that it could lead to a mistrial if we don't give a proper instruction here.

So I don't like the behavior, but I don't see a way to grant the relief as it's being requested. I certainly will hear from Defense Counsel if they have a creative mechanism, although I'm probably not going to get much from them since I'm leaning in their direction on this. They're just going to say I have nothing else to add, you nailed it, Judge, good job. Right?

MS. TURPIN: I do have something. I think you're right, Judge, practically speaking, it's very clear as to what they're actually asking us to enforce at the time of trial. These were discovery depositions. Form and foundation are discovery objections. Plaintiff most certainly still has a duty to establish foundation at the time of the trial.

I'd like to defend myself a little bit. The motion and thus

far this morning assumes all of the questions were appropriate. Objections at the time of deposition most certainly here in Southern Nevada can go beyond form and foundation. I had legitimate concerns about many of the questions over this eight hours of deposition testimony, including Plaintiff's repeated convolution of medical staff, versus nursing staff which is very different, given the different providers in these case, the convolution of nursing policies and procedures versus clinician policies and procedures that were repeatedly just referred to as policies and procedures, or when she repeatedly used staff without clarifying are you referring to nursing staff or are you referring to clinical staff because those are different things.

Likewise, the continued efforts to get APRN Sithole to give information or testimony about registered nurses who were not in her employ. APRNs and staff nurses at a facility are very different and so those were most certainly appropriate in my mind, scope objections. I was not coaching these witnesses. Regardless, they never took it up with the Discovery Commissioner, nor did I ever to instruct the witnesses not to answer those questions.

So just defending myself a little bit because I also think these are issues we're going to see at the time of trial when it comes to the convolution of the policies and procedures and who they apply to, but there's no practical way to do what Plaintiff is asking in this motion.

THE COURT: All right. Thank you for that.

Ms. Wise, with regards to the unanswered question, are there questions that based on what transpired during the deposition that you believe the Plaintiff is prejudiced in going to trial without it being answered?

MS. WISE: At this time, Your Honor, I mean, we'll see what their testimony is at the time of trial. That's all we can do.

THE COURT: Certainly. And --

MS. WISE: And hopefully we can use it for impeachment purposes.

THE COURT: And that was kind of my next point, is it so bad that you have these responses in this way? Because then at the time of trial they magically have responses. Well why didn't you give it the time of the deposition is I think every cross-examination's favorite question to ask, right?

MS. WISE: Exactly.

THE COURT: Right. Okay. So I don't see the prejudice to the Plaintiff. Certainly if there is prejudice that comes out at the time of trial, we will address it outside of the presence of the jury.

MS. TURPIN: Is the motion denied then, Judge?

THE COURT: The motion's denied. Ms. Turpin, I'll ask you to prepare the order.

MS. TURPIN: Yes, Judge.

THE COURT: All right. Thank you.

And I didn't say this before, the other -- the initial motion that we went through with regards to the pre-instructions, Ms.

Wise, you're to prepare the order on that one. I have to keep track of that as we go. So if I don't say who it is, please ask me and remind me so that my clerk has a proper record as well to keep. Thank you.

All right. Plaintiff's Motion to Strike Defendant Spring Valley Healthcare LLC's Joinder to Defendant Shanna Marie Baltar and Miriam Sithole's Motion in Limines Number 1 through 11. All right. Let's address the -- whether or not the Joinders can be considered. Let's go there. Go ahead, Ms. Wise.

MS. WISE: The Joinders were untimely in this case, plain and simple. The Joinders were due seven days after filing of the Motions in Limine, which was December 23rd, which meant that they were due December 31st. They waited until January 7th. The rule says -- EDCR 2.20 says they must be filed within seven days after service of the motion, and they weren't. It's that simple.

THE COURT: All right. Ms. Buys.

MS. BUYS: The parties had a stipulation and agreement for the Motion in Limine deadline to be January 7th, 2022. You know, during the telephone conference, the Motions in Limine brought up by Co-Defendants were the ones that were discussed. No additional MILs were brought. The Joinders are non-substantive. There has been no prejudice to Plaintiff. The matters have been fully briefed.

If Plaintiff had needed additional time to respond to the non-substantive Joinders, certainly Plaintiff would have been

provided with that additional time, but it was never requested, therefore there hasn't been a showing of prejudice and we are requesting that these motions be heard on their merits.

THE COURT: Okay. But Counsel, do you disagree that -- regardless of what the deadline was, you're supposed to respond within seven days of the filing. You didn't do that, right?

MS. BUYS: That's correct, Your Honor. They were filed January 7th.

THE COURT: Right. So is there excusable neglect that you can offer as to why you all did not file your Joinders timely?

MS. BUYS: Certainly, Your Honor. I hate to go and state it, my assistant did not calendar it correctly. I apologize for that and that is why.

THE COURT: All right. Ms. Wise, your response?

MS. WISE: I just want to address one issue. There was a stipulation in the order, but it had no bearing on when Motions in Limine were to be filed. All the parties understood that they were due Christmas Eve, that's why they were filed prior to Christmas Eve, and we had the EDCR well before the holidays.

The only -- the stip and order was merely to extend the deadline to do the Opps by a week so that we weren't all scrambling over Christmas and New Year's; so the Oppositions were being extended from January 7th, to January 14th. That has nothing to do with service of the initial motion, which was due on Christmas Eve.

I think later, at some point there was -- you know, we had also agreed on when the replies would be due and then we appeared in front of Your Honor, and you gave us a briefing schedule that was consistent with that. But at the end of the day, I mean, yes, they were not substantive, but they should not be able to stand alone in the event that something happens with the moving party.

THE COURT: All right. And with regards to prejudice, since it was raised, what's your response, Ms. Wise?

MS. WISE: Well we -- after the fact, when we're in the middle of drafting it have already figured out who's drafting what, we're scrambling to get them all, look at them and see if there is any substantive argument.

Plus, in addition too, we had to go back and craft the Motions in Limine, and the Opposition, as quick as we possibly could to try to include Spring Valley's, you know -- even if it's not substantive, they're like oh, anything that applies to Dr. Baltar and APRN Sithole should also apply to us.

Well, when we initially drafted the motions, we were only responding to APRN Sithole and Dr. Baltar. We had to go back and add in additional facts. This created -- you know, a lot of these motions were already -- or Oppositions were already drafted so it created a heftier workload for Plaintiffs.

THE COURT: All right. Based on EDCR 2.20(d), it's clear that the rules require and there is no prejudice standard within the

rule, it's merely a time limitation and I don't find that there has been excusable neglect. It was substantially beyond the time period permitted for -- pursuant to the rules, so I will grant the motion and Defendant Spring Valley's Joinders are stricken. And that's for Plaintiff's Motions in Limine 1 through 11, except for 3. I don't believe a Joinder was even filed as to 3.

MS. WISE: You mean, Defense's --

THE COURT: Yeah, Co-Defendant --

MS. WISE: -- Motion in Limine --

THE COURT: -- Joinders --

MS. WISE: -- right, Your Honor?

THE COURT: I apologize. Co-Defendant's Joinders to the Opposition to Plaintiff's Motions in Limine 1 through 11, except for 3; nothing was filed for 3. The remainder of those Joinders are stricken as untimely. And Ms. Wise to prepare the order. Thank you.

All right. Next, we have Defendant Baltar and Sithole's Amended Motion for Partial Summary Judgment.

MS. TURPIN: Good morning, Judge. This is a medical malpractice case. The Plaintiff presented to the subacute rehabilitation wing of our Co-Defendant facility after he had been in the hospital after two dislocations of his hip arthroplasty, and he was admitted to Summerlin Hospital and his orthopedic surgeon applied a -- or ordered a brace and sent him to rehab care and that's where he is seen by all of the providers.

And while he is at the facility, he develops pressure ulcers on his heels. Mr. Heifetz is an elderly gentleman with a chronic history -- a history of chronic vascular insufficiency, along with a myriad of other comorbidities. And what we have here -- and then he was -- when the wounds were recognized, he was -- wound care was ordered, he was seen by the wound care team and eventually he was discharged.

And when I took his deposition in 2021, he was back to living independently at home by himself and testified, letting me know that he -- there was nothing that he couldn't do then that he wasn't able to do before his injuries.

My point, Judge, is that this is a medical malpractice case. This is not an elder abuse case. This is not a case where the record supports punitive damages. I'm not going to rehash the various law on punitives and elder abuse because I know that Your Honor is very familiar with it and has seen these motions before.

But the fact of the matter is, even if you were to assume all of the allegations and assertions that the Plaintiff has put in their briefing, none of that rises to elder abuse, or enhanced punitive damages. All of the injuries are the same medical injury arising out of the same alleged allegations of professional negligence.

This is not an instance where the Plaintiff is alleging all right, well we have professional medical negligence that led to the development of pressure ulcers in a patient with chronic veinous insufficiency. And then also, by the way, the damages should be

enhanced for these variety other abuses, such as physical or chemical restraints or a denial of food.

That's not what we have here is we have professional negligence, and we have one set of facts and one set of an alleged medical injury and Plaintiff is trying to apply that to three different levels of enhancement; the professional negligence, the elder abuse, and then the punitive damages. And that's not what the law provides.

As a matter of law, Judge, it's you may determine whether or not the Plaintiff may proceed on the enhanced damages claim of elder abuse and punitive damages and I submit to you that the record in the case does not support those enhanced damages. What we have here is a medical malpractice case.

THE COURT: All right. Ms. Wise --

MS. TURPIN: That's it, Judge.

THE COURT: -- your response?

MS. WISE: Thank you, Your Honor. This is a Motion for Summary Judgment. Genuine issues of material fact do preclude summary judgment on both the punitive damage and the elder abuse claims.

Punitive damages are appropriate against both Dr. Baltar and APRN Sithole and the reason is because they both exhibited a conscious disregard for the rights and safety of Plaintiff. It does not have to be willful; they just have to exhibit a conscious disregard. Here, their method of treating Mr. Heifetz was to set it and forget it;

that's all they wanted to do.

As to Baltar, she saw him one time. She saw him on the initial. He had wounds that were discovered. They called her. She never showed up. She did not care. She was like oh yeah, just do an order over the phone, whatever. She rubberstamped APRN Sithole's discharge summary.

When asked at her deposition if she had any responsibility in supervising APRN Sithole, she said no. That's a violation of federal law and both the policies and procedures of the case. She had no idea what the law required, what the nursing staff required.

Same for APRN Sithole. She kept saying she had no idea what a registered nurse was supposed to do, that's not her problem, that's outside of her scope, but she was a registered nurse by trade and still had no idea how to properly treat the patient.

So I want to kind of specifically talk about some instances that were raised in the motion. Neither APRN Sithole or Dr. Baltar assisted in creating the care plan, even though it's -- we have expert testimony that creating the care plan is a multidisciplinary approach. Creating the care plan requires doctor's orders and the nursing staff -- even Spring Valley's nurse was like oh, the care plan was created timely. I mean, it's not as much as you want to see but it was created timely. It wasn't created for a week.

The law and the policies and procedures that we now have require it be -- to be required -- to be prepared within 48 hours. Neither of these providers had any clue about the care plan;

when it had to be created, what needed to be in it, they thought -- they said that's the nursing function. That's a nursing function. That's a nursing function.

Defendant also argued that Dr. Baltar did her part in prevention of pressure sores because they -- she ordered a pressure relieving mattress.

The issue here is that Mr. Heifetz needed to be turned. Neither provider ordered any kind of turning or repositioning, any kind of offloading procedures. They didn't even note that he was at-risk.

Then we have Spring Valley's nurse expert, Ms. Clark who's saying oh, he didn't really need to be turned and repositioned because he had handrails. But then at the end of the day they're saying oh, we think he was turned and repositioned. That's a nursing function. That's not our problem to know if our patient is getting the proper care.

The same is true for their orders. They think it's not their responsibility to make sure that the nurses are treating their patients, even though it is their patient. They were like we'll set it, we'll forget it. He's fine. Whatever. They never checked his skin. And while I agree that that is likely a nursing function, they never even looked to make sure that he was being properly treated. He was clearly not turned in this case and he clearly needed to be and that these providers just did not care.

Another issue was the compressions stockings -- the

compression socks. So Mr. Heifetz was admitted to Spanish Hills with the compression socks on. His testimony is he is admitted, nobody cares about them, they never remove them until a couple of days later when his friend comes in; his friend's a nurse. The -- we have photographic evidence that these compression stockings are like rolled down around his ankle and caused massive swelling in his calf. His friend took it off, said no, these are not appropriate.

Meanwhile, now that we have those records, there's an order that they are taken on and off every 12 hours. But this is just an assumption that it was actually done, that the order was actually followed and both APRN Sithole and Dr. Baltar both argued that the -- it was their understanding that it was done and that it was their assumption that it would be done but that they just said it, and forget it. Not their job to check for the compression stockings.

They also said it's not their job to check for the Braden assessment. We know one was performed by Nurse Anderson; just one. They did not care enough to note that he was a high-risk patient, that he needed a continuous Braden assessment, they didn't order additional Braden assessments, they didn't look at the MDS, which had showed that he had no new skin issues when he had wounds that were discovered.

I mean, this is a situation where once the wounds were discovered, nobody cared. APRN Sithole noted that he was treated with eight bandages. When I asked her in her deposition if she saw the wounds, if she did anything with the wounds, she was like no,

that's wound care's problem, that's not my problem. I don't care that he has wounds. I don't care that there's anything. She just was like that's the wound care function, not my function. Nothing was her function other than coming in and saying hi and filling out her little forms.

As to the elder abuse case, you know, elder abuse is also not just abuse but it's also neglect and one of the neglects is to provide an essential service when you have a legal responsibility to do so. The *Mary Curtis* case tells us that's not subsumed by professional negligence now.

Mary Curtis, footnote 5, it's really, really clear that says we are not convinced that the protections of the elder abuse statute are subsumed by professional negligence. Here we have expert support that says he was a vulnerable adult, and these were all of the things that this facility did that amounted to -- and that amounted to elder abuse.

At the end of the day, there was a deprivation of service and at the very least a genuine issue of material fact precludes summary judgment on these claims.

THE COURT: All right. Your response, Ms. Turpin.

MS. TURPIN: Judge, everything Ms. Wise just described is professional negligence, it's not elder abuse and it doesn't warrant heightened damages of punitive damages. What instead it shows is the Plaintiff's continued fundamental misunderstanding of the different duties and standards of care that apply to the three

different levels of providers in this case.

We have a DO, Dr. Baltar, we have an APRN, nurse -- APRN Sithole, and then we have the facility and the facility's RNs, LPNs, and CNAs. Those are all different levels and different standards of care and different duties as they applied.

Ms. Wise, in her prerogatives and her -- Nurse Sithole never said I don't care, I don't care about his wounds. That's ridiculous, Judge. It's nonsense. What we have here is we have different providers and our -- it's -- what she's saying, everything amounts to medical malpractice and as a matter of law, Judge, you have the ability to say okay, this doesn't rise to the heightened level of elder abuse, it doesn't rise to a punitive damages claim.

Ms. -- what she's stating may be questions of fact, but they're questions of fact for medical negligence, Judge. So we have --

THE COURT: Well, Ms. Turpin --

MS. TURPIN: -- expert testimony --

THE COURT: -- with regard to this -- I understand your argument with regards to the legal implications and the case law; however --

MS. TURPIN: Yes.

THE COURT: -- on a Motion for Summary Judgment standard, the Court has to consider the facts in the favor of the non-moving party and in this case, what's been alleged is that there was a conscious disregard for Mr. Baltar's[sic] condition and that that

conscious disregard of his rights and his safety just looking at this element of the compression hose where there was an order that was not followed and that there -- it went two days without being changed out, how is it that there's not sufficient facts in controversy to defeat a Motion for Summary Judgment, where the Court must allow the jury to decide whether or not those facts substantiate punitive damages?

You -- I know your argument is for me to follow the law and my view on it is 56 limits my ability to interpret those facts, so raise -- address that issue.

MS. TURPIN: Sure. What we have is we've got allegations of conscious disregard, but those allegations of conscious disregard aren't supported by the record --

THE COURT: Okay.

MS. TURPIN: -- right? What we have --

THE COURT: So point to me in a deposition where your -- you believe there is witness testimony that is conclusive on that point.

MS. TURPIN: Sitting here today, Judge, I can't say that I can point chapter and verse to page and line of the testimony but what I can tell you is what I mentioned earlier is we have this repeated convolution of the different standards of care and duties that apply to the different providers in this case. I have the doctor and the midlevel practitioner who has her own license who operates in -- as -- on her own and in the state of Nevada, operates

as an APRN, outside the supervision of a physician.

So what we have is we have a DO, who admits the patient into the facility. She does an Admit H&P. There's a question of fact as to whether or not Mr. Heifetz even had the stockings on when he came into the facility. He says he does. Nobody else does. Nobody else supports that testimony. That's a question of fact. Regardless that's a medical negligence standard.

And then we have my other client, Nurse Sithole, who two days after Mr. Heifetz had already been admitted, then she orders the stockings to remove and there's been no evidence presented in this case that after Nurse Sithole made that order that they be 12 hours on or 12 hours off, but that didn't happen. The order came two days after his admission and the record suggests that it was followed, everything thereafter.

Now, Ms. Wise wants to task the doctor and the midlevel practitioner with turning the patient and supervising RNs and LPNs and CNAs who are not their employees. There is in fact several issues raised in this case with regard to scope, which Plaintiff continues to convolute and try to apply standard nursing functions, which is turning patients and offloading, to a physician, who admitted the patient, and an APRN. Those are not APRN and doctor functions; those are nursing functions.

So what she's alleging are just general negligence medical malpractice facts. There is one common medical injury in this case and it -- that's medical negligence and there's nothing in

the record that shows that those allegations are different with regard to punitive damages or elder abuse. And neg -- they are not one in the same, they don't necessarily rise to the other, and I'm telling you the record doesn't support it.

THE COURT: But those facts are in dispute. I understand your position as to how they should --

MS. TURPIN: But --

THE COURT: -- be interpreted --

MS. TURPIN: And even if --

THE COURT: And again, it goes --

MS. TURPIN: But the facts --

THE COURT: -- to my -- excuse me.

MS. TURPIN: I'm sorry, Judge.

THE COURT: It goes to my question from a legal perspective -- not based on the facts as you believe them to be -- on a legal perspective, how can the Court grant a Motion for Summary Judgment on punitive damages when the Plaintiff has set forth facts that her client testified occurred, your client has testified, no it didn't, and if the Plaintiff's testimony is proven at the time of trial, how that doesn't warrant contemplation by the jury as to punitive damages.

MS. TURPIN: I understand your position, Judge. What -- perhaps what I'm inartfully saying is that even if you believe everything Ms. Wise just said, none of that elevates this to elder abuse or punitive damages as a matter of law. If there's no

conscious disregard, there's no -- anything excess above and beyond negligence, even if you believe everything she says.

THE COURT: Okay. Since I asked so many questions, Ms. Wise, I'll give you an opportunity to respond to that and then I'll go back to Ms. Turpin.

MS. WISE: Yes, Your Honor. So, you know, just real quick, the facts as we've outlined them do rise to the level of a conscious disregard for the rights and safety of the patient -- for -- of the patient, which is Mr. Heifetz.

There's numerous other facts that are in this case that are applicable to punitive damages, but we did not raise them because those were strictly nursing functions. For example, we have facts that he wasn't bathed, he had to beg to get a bath, they threw him a washcloth. His daughter came in and yelled at them because then they said he refused to be bathed. All this is in the record. I'm not saying that that is a function of Dr. Baltar, or APRN Sithole. That, I agree, nursing function.

The issue is, not that they were physically supposed to turn and reposition him but that they said it's not their job to make sure that orders they write are being carried out on their patients. So their job is to what, come in and create orders and walk out and not do anything?

Another, and a huge issue, is the issue of supervision between Dr. Baltar and APRN Sithole. I know there's a motion on it and it's been heavily fought in this case whether, you know, she --

APRN Sithole is autonomous in Nevada, but the bottom line is they decided to work at a skilled nursing facility. The skilled nursing facility has to follow the CMS guidelines which require the physician to supervise everyone. And for the policies and procedures which mirror the federal guidelines, it requires that supervision and they just didn't happen.

They allowed -- he has vascular insufficiency. They allowed that to be treated with compression stockings. They are the doctors and the APRN; like they should be actively involved in the patient care and say hey, this isn't right. This is my patient. This is how I want things done, instead of just being like eh, it's fine, it's fine.

And then allowing APRN Sithole to author the discharge report and just signing it without seeing the patient, without doing anything to -- without even asking the question like why was an Ace bandage used? Dr. Baltar's the doctor here and she's just rubberstamping it.

THE COURT: All right. And --

MS. WISE: With that, I submit to you, Your Honor.

THE COURT: And as to those facts -- and I will say, I did catch in the Plaintiff's Opposition this fact and so Ms. Turpin, I'd like for you to address this that --

MS. TURPIN: Yes.

THE COURT: -- what they're basing the conduct that alludes to a punitive damage is that the providers never assisted in

the creation of the care plan, nor did they ensure that any of their orders were followed and that is what I see as the theme throughout the Opposition is essentially -- and we can go from order, to order, to order, but this context of punitive damages are warranted because there seems to be a complete disconnect from these physicians as to their own policies and procedures and federal law, specifically 42 CFR 48321, which requires that the care plan be created within 48 hours. It wasn't done, but not only was it not done, as alleged, is that after the care plan was to a certain extent created that they didn't assist in the creation of it, nor did they even know that they were supposed to.

And so I think that's where the Plaintiff has alleged facts to support a conscious disregard for patient safety that these physicians during their depositions the -- I'm sorry, the APRN, as well as the DO, indicated that they were not aware of their requirement to ensure that their orders were followed and nor did they have a pattern and practice of doing so. That --

MS. TURPIN: Okay, Judge, so --

THE COURT: So that's what I'm focused on as far as the factual assertions that support punitive damages and certainly those facts are in dispute.

MS. TURPIN: Certainly. A couple of things, Judge. This wasn't a SNF. He wasn't in a skilled nursing facility; he was in a subacute rehab admission. So that's something that also has to be continued -- or considered. This isn't a SNF standard of care, this is

a subacute rehabilitation hospital. So that correction for the record, Judge.

The other thing is a care plan -- the care planning falls onto the Co-Defendant facility. Neither Dr. Baltar, nor APRN Sithole were employees of this facility. They were employees of non-party Optum Care. Dr. Baltar and Nurse -- APRN Sithole were simply credentialed providers who were credentialed to round on patients at this facility. Care planning is a facility function. While there is testimony in this case that it's a multi-disciplinary approach, it is. Do you know what it involves? It involves nursing, it involves OT, PT, dieticians, social work. That's the multi-disciplinary approach.

And again, the policies and procedures that the Plaintiff keeps trying to push on to APRN Sithole are nursing staff policies and procedures that do not apply to credentialed providers who are not employees of the facility. Again, the whole theme of Plaintiff's case is convoluting policies and procedures and standards that apply to the facility and their staff nurses to my credentialed providers.

So again, Judge, everything she says is still professional negligence and that they're misrepresenting the standards in this case and what he was there for. He wasn't there on a SNF, he was there for subacute rehab. And again, the care planning goes to the facility; that staff nursing policies and procedures that they are alleging were not followed go to the staff's facility with the staff nurses, not my credentialed providers.

THE COURT: Well let me ask you this, Ms. Turpin then in a more --

MS. TURPIN: Sure.

THE COURT: -- direct way. Is it your argument that Dr. Baltar's obligation to ensure his orders were followed -- well first of all, do you -- are you arguing that there is no responsibility of a physician to ensure that their orders are followed?

MS. TURPIN: No, I'm not arguing that, Judge.

THE COURT: All right. So then we agree --

MS. TURPIN: But I will submit --

THE COURT: We agree that they --

MS. TURPIN: -- to the Court that --

THE COURT: -- there should be -- there's a standard of care as to ensuring that orders are followed, correct?

MS. TURPIN: Right. And it's complimented by the fact that physicians, absent of showing otherwise have a reason -- it's reasonable for them to rely on other licensed healthcare professionals to follow out those orders. There's been no showing in this case that Dr. Baltar had a reason to believe that there were any orders not being carried out. There is no showing in the record of that, Judge.

THE COURT: But -- I understand that, but -- so we agree that there's a standard of care to ensure that your orders are followed and if the argument simply was that he failed to do that in this case, as opposed to a pattern and practice argument, then I

would agree with you that that's just a reasonable medical negligence standard that would be applied because he doesn't consistently in all matters, just in this particular case something happened, if that was the facts that were being argued.

That's not what's being argued; at least not what I'm hearing. What the Plaintiff is saying is Dr. Balthazar based on his -- Baltar, based on his testimony was that he's not required to do that and so that's different than I always follow-up on my orders but in this particular case, I don't know what happened or I disagree, I did follow-up in this case. Instead his testimony, at least what's been alleged is that's not my responsibility, the nurses do that. And if they don't do that, it's not my problem.

That's allege -- essentially the summation of what I'm hearing from Plaintiff's Counsel. So --

MS. TURPIN: I think that --

THE COURT: -- addressing that, how is that not above this argument as to what the standard of care is, but basically that Dr. Baltar's position is I write the orders, they follow them; no, I don't follow up.

MS. TURPIN: I think that is -- I think it's more nuanced than that, Judge. I think that the questions that were posed to Dr. Baltar at the time of his deposition are -- and also to APRN Sithole well, are you following up with the nurses to see that they turned the patient; are you following up with the nurses to see that they offload the patient? And no, they don't. Those are standard

nursing functions, which are reasonable for the physicians and the clinicians to expect the nurses to provide.

THE COURT: But doesn't the jury get to --

MS. TURPIN: And again, there's nothing --

THE COURT: -- decide --

MS. TURPIN: -- in the record --

THE COURT: -- whether it's reasonable?

MS. TURPIN: Yep. Yes. But even if in that allegation, that doesn't constitute or give rise in this record to enhanced damages. It's medical malpractice.

THE COURT: All right. Anything else you'd like to add?

MS. TURPIN: Not at this time, Judge. Thank you.

THE COURT: All right. Based on the briefing that's been provided and the argument of Counsel here today, as to the issue of punitive damages, the motion -- the Partial Motion for Summary Judgment is denied. I think the Plaintiff has set forth sufficient facts to support an argument for punitive damages and it's ultimately up to the jury to decide if the facts warrant that.

I do find the difference in the standard of care arguments versus the conscious disregard for patient safety to be compelling and I do believe that a reasonable juror, if given all of the facts and proven as alleged by the Plaintiff could reach the conclusion that the doctor and the nurse -- the nurse -- the APRN, as well as the DO in this case, not only fell below the standard of care but they're falling below the standard of care also reaches a level of some

gross -- reckless or gross negligence or conscious disregard for the patient's safety, especially given that -- the posturing from the depositions, at least what's been submitted -- and certainly what comes out at trial may be nuanced as you said Ms. Turpin but what has been presented to the Court in deposition, it does appear that they just blatantly wrote orders and didn't make sure that they were followed and I think the jury gets to decide whether that practice was reasonable or not.

MS. TURPIN: And as to the issue of elder abuse, Judge?

THE COURT: Yeah, I'm getting there. All right. With elder abuse, there are certainly instances where I would agree with you, Ms. Turpin where it's argued that any person over 60 that is a Plaintiff in a malpractice case should not fall under the elder abuse statute and I wholly agree with you in that regard; however, the Court does, based on *Curtis*, and other implied cases regarding the statute -- statutory provisions of 41.1395 have to look at the facts in the case to see whether or not this abuse or the conduct is tied directly to the age of the victim and whether or not the victim is in a situation in which due to their age, not just because of medical judgment, is being mistreated or neglected within the standard of the statute.

I do believe the Plaintiff has set forth a vulnerable person standard and certainly the testimony of the Plaintiff in this case, he at least believed part of his mistreatment was his vulnerable status. He was non-mobile. They met the elements with regards to the

definition of a vulnerable person. He was an elder based on the statute.

And so really it comes down to whether or not the Plaintiff has established by preponderance of the evidence that a person who's liable for damages, pursuant to this acted with recklessness, oppression, fraud, malice -- I don't -- there's not been a showing of fraud or malice, so really, we're dealing with recklessness here. And again, I think the jury gets to decide whether the facts support a finding that the conduct was recklessness.

But for the conflicting testimony, I understand what your client's position is, but again, this is an issue of fact standard, not what this corporate -- this Court interprets those facts to be and therefore, I have to deny the motion because I do think the jury gets to consider it.

You certainly have an opportunity to argue the facts of the case and you get an opportunity to explain the law, but I can see a set of facts and circumstances in this case where if the Plaintiff's version of facts is adopted as being true on the whole, a reasonable juror could conclude that this was elder abuse and there -- you know, there are very limited circumstances where a medical negligence case would come to fall underneath this.

But given the type of subacute care that was provided, I think those are the exact cases where the elder abuse statute can fall in and not be subsumed by the medical professional negligence standards set forth in the statute.

So I'm going to deny it. It's without prejudice. Certainly, a legal issue can be addressed at the time of trial. If the facts do not come out the way that it has been shown thus far, you can raise the motion again, Ms. Turpin.

MS. TURPIN: Very good. Thank you, Judge.

THE COURT: All right.

MS. BUYS: Your Honor, if I may, we had filed a Joinder on this one too. I just want to confirm that the Joinder would be also similarly denied without prejudice.

THE COURT: That's correct.

MS. BUYS: Thank you, Your Honor.

THE COURT: There was no substantive argument that was being raised, right?

MS. BUYS: No, Your Honor.

THE COURT: Okay. And Ms. Wise, you can prepare that order denying the motion. And it's based on --

MS. WISE: Will do, Your Honor.

THE COURT: -- the genuine issue of fact just prevents the Court from reaching any further ruling on it.

And you can include the Joinder in that order, so it's just one order addressing both.

MS. WISE: Will do, Your Honor.

THE COURT: All right. Let's move on to -- are you all okay to keep going?

All right. Plaintiff's Motion in Limine 1 to Preclude any

Evidence of Collateral Source Benefits. Ms. Wise.

MS. WISE: Thank you, Your Honor. Simple issue. The *McCrosky* case tells us that collateral source should not be admitted in a federal case, such as when a patient has Medicare. Here, Mr. Heifetz has Medicare, so it's any collateral source, it should revert back to common law. And under the *Proctor* case, it's non-admissible. It's that's simple.

The same is true for any discounts or write-downs. I think Defense's Opposition said that they should be able to admit the actual bills that were paid, which is the exact same finding under *McCrosky*, so I don't quite understand that argument but at the end of the day, this is preempted, and so collateral source should be excluded.

THE COURT: All right. Ms. Turpin, your response.

MS. TURPIN: Yes, Judge. I -- again, this is an issue that's been briefed time and time again. I certainly don't think that it warrants any discussion of the constitutional standards this morning.

The issue that -- agreed, this is a matter where the Plaintiff was treated under Medicare, so I get those issues. I think the differentiation or the nuance in this is that *McCrosky* includes evidence of payments, but write-downs were not payments and that's the position the Defendants were taking. But that being said, Judge, we rest on the briefs.

THE COURT: All right.

MS. BUYS: Your Honor --

THE COURT: Well I --

MS. BUYS: Thank you --

THE COURT: -- struck your Joinder, but --

MS. BUYS: No, I -- it was an Opposition, Your Honor, that was filed timely.

THE COURT: All right. Go ahead.

MS. BUYS: Thank you so much, Your Honor. Yes, Charlotte Buys for Defendant Spanish Hills, for Spanish Hills' Opposition.

NRS 42.021 was enacted by the Nevada Legislature under KODIN, as part of the state-wide ballot initiative. It allows all collateral source evidence to come into a medical malpractice case. This is a medical malpractice case; therefore, state law allows collateral sources to come in unless there's a reason not to.

THE COURT: Such as federal --

MS. BUYS: The only reason --

THE COURT: -- preemption.

MS. BUYS: Yes. The only reason -- you're exactly right, Judge. The only reason in the state of Nevada is federal preemption for federal payments because there is a federal statute which allows the federal government to subrogate for payments.

In this case, the amounts that are written down or written off are never going to paid by anyone. And the Nevada Supreme Court upheld the constitutionality of the 42.021 in *McCrosky*. They

said but for a federal preemption for the payments, 42.021 still stands in federal negligence actions.

For example, in this case, it's designed to help prevent double dipping. One of the bills was $1,147 bill from Direct Mobile Imaging; however, Plaintiff's insurer only paid 63 percent of the bill. That other 37 percent will never be paid. It is not subject to the federal subrogation statute.

Therefore, if Plaintiff would agree to offer into evidence the amounts paid, the amounts that are subject to that federal subrogation statute, then that is permissible under 42.021. 42.021 still remains intact with regards to the write-downs and write-offs. Thank, Your Honor.

THE COURT: All right. Ms. Wise, you get the last word.

MS. WISE: Thank you, Your Honor.

The Court -- the *Khoury versus Seastrand* case specifically address write-downs and the Court there determined that they're irrelevant for determining the value of a case.

As far as the *McCrosky* decision, it preempts -- the -- what happened with *McCrosky* is it preempts the collateral source. It goes back to common law. Common law tells us that a Defendant doesn't get the benefit of a Plaintiff being insured. Like it does not matter that a Plaintiff has insurance or doesn't have insurance. That's why insurance is not admissible. At the end of the day, it's -- whether the Plaintiff has it or not, just in a general personal injury, we are going to admit the actual amount, not any amounts of write-

downs or things that are actually paid. So I don't quite understand that argument.

Furthermore, numerous judges have already determined that, you know, these write-downs should not be admitted. Both in our jurisdiction, as well as other jurisdictions. And I'm not going to belabor the point because I put the briefing out for you and again, I won't get into the constitutionality because I know Your Honor probably does not want to discuss that this morning.

But that being --

THE COURT: Well, but why not --

MS. WISE: -- said, I will --

THE COURT: -- Ms. Wise? Why not discuss constitutionality?

MS. WISE: Oh, okay. I mean, we can go into it. I mean, the -- I'm sorry, Your Honor, I presumed that you didn't want to. I've argued this motion numerous times and most judges say they're not going to address the constitutionality argument.

THE COURT: I may not, but if you want to make your record for purposes of appeal --

MS. WISE: Okay.

THE COURT: -- I'll allow it.

MS. WISE: We'll submit to Your Honor on the briefs. We do just believe that the, you know, statute is unconstitutional because it treats these Plaintiffs differently and that it violates the equal protection clause of both the Nevada Constitution, as well as

the US Constitution.

THE COURT: All right. Based on federal preemption, I do find that the *McCrosky* case is controlling and in this instance, the Medicare payments that resulted in this case, that Plaintiff is correct that based on the preemption -- federal law preempts NRS 42.021 in its entirety according to the *McCrosky* case and therefore, the collateral source rule applies with regards to the introduction of the payments and the bills, the write-downs, and so I'm going to grant Plaintiff's motion. Ms. Wise to prepare the order.

And as all my other colleagues, I do not reach the issue of constitutionality, but I do find that it has been raised and properly preserved as an issue for appeal.

MS. WISE: Thank you, Your Honor.

THE COURT: All right. Number 2. Plaintiff's Motion in Limine Number 2 to Exclude Evidence of Employment or Business Ownership.

MS. WISE: This one's short and sweet, Your Honor. My client was retired for many, many, many years before he was admitted into this facility. At the time of -- well, let me give you the back story. At the time of mediation, the adjustor was trying to elicit some weird stories from Plaintiff about like his prior history and his workforce. That's not relevant.

He has no wage loss, no future loss of earning capacity claims. He didn't work at any point during this case or for years and years and years before this case, so we just want to exclude

any argument or evidence of his prior employment or business ownership.

THE COURT: All right. And Ms. Turpin, there's not a claim for futures or loss --

MS. TURPIN: Yeah.

THE COURT: -- of income, so why is it relevant?

MS. TURPIN: I agree, Judge. I don't know that it's -- I agree. It's a little bit of confusing. It's also a Motion in Limine I haven't encountered before because typically the Plaintiff's ask their client on the stand to humanize them in front of the jury, hey, what did you do before you retired, Barry. And in this instance what he would say is that he ran some sort of sport bookie betting business, which is what he -- which is the weird story that Ms. Wise is referring to at mediation. But this is Vegas, I don't think anybody cares that he ran a sports betting business.

I don't know that it's relevant, but I also don't know that it's prejudicial. With that, Judge, I'll rest on the brief.

THE COURT: All right. We'll grant the motion. The Plaintiff is not requesting any future damages for loss of employment or for past loss of employment. The Plaintiff was clearly retired so any mention of his prior business or ownership is excluded, and Ms. Wise can prepare the order granting that motion.

All right. Motion in Limine 3 to Strike Alexa Parker Clark, RN.

Go ahead, Ms. Wise.

MS. WISE: Thank you, Your Honor. I know I provided a lot of evidence for you in the Motion and the Reply, so I'll try to be brief.

Nurse Clark is not qualified to offer opinions under *Hallmark*. At the time when we drafted the initial motion, all we had was her CV and her deposition testimony where she didn't remember what -- at what point she did a lot of things. Once we got her file, we learned she had not been a nurse since 2009, did not taught since 1976. She had no other publications in that time. So the bottom line, she does not know the applicable standard of care.

Here, the -- many of the CMS guidelines that we're dealing with were enacted in 2015 and 2017. And it was clear from her testimony that she didn't know these guidelines. She disagreed with some of these guidelines. And so she just does not know the applicable standard of care for a nurse in this day and age.

If that weren't enough, her opinions are based on assumptions that will not assist the trier of fact. She assumed that Mr. Heifetz was turned and repositioned. Well first she said he didn't need to be turned and repositioned because he had the bed roll, but her opinion was that he was turned and repositioned. There's zero record that he was turned and repositioned, which I got her to concede that there was no record that he was turned and repositioned.

There is evidence to the contrary, the testimony of Plaintiff

and his family where he says nobody ever turned or repositioned me or offloaded me, other than after the fact when the wounds were discovered, then his heels were offloaded. But prior to the wounds, no offloading, no turning, no repositioning. I asked her what did you do with that testimony. She chose to ignore it, she determined it was not reliable. There's nothing in the record that says it and still she's going to poison the jury by saying that this happened.

The similar thing with the compression stockings. She has -- her opinion was that the pro -- the use of the compression stockings was proper, the 12 hours on, 12 hours off. I asked her if she was aware that Mr. Heifetz came into the facility with the compression stockings, she said she ignored it because it wasn't in the record, so it was not reliable.

I asked her if she saw the pictures, she said she ignored it because it was not reliable. And because there's -- there's nothing -- she said there was nothing in the record that he came in, so she was under the assumption that they were on and off every 12 hours. There was also an issue that they -- Mr. Heifetz testified that they were never taken off once he was admitted and that 12 hour on and off didn't actually happen. She said that she chose to ignore that testimony.

The other issue is that she didn't have any of this evidence when she even forming her opinion. She authored -- well, she authored her report at some point before July 6th because that's

when it was initially disclosed to us, but she received a bulk of the evidence after the close of discovery. So 153 days after the initial, 130 days after the rebuttal, and 21 days after the close of discovery is when Defense produced everything in her file to her, based on the evidence that we recently received when we asked for a copy of her file.

It's clear that she then went through it and she cherry picked what she wanted to rely on to conform that to her evidence -- to her opinions and then she ignored everything else. And generally I would say something like this might go to the weight of, you know, non-admissibility, it goes to the weight of the evidence but that's not this case because she's going to stand up and tell the jury these things happened when there's no evidence that they happened. And hearing that from a witness saying oh, this is our practices, this is what we believe happened is a lot different than an expert standing up there and saying paid testimony is not reliable, listen to my assumptions.

And with that, Your Honor, I submit to you.

THE COURT: Well and Counsel, let me ask you that though. How is a limiting instruction not more appropriate in this setting, as opposed to fully strike -- I mean, she's clearly been a nurse for 50 years and the argument can't be that she's unqualified on her face. Essentially, you're attacking the credibility of the opinion that she provided and certainly there should be some limiting instructions with regards to differentiating between those

assumptions versus fact. How is a limiting instruction not curative of that issue?

MS. WISE: Well, initially, Your Honor, she hasn't practiced as a nurse in some time, and I don't think she is aware of the applicable standard of care based on her testimony. That -- you know, there were things where she was like I don't think that's true, I don't -- she didn't agree with me when I was asking her -- I specifically read federal guidelines from her to ask her, you know, if she would agree with this, if she would agree with that. There were instances where she would just say no.

So I just don't think that she's qualified to offer standard of care opinions first of all.

THE COURT: All right.

MS. WISE: Second of all, I mean, I don't know that a limiting instruction would help. I mean, it could potentially be crafted in a way that her opinions are based on assumption but I'm sure Defense would object to that. I think just -- you know, *Hallmark* tells us that they can't be based -- her opinions can't be based on assumptions because they don't assist the trier of fact and that's exactly what she's doing her.

THE COURT: Understood.

All right. Response?

MS. BUYS: Yes, Your Honor. This is Charlotte Buys.

Again, you know, you sort of hit the nail on the head that Plaintiff's argument's going to weight, not admissibility. Nurse

Parker Clark has 50 years' experience as a nurse, including 10 years as a Director of Nursing at a skilled nursing facility. She is licensed as a nursing home administrator and has a bachelor's degree in nursing from the University of Pennsylvania. She is fully qualified to opine as to the standard of care. Plaintiff's arguments in their motion and here today are cross-examination material, not as to admissibility under *Hallmark.*

One of the arguments was Nurse Parker Clark explained that having a patient reposition or turn themselves every two hours is part of the routine care and is not required to be documented. And while Plaintiff contends that's speculative as to whether or not Plaintiff was turned, Nurse Clark explained not only is it within the standard of care to document by exception for routine care, but had the patient not been repositioned, she would have expected him to develop multiple skin ulcers based on her experience and her review of the records in multiple areas, such as his hips where he had a brace or his coccyx. Instead, Mr. Heifetz just had issues with skin integrity in areas where he had preexisting neuropathy.

Her testimony will assist the trier of fact in understanding the nursing standard of care and based upon her qualifications, education, and significant experience as a nurse, she's qualified under *Hallmark.* Her testimony is relevant, and its probative value substantially outweighs her -- any potential prejudice under 48.025 and 48.035.

THE COURT: With regards to her not practicing since

2009, address that point with regards to her qualifications.

MS. BUYS: Certainly, Your Honor. Again, it goes back to her educational background. She isn't just an RN. She does have specific licensure as a nursing home administrator and this care did happen a while back. I believe this -- the care at issue. And she was fully aware of the standard of care for nurses at a facility like Spanish Hills Wellness. She testified to that in her deposition.

THE COURT: All right. Anything else you'd like to add?

MS. BUYS: Not at this time, Your Honor. Thank you.

THE COURT: Oh, okay. Thank you.

Ms. Wise?

MS. WISE: Thank you, Your Honor. I just want to make a quick point. Defense argued about the location of the wounds and what they believe the wounds to be. Nurse Clark conceded that she's not qualified to offer those opinions on the location, what the location means, whether they're vascular or pressure in nature. So any argument to that should be ignored because she already conceded that she was not qualified.

I think just having licensing does not make you qualified to do something. There are people who have licenses that they renew over and over, for years and years. It doesn't mean you're aware of what the standard of care is in a case.

And the bigger issue here -- I know they keep saying the documentation by exception. The bigger issue here is that she's assuming that it was done when there's zero evidence it was done.

But I asked the nurses, how do you know it's done. If you have a patient and you don't know if it's done, how do you know it's done. And they said I ask -- one nurse said I talk to my patient. The 30(b)(6) testified that there's some loudspeaker that comes on to tell you to turn your patient. Everybody gave us different things. Everybody had different testimony on the subject.

So first of all, the only evidence on the subject is that it was not done because there was not even a nurse who could specifically say yes, he was turned or repositioned. So she's just basing everything on assumptions. Whether it's required to be documented or not is a whole nother issue. She is assuming that all of these things were done when there's evidence to the contrary and she's going to poison the jury by saying they were done, and Plaintiff's testimony is not reliable. That's all, Your Honor.

THE COURT: All right. Based on *Hallmark*, I don't find that Plaintiff has substantiated that Ms. Clark is unduly qualified as an expert per se. Certainly during the points of cross-examination, it sounds like there's a lot of material here to impeach her with, as well as to discredit her as to her credibility and the strength of her opinions. And I am going to find that a limiting instruction is appropriate.

The limiting instruction, Ms. Wise, I'll ask for you to craft and have Opposing Counsel review and weigh in on, but I expect to have this issue fully fleshed out when we settle jury instructions. But there will be a limiting instruction. And the reason I'm

reserving it until that time is perhaps she doesn't testify in that way and it's not what's presented to the jury.

But if, similarly, these big assumptions and speculation that she has proffered in her report, as well as her deposition, if those are elicited and she does belie the record as to her -- those assumptions, there will be a limiting instruction to clarify that to the jury and to cure any prejudice to the Plaintiff that just because she has assumed that those things were done, the jury is not to take that as fact and/or instruction as to what transpired in this case.

Certainly, Counsel, I am assuming after this hearing, you will have a nice thorough conversation with your expert as to confining her opinions to what is actually in the record, as opposed to for those assumptions and especially -- this limiting instruction is appropriate, especially given that she explicitly stated that she ignored facts that were presented to her.

MS. WISE: Understood. Thank you, Your Honor.

THE COURT: All right. So we'll ask for that -- so that motion is denied in part, granted in part in the sense that I do see prejudice to the Plaintiff, if this testimony were to come out in the manner it did at the deposition and therefore the limiting instruction is the curative position that the Court is taking as to ensure that the jury is not confused.

And again, this goes back to the Plaintiff's initial request for why there should be instructions at the beginning of the trial. Certainly, if listening to this expert and not understanding the

distinction between a fact witness and an expert witness, this type of testimony is the exact reason that I think it is beneficial in a medical malpractice case to explain to a jury what evidence is and what it isn't. And hopefully with that -- the curative instruction, that will keep the playing field fair.

All right. Moving on to -- let's see where we are on time. We can do one more.

MS. WISE: You want me to prepare the order, Your Honor?

THE COURT: Yes. Ms. Wise to prepare the order since you got part of what you wanted.

MS. WISE: Okay.

THE COURT: All right.

MS. WISE: I got it.

THE COURT: Defendant's -- well -- I don't think we can address it in 15 minutes, Counsel. So I think we're going to stop there for today. I think we made it through a substantial amount of material. Also, before we get into the Defendant's Motion in Limine, I need to make a ruling on that sanction motion anyway. So I think what we'll do is we'll -- at --

[Colloquy between the Court and the Clerk]

MR. VERDE: Your Honor, this is Brandon Verde, on behalf of Defendants Dr. Baltar and APRN Sithole. Since the trial has been moved to July, would it make more sense to have the continuance of the hearing closer to trial so that we can save costs and possibly

maybe even come to a settlement conclusion of this case?

THE COURT: Well, I'm going to set it out further from when I'm going to make my decision on the sanction. I would imagine if I, you know, rule on that that might be encouraging to the parties or perhaps you settle before I rule on it, then I would agree with you.

MS. WISE: Your Honor, this is Shannon Wise. That's fine by me but the sanction motion is applicable to Spanish Hills, and these are Dr. Baltar and APRN Sithole's motions, so I'm not sure that that's going to have a huge effect.

THE COURT: I'm ever so hopeful that you will resolve the case. So let's go --

MS. WISE: Me too.

[Colloquy between the Court and the Clerk]

MS. WISE: Your Honor, I'm in a two-week medmal trial with Judge Wiese starting on April 4th, to conclude -- I might be done on the 15th, but I don't know. Just so you're aware when you're scheduling.

[Colloquy between the Court and the Clerk]

THE COURT: How about April 22nd? Are you all available then?

MS. WISE: I am not. I am the chair of the Trial Academy for the State Bar of Nevada, and we are -- that's the Trial Academy day. The second day of the Trial Academy.

THE COURT: Okay. April 15th? Judge is not --

MS. WISE: We can set it for that.

THE COURT: I'm not available. I'm offering a date that I'm not available, so let's not do that. Let's roll over to May.

[Colloquy between the Court and the Clerk]

THE COURT: All right. What about April 25th in the afternoon?

MS. WISE: Works for me, Your Honor.

THE COURT: Ms. Turpin?

MS. TURPIN: We'll make it work, Judge.

THE COURT: All right. Ms. Buys?

MS. BUYS: That'll be fine, Your Honor. Thank you.

THE COURT: All right. We'll start at 1:00 on April 25th, with the Defendant's Motions in Limine and anything else that we haven't addressed yet today. I've got quite a few more pages. So we'll stop there for today.

I appreciate your preparation and thorough briefing and I look forward to seeing those supplements and we will see you all back her at the end of March.

[Hearing concluded at 11:52 a.m.]

* * * * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.

Brittany Mangelson
Independent Transcriber

NEO
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Nevada Bar No. 008829
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CLAGGETT & SYKES LAW FIRM

DISTRICT COURT

CLARK COUNTY, NEVADA

BARRY HEIFETZ, an Individual, Plaintiff, v. SPRING VALLEY HEALTH CARE, LLC, a foreign limited-liability company, d/b/a SPANISH HILLS WELLNESS SUITES; SHANNA MARIE BALTAR, DO; an individual, MIRIAM SITHOLE, APRN; an individual, DOE DOCTOR I, an Individual; DOE NURSE I, an individual; DOES I through X; ROE BUSINESS ENTITIES XI through XX, inclusive, Defendants.	Case No. A-20-808436-C Dept. No. XXI **NOTICE OF ENTRY OF ORDER**

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TO: ALL PARTIES AND THEIR COUNSEL OF RECORD:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that an Order in the above-entitled action was entered and filed on the 25th day of March, 2022.

A copy of which is attached hereto.

CLAGGETT & SYKES LAW FIRM

/s/ Shannon L. Wise
Shannon L. Wise, Esq.
Nevada Bar No. 014509
Attorneys for Plaintiffs

CLAGGETT & SYKES LAW FIRM

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT on the 25th day of March, 2022, I caused to be served a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER** on the following person(s) by the following method(s) pursuant to N.R.C.P. 5(b) and N.E.F.C.R. 9:

Via E-Service
John H. Cotton, Esq.
Brandon C. Verde, Esq.
JOHN H. COTTON & ASSOCIATES
7900 W. Sahara Avenue, Suite 200
Las Vegas, Nevada 89117
Telephone: (702) 832-5909
Attorneys for Defendants Shanna Marie Baltar, DO and Miriam Sithole, APRN

Via E-Service
Robert C. McBride. Esq.
MCBRIDE HALL
8329 W. Sunset Road, Suite 260
Las Vegas, Nevada 89113
Attorneys for Defendant Spring Valley Healthcare, LLC d/b/a Spanish Hills Wellness Suites

/s/ Jackie Abrego
An Employee of CLAGGETT & SYKES LAW FIRM

CLAGGETT & SYKES LAW FIRM

ORDR

Sean K. Claggett, Esq.
Nevada Bar No. 008407
Jennifer Morales, Esq.
Nevada Bar No. 008829
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CLAGGETT & SYKES LAW FIRM

DISTRICT COURT

CLARK COUNTY, NEVADA

BARRY HEIFETZ, an Individual, Plaintiff, v. SPRING VALLEY HEALTH CARE, LLC, a foreign limited-liability company, d/b/a SPANISH HILLS WELLNESS SUITES; SHANNA MARIE BALTAR, DO; an individual, MIRIAM SITHOLE, APRN; an individual, DOE DOCTOR I, an Individual; DOE NURSE I, an individual; DOES I through X; ROE BUSINESS ENTITIES XI through XX, inclusive, Defendants.	Case No. A-20-808436-C Dept. No. XXI **ORDER**

On February 18, 2022, the Court heard Defendants Shanna Marie Baltar, DO and Miriam Sithole, APRN's Motion for Partial Summary Judgment and any joinders thereto, with Shannon L. Wise, Esq. of Claggett and Sykes Law Firm appearing on behalf of Plaintiff; Katherine Turpin, Esq. and Brandon Verde, Esq. of John Cotton and Associates appearing on behalf of Defendants Shanna Marie Baltar, DO and Miriam Sithole, APRN; and Charlotte Buys, Esq. of McBride Hall appearing on behalf of Spanish Hills Wellness Suites. The Court, having considered the Motion, the Opposition, and Reply thereto, and the arguments of counsel, hereby finds as follows:

THE COURT HEREBY FINDS that pursuant to NRCP 56(c) summary judgment is only appropriate if "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. NRCP 56(c).

THE COURT FURTHER FINDS that genuine issues of material fact preclude Summary Judgment on Plaintiff's punitive damages claim.

THE COURT FURTHER FINDS that genuine issues of material fact preclude Summary Judgment on Plaintiff's elder abuse claim. The Court finds that the elder abuse statute is not subsumed by professional negligence. E*state of Curtis v. S. Las Vegas Med. Inv'rs, LLC,* 466 P.3d 1263, 1271 (Nev. 2020) FN 5. Further, the Court finds that it must look to the facts of each case to determine if such a claim may go forward to the jury. Here, Plaintiff has set forth that he is a vulnerable person and supportive testimony. A reasonable juror could find the conduct of Defendants, and each of them, to be a conscious disregard, reckless, or gross negligence.

IT IS HEREBY ORDERED that Defendants Shanna Marie Baltar, DO and Miriam Sithole, APRN's Motion for Partial Summary Judgment and any joinders thereto is denied without prejudice.

CLAGGETT & SYKES LAW FIRM /s/ Shannon L. Wise Date: 03/15/2022 Shannon L. Wise, Esq. 4101 Meadows Lane, Suite 100 Las Vegas, Nevada 89107 *Attorneys for Plaintiff*	JOHN H. COTTON & ASSOCIATES /s/ Brandon C. Verde Date: 03/15/2022 John H. Cotton, Esq. Katherine Turpin, Esq Brandon C. Verde, Esq. 7900 W. Sahara Avenue, Suite 200 Las Vegas, Nevada 89117 *Attorneys for Defendants Shanna Marie Baltar, D.O., and Miriam Sithole, APRN*
MCBRDIE HALL T. Charlotte Buys Date: 03/18/2022 Robert C. McBride, Esq. T. Charlotte Buys, Esq. 8329 W. Sunset Road, Suite 260 Las Vegas, Nevada 89113 *Attorney for Defendant Spring Valley Healthcare, LLC dba Spanish Hills Wellness Suites*	

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IT IS SO ORDERED.

Dated this 25th day of March, 2022

DISTRICT COURT JUDGE

3C8 8C8 20D9 95CE
Tara Clark Newberry
District Court Judge

Prepared and Submitted by:
CLAGGETT & SYKES LAW FIRM

/s/ Shannon L. Wise
Shannon L. Wise, Esq.
Nevada Bar No. 014509
Attorneys for Plaintiffs
Approved as to form and Content:

CLAGGETT & SYKES LAW FIRM

From:	Natalie Jones
To:	Jackie Abrego; Brandon Verde; Teyla Charlotte Buys
Cc:	Arielle Atkinson; Candace P. Cullina; Jennifer Morales; Shannon Wise
Subject:	RE: Heifetz v. Baltar, Sithole et al / A-20-808436-C / Order re: Summary Judgment
Date:	Friday, March 18, 2022 10:52:40 AM
Attachments:	image001.png image002.png image003.png image004.png image005.png image006.png image007.png image008.png

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You can affix Charlotte's signature on the revised order.

Thank you,

Natalie Jones
Legal Assistant to Teyla Charlotte Buys, Esq.
njones@mcbridehall.com | www.mcbridehall.com
8329 West Sunset Road
Suite 260
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MCBRIDE HALL
ATTORNEYS AT LAW

From: Natalie Jones
Sent: Wednesday, March 16, 2022 3:38 PM
To: Jackie Abrego <JAbrego@claggettlaw.com>; Brandon Verde <bverde@jhcottonlaw.com>; Teyla Charlotte Buys <tcbuys@mcbridehall.com>
Cc: Arielle Atkinson <aatkinson@jhcottonlaw.com>; Candace P. Cullina <ccullina@mcbridehall.com>;

Jennifer Morales <JMorales@claggettlaw.com>; Shannon Wise <swise@claggettlaw.com>
Subject: RE: Heifetz v. Baltar, Sithole et al / A-20-808436-C / Order re: Summary Judgment

Hey Jackie,

Charlotte has been in hearings and depositions all day, she will respond when ever she gets the chance to review.

Thank you,

Natalie Jones
Legal Assistant to Teyla Charlotte Buys, Esq.
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Suite 260
Las Vegas, Nevada 89113
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MCBRIDE HALL
ATTORNEYS AT LAW

From: Jackie Abrego <JAbrego@claggettlaw.com>
Sent: Tuesday, March 15, 2022 5:27 PM
To: Brandon Verde <bverde@jhcottonlaw.com>; Teyla Charlotte Buys <tcbuys@mcbridehall.com>
Cc: Arielle Atkinson <aatkinson@jhcottonlaw.com>; Candace P. Cullina <ccullina@mcbridehall.com>; Natalie Jones <njones@mcbridehall.com>; Jennifer Morales <JMorales@claggettlaw.com>; Shannon Wise <swise@claggettlaw.com>; Jackie Abrego <JAbrego@claggettlaw.com>
Subject: RE: Heifetz v. Baltar, Sithole et al / A-20-808436-C / Order re: Summary Judgment

Good afternoon:

Attached is the revised Order.

Per Brandon, - that's acceptable, with keeping the other case law, and removing the punitive damage case from the order. You have my permission to affix my electronic signature.

Charlotte, do you have any changes? Or if approved, do I have your permission to add your e-signature and submit it to the Court?

From: Shannon Wise <swise@claggettlaw.com>
Sent: Thursday, March 10, 2022 1:00 PM
To: Brandon Verde <bverde@jhcottonlaw.com>; Jackie Abrego <JAbrego@claggettlaw.com>; Teyla Charlotte Buys <tcbuys@mcbridehall.com>; Jennifer Morales <JMorales@claggettlaw.com>
Cc: Arielle Atkinson <aatkinson@jhcottonlaw.com>; Candace P. Cullina <ccullina@mcbridehall.com>; Natalie Jones <njones@mcbridehall.com>
Subject: RE: Heifetz v. Baltar, Sithole et al / A-20-808436-C / Order

All-
 I am fine removing the punitive damages standard. But why do you want to remove the law in Curtis that the Court relied on in making her decision? I feel that law is necessary here.

Shannon L. Wise, Esq.
Trial Attorney

4101 Meadows Lane, Ste. 100 Las Vegas, NV 89107
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Connect with us on social media:

From: Brandon Verde
To: Jackie Abrego
Subject: RE: Heifetz v. Baltar, Sithole et al / A-20-808436-C / Order
Date: Tuesday, March 15, 2022 11:52:37 AM
Attachments: image001.png
image002.png
image003.png
image004.png
image005.png
image006.png
image007.png

I meant to respond last week—that's acceptable, with keeping the other case law, and removing the punitive damage case from the order. You have my permission to affix my electronic signature.

Thanks,

BCV

Brandon C. Verde, Esq.
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From: Jackie Abrego <JAbrego@claggettlaw.com>
Sent: Tuesday, March 15, 2022 11:50 AM
To: Brandon Verde <bverde@jhcottonlaw.com>
Subject: RE: Heifetz v. Baltar, Sithole et al / A-20-808436-C / Order

Brandon, was this taken care of?

From: Shannon Wise <swise@claggettlaw.com>
Sent: Thursday, March 10, 2022 1:00 PM
To: Brandon Verde <bverde@jhcottonlaw.com>; Jackie Abrego <JAbrego@claggettlaw.com>; Teyla Charlotte Buys <tcbuys@mcbridehall.com>; Jennifer Morales <JMorales@claggettlaw.com>
Cc: Arielle Atkinson <aatkinson@jhcottonlaw.com>; Candace P. Cullina <ccullina@mcbridehall.com>; Natalie Jones <njones@mcbridehall.com>
Subject: RE: Heifetz v. Baltar, Sithole et al / A-20-808436-C / Order

All-
I am fine removing the punitive damages standard. But why do you want to remove the law in Curtis that the Court relied on in making her decision? I feel that law is necessary here.

Shannon L. Wise, Esq.
Trial Attorney

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CLAGGETT & SYKES LAW FIRM

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From: Brandon Verde <bverde@jhcottonlaw.com>
Sent: Wednesday, March 09, 2022 11:16 AM
To: Jackie Abrego <JAbrego@claggettlaw.com>; Teyla Charlotte Buys <tcbuys@mcbridehall.com>; Jennifer Morales <JMorales@claggettlaw.com>; Shannon Wise <swise@claggettlaw.com>
Cc: Arielle Atkinson <aatkinson@jhcottonlaw.com>; Candace P. Cullina <ccullina@mcbridehall.com>; Natalie Jones <njones@mcbridehall.com>
Subject: RE: Heifetz v. Baltar, Sithole et al / A-20-808436-C / Order

Hi All,

Let me know if the strikethroughs are acceptable; if so, you have my permission to affix my signature.

Thanks,

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Barry Heifetz, Plaintiff(s) vs. Spring Valley Health Care LLC, Defendant(s)	CASE NO: A-20-808436-C DEPT. NO. Department 21

AUTOMATED CERTIFICATE OF SERVICE

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Service Date: 3/25/2022

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