

1
2 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

3
4 No. 85441

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Clerk of Supreme Court

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7 **JEFFREY A. MYERS and ANDREW JAMES,**

8
9 Appellants,

10
11 vs.

12
13 **THI OF NEVADA AT CHEYENNE, LLC; HEALTHCARE REALTY OF**
14 **CHEYENNE, LLC; FUNDAMENTAL ADMINISTRATIVE SERVICES,**
15 **LLC**

16
17 Respondents.

18
19 **APPELLANTS' OPENING BRIEF**

20 Appeal from the Eighth Judicial District Court for Clark County

21 District Court Case No. A-16-735550-C

22 (Honorable Mark Gibbons)

23
24 **DONALD C. KUDLER, ESQ.**

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1
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3

4 JEFFREY A. MYERS and ANDREW JAMES)

No. 85441

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7 THI OF NEVADA AT CHEYENNE, LLC;
8 HEALTHCARE REALTY OF CHEYENNE,
9 LLC; FUNDAMENTAL ADMINISTRATIVE
SERVICES, LLC)

10 Respondents.)
11

12 **NRAP RULE 26.1. DISCLOSURE STATEMENT**

13 Appellants are individuals suing in their individual capacity. The sole
14 attorney who has, or will, appear on the Appellants' behalf is DONALD C.
15 KUDLER, ESQ., who is a partner in the Law Office of CAP & KUDLER.
16

17 DATED this 7th day of February, 2023.

18 CAP & KUDLER

19
20 By: 

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4. *Rees v. Roderiques*,
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4. NRCP Rule 59(a)(1)(E).....page 22, line 17

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(b) Appealable Determinations. An appeal may be taken from the following judgments and orders of a district court in a civil action:

(2) An order granting or denying a motion for a new trial. . .

20

24

25

26

27

1 At the Hearing, Judge Marc Gibbons advised that this Appeal should be heard
2 by the Supreme Court to avoid any appearance of conflict as his brother, Michael
3 Gibbons, is on the Court of Appeals.

4 **STATEMENT OF ISSUES ON APPEAL**

5 1. Did the Jury Err in finding that the Defendants did not Breach any duty
6 of care owed to the Plaintiffs?

7 2. Did the District Court err by denying the Plaintiffs' Motion for New
8 Trial?

9 3. Did the District Court error by not following the law of the case?
10

11 **STATEMENT OF THE CASE**

12 **I. NATURE OF THE CASE**

13 This cases arises out of a June 6, 2014 incident at the Defendants' property.
14 At the time of the incident, the Plaintiffs were working on an electrical panel when
15 one of two screws that had been left on a shelf fell causing a short resulting in an
16 arc flash that injured the Plaintiffs. During this event, the main breaker should have
17 tripped ending the possibility of the arc flash and injuries. At no time did the main
18 breaker trip during this event - it failed to work as intended after not having been
19 inspected or maintained for several years. The case was tried to a Jury from May
20 31, 2022 to June 6, 2022. After hearing the testimony cited below, the Jury
21 concluded that the Defendants were not negligent - that they had not breached any
22 duty owed to the Plaintiffs. (*See* bates nos. AA000943 *through* AA000945). The
23 Plaintiffs filed a Motion for New Trial which was opposed by the Defendants. (*See*
24 bates nos., AA000962 *through* AA000976). The District Court denied the Motion.
25 (*See* bates nos., AA000985 *through* AA000996).

26 ...
27
28

1 **II. COURSE OF PROCEEDINGS/DISPOSITION**

2 Appellants, Jeffrey A. Myers and Andrew James filed the instant case on May
3 06, 2016. During the Course of Discovery, the Defendants failed to respond and the
4 Plaintiffs were granted a Motion to Compel holding that the Defendants had spoiled
5 evidence and were, therefore, held responsible for the screw that fell. The case
6 eventually came up for Trial on May 31, 2022. After the presentation of evidence,
7 the Court granted Judgment as a Matter of Law in Favor of Defendant Healthcare
8 Realty of Cheyenne, LLC and Defendant Fundamental Administrative Services,
9 LLC on June 14, 2022. The Jury, having heard the evidence cited herein found that
10 the Defendants' did not Breach any duty of care owed to the Plaintiffs. The
11 Plaintiffs filed a Motion for New Trial on July 18, 2022, which was denied by the
12 Court. The Order was filed on September 23, 2022, and the Notice of Entry of Order
13 was filed on September 27, 2022. The Plaintiffs filed the instant Appeal on
14 September 28, 2022.

15
16 **STATEMENT OF FACTS**

17 **Jury Instructions At Issue**

18 The Court read the following Jury Instructions to the Jury: (*See bates nos.,*
19 *AA000038 through AA000041*)

20 **Instruction 22:**

21 Generally, everyone has a duty to exercise reasonable care when their
22 conduct creates a risk of physical harm to others.

23
24 Negligence is the failure to exercise that degree of care which an
25 ordinarily careful and prudent person would exercise under the same or
26 similar circumstances. Ordinary care is that care which persons of ordinary
27

1 prudence exercise in the management of their own affairs in order to avoid
2 injury to themselves or to others.

3
4 You will note that the person whose conduct we set up as a standard
5 is not the extraordinarily cautious individual, not the exceptionally skillful
6 one, but a person of reasonable and ordinary prudence. While exceptional
7 skill is to be admired and encouraged, the law does not demand it as a general
8 standard of conduct.

9
10 Instruction 27:

11 Plaintiffs claim that they were harmed because of the way Defendants
12 managed their property. To establish this claim Plaintiffs must provide all of
13 the following:

- 14
- 15 1. That Defendants controlled the property;
 - 16
 - 17 2. That Defendants were negligent in the inspection, use or maintenance
18 of the property;
 - 19
 - 20 3. That Plaintiffs were harmed; and
 - 21
 - 22 4. That Defendants' negligence was a substantial factor in causing the
23 Plaintiffs' harm.

24 ...

25 ...

26 ...

1 Instruction 28:

2 The owner or occupier of land has a duty to inspect the premises for
3 latent or concealed dangerous conditions not known to them. If reasonable
4 inspection would have revealed a dangerous condition, the owner or occupier
5 of land is charged with constructive notice of it.

6
7 Constructive knowledge of a latent defect may be established by
8 circumstantial evidence.

9
10 Instruction 29:

11 An owner or occupant of land must exercise ordinary care and
12 prudence to render the premises reasonably safe for the visit of a person
13 invited on their premises for business purposes. An owner or occupant of
14 land who knows, or in the exercise of reasonable care should know, of their
15 dangerous and unsafe condition, and who invites others to enter upon the
16 property, owes to such invitees a duty to warn them of the danger, where the
17 peril is hidden, latent, or concealed, or the invitees are without knowledge
18 thereof.

19
20 Plaintiffs' Trial Transcripts for Don Gifford, Roy Comstock, Jeffrey Myers
21 and Andrew James are referenced below as: bates nos., AA000394 *through*
22 AA000463 is the testimony of Don Gifford; bates nos., AA000810 *through*
23 AA000854 is the testimony of Roy Comstock; and bates nos., AA000560 *through*
24 AA000715 is the testimonies of Jeffrey Myers and Andrew James.

25 ...

26 ...

1 **The Defendants Had a Duty to Maintain Their Breakers**

2 The Plaintiffs retained Don Gifford as an expert in this case who testified that
3 Defendants had a duty to maintain the equipment including the breakers at Page 16,
4 line 17 to page 17, line 18 (*See* bates nos. AA000409 *through* AA000410):

5 **Q** Do you have any other opinions in regards to this case?

6
7 **A** Well, yes. College Park has an obligation, just like any operator of a -- of
8 a commercial facility, in any jurisdiction where they adopt, and therefore
9 enforce the national -- National Electrical Code. And where we have Nevada
10 statutes, College Park is required to maintain the electrical gear to provide for
11 a surf -- a safe working environment for their own employees, and therefore
12 for other people who may be in the property. And they failed to do that.

13
14 And I am also critical, based on it is my understanding, and certainly it was
15 my understanding on the date of my inspection of the property at least two
16 years ago, that the circuit breaker that had tripped had never been replaced
17 and the MSA had never been replaced. I'm critical of that.

18
19 **Q** Okay. Do you have any evidence that prior to this incident, let's say in the
20 seven years, that anybody had ever done any maintenance on this equipment?

21
22 **A** Well, I don't know exactly. Based on Mr. Comstock's deposition, he had
23 indicated that, no, nobody had been in there at least for four years. There's a
24 little question about his deposition. It may be four, it may be seven or more
25 years. But based on the fact that there were parts sitting on top of that
26 material, the parts that actually fell, those are not something that are part of

1 the original installation of the equipment.

2
3 Furthermore, in the event where College Park was doing the appropriate job
4 of inspecting and maintaining their equipment, that sort of thing could have,
5 would have in all likelihood been discovered prior to having somebody go
6 into the gear live.

7
8 Mr. Gifford went on to testify that the Defendants were required to maintain
9 the breakers pursuant to law at Page 66, line 22 - page 68, line 5 (*See* bates nos.
10 AA000459 *through* AA000600):

11
12 On the other hand, the OSHA -- the OSHA violations by College Park was
13 the fact that the requirement under 1926 is that the employer, in this
14 particular case, College Park, had an obligation to provide a safe working
15 environment. They had an old electrical panel that had been -- had been
16 opened and something had been done inside of it and people had left
17 materials inside of it that they shouldn't have left. And as time went on,
18 because under the -- under the rules of the National Electrical Safety Code
19 and under the National Electrical Code, the owner of the facility has to
20 maintain and inspect their equipment. Those things were not done. And that
21 comprises an OSHA violation.

22
23 The requirement to maintain the breakers pursuant to law was reiterated by
24 Plaintiff Andrew James testified about the requirements to test and maintain
25 breakers at Page 88, line 23 - page 89, line 10 (*See* bates nos. AA000647 *through*
26 AA000648):

1 Q Okay. Did you assume that this -- these breakers were tested?

2
3 A Yes.

4
5 Q Why?

6
7 A Well, it's required, again, under several federal, state agencies. NFPA
8 requires maintenance and inspection, and all maintenance and inspection
9 shall be documented. The NEC requires the exact same thing. OSHA requires
10 the exact same thing. And because it's a health facility, Center for Medicaid
11 and Medicare Services requires the exact same thing. So going into a medical
12 facility, you assume that since people live there and people's lives are a stake,
13 that they're doing what they're supposed to be doing. And in this case, it's my
14 firm opinion as well as our electrical experts, that they were not doing now.

15
16 **The Defendants Failed to Maintain Electrical**
17 **Equipment Including the Main Breaker**

18 Roy Comstock has worked as the director of the maintenance department for
19 the Defendant since 2007. See, Comstock Trial testimony at Page 6, lines 17 - 25
20 (*See bates no. AA000815*). The testimony cited below demonstrates that the
21 Defendant has not, and does not, conduct regular inspections of the electrical system
22 or conduct any maintenance on it unless something goes wrong.

23 At Trial, Mr. Comstock testified that his responsibilities are to fix things that
24 are broken at Page 11, lines 1 - 7 (*See bates no. AA000820*):

25 Q Okay. What is your job responsibilities?
26
27
28

1 A Well if somebody has say a controller for their bed and it doesn't work,
2 then my job is to determine that it doesn't work and replace it. And I'm to
3 make sure that the facility has lightbulbs, caps that go over the lights. Just
4 about all of the materials in the building. I order those materials. I set up the
5 contracts with the various vendors for jobs that need to be done. That type of
6 thing.

7
8 Mr. Comstock went on to state that his electrical work is limited to minor
9 repairs at Page 16, lines 1 - 9 (*See* bates no. AA000825):

10 Q Do you do any electrical work in the facility?

11
12 A Small stuff, switches, some receptacles, and light bulbs.

13
14 Q Okay. Do you do any electrical work -- first of all, does the facility have
15 electrical panels?

16
17 A They have main electrical panels. Yes, sir.

18
19 Q Right. And you also have a big generator?

20
21 A Yeah. We have a 10 kilowatt generator. Yes, sir.

22
23 Q Okay. Do you do any work on those panels?

24
25 A No, sir.

1 Mr. Comstock further testified that in the SEVEN years before his incident,
2 no one had been in the panels for any reason at Page 21, lines 10 - 16 (*See* bates no.
3 AA000830):

4 Q From 2007 to 2014, did anybody that you were aware of go into that
5 panel?
6

7 A No. Just these gentlemen when they started to work.
8

9 Q Okay. Before these gentlemen -- before they started to work in that panel,
10 was there any other person in that panel that you were aware of?
11

12 A No, sir.
13

14 Mr. Comstock testified that things had been left as they were when originally
15 installed and that no regular inspection by licensed electricians at Page 25, lines 1
16 - 8 (*See* bates no. AA000834):

17 Q Okay. Were they -- were any of the panels labeled beforehand?
18

19 A I don't believe so. No. That's why they said it was all convoluted. It was all
20 just mish mashed. That was from the original installation of the -- from the
21 building when it was built.
22

23 Q Do you know whether or not there were any regular inspection of those
24 panels by a licensed electrician?
25

26 A No. Just a licensed electrician if there's a problem.
27
28

1 Mr. Comstock admitted that they don't keep any log books that would
2 support any claim that they conducted regular inspections and maintenance of the
3 breakers (a claim they did not make to date) at Page 26, lines 18 - 21 (*See* bates no.
4 AA000835):

5 Q I forgot where I was. I was on the log. Let me ask you this. A regular
6 inspection and those panels where a log is kept, how about that?

7
8 A No. No, sir.
9

10 Mr. Comstock, again, confirmed that there were no regular inspections of the
11 electrical panel at Page 33, line 12 - page 34, line 5 (*See* bates nos. AA000842
12 *through* AA000543):

13 Q Now I just want to make clear. The entire time that you've been there, no
14 regular maintenance had been done on that panel, correct?
15

16 A No. the only maintenance that's done is when there's a problem. That's
17 correct.
18

19 Q No regular inspections had been done on that panel ever?
20

21 A Well I can't say ever. I don't know. There was people there before me.
22

23 Q The entire time that you've been there?
24

25 A No. It's only if there's a problem. It isn't like somebody comes out and does
26 the inspection.
27

1 Q Let me ask the question again.

2
3 A The people who inspected it when it was --

4
5 Q Let me ask the question again.

6
7 A Yes, sir.

8
9 Q You do not do regular inspections on that electrical panel or have
10 somebody do them, do you?

11
12 MR. A. GIOVANNIELLO: Objection. Asked and answered.

13
14 THE WITNESS: Yes. I don't. That's correct.

15
16 The failure to maintain the equipment continued even after the arc flash that
17 injured the Plaintiffs as confirmed by Mr. Comstock at Page 38, lines 17 - 22 (*See*
18 *bates no. AA000847*):

19 THE COURT: Was any work done on the electrical panel between ILP
20 [Andrew James] finished? Was there -- was any work done on the electrical
21 panel between when ILP finished their work, and when Helix discovered the
22 screw placed through the electrical wires?

23
24 THE WITNESS: No. No work was done by any other electrical company. It
25 was James, and then Helix.

1 The Court asked Plaintiff Jeffrey Myers about maintenance log books which
2 lead to him testifying that he would expect the Defendants to have fulfilled their
3 duty and maintained the equipment at Page 57, line 25 - Page 58, line 9 (*See bates*
4 *nos. AA000616 through AA000617*):

5 THE COURT: Is it part of your process to check maintenance logs before you
6 perform work on a breaker? Were those logs checked?

7
8 THE WITNESS: No logs were made available for me to check.

9
10 THE COURT: You mentioned the breaker had not been properly maintained.
11 Are you required to continue working on equipment if it hasn't been properly
12 maintained?

13
14 THE WITNESS: Well, I can only say that I believe that it wasn't maintained
15 after that incident. Before that incident, all you can do is assume that it had
16 been.

17
18 Mr. James again discussed the requirement to maintain the equipment at Page
19 120, line 17 - page 121, line 4 (*See bates nos. AA000679 through AA000680*):

20 Q Okay. If there's no labeling why would you do the work on that panel?

21
22 A Because it's a general assumption -- well, first of all, NFPA says anything
23 under 240 volts, there's a specified level of PPE. We were wearing that level
24 of PPE. Plus, as you know, there are requirements under CMS, NFPA, NEC,
25 OSHA for this facility to be testing and inspecting this equipment, and they
26 did not do that,

1 Q But you don't really know that they did not do that, right? You have no
2 evidence that they didn't do that at all, right?

3
4 A Evidence in this case, yes.

5
6 Q But what's that?

7
8 A They couldn't produce any log books. Roy Comstock's deposition says that
9 they didn't do it. Yes. There's absolutely evidence.

10
11 Mr. James again discussed the requirement to maintain the breaker and the
12 failure to do so at Page 148, line 23 - page 149, line 19 (*See* bates nos. AA000707
13 *through* AA000708):

14
15 THE COURT: How do you test a circuit breaker without a test slash reset
16 button?

17
18 THE WITNESS: So the only real way to test a breaker is to do a manual
19 reset. So, Eaton Manufacturing, who now owns the subsequent companies
20 that bought Westinghouse that manufactured that breaker, they have
21 maintenance requirements that are required, you know, under Medicaid,
22 Medicare, under the NFPA, under the NEC, under OSHA -- it all refers to
23 manufacturer-recommended maintenance intervals. Eaton, who now owns the
24 company that built that breaker, their manufacturer's inspection internals are
25 every three years, that breaker is supposed to be manually tripped, manually
26 turned off, manually turned back on.

1
2 My belief is that breaker was never tested like that. There's no inspection
3 reports of it, because also Eaton says inspections shall be documented.
4 NFPA, NEC, OSHA, and CMS all say all inspection -- all inspection and
5 maintenance activities shall be documented. Shall is the operative word there.
6 It's not an option. They're required to actually document every time that
7 breaker was tested, per the manufacturer's specifications. They could produce
8 none of that evidence, which tells me it was never tested. Ever. It was never
9 inspected, it was never tested, and there was no log book ever made. So the
10 only way to really test that breaker is to manually turn it off and turn it back
11 on.

12 **The Main Breaker Failed**

13 Plaintiffs' expert Don Gifford testified that the main breaker should have
14 tripped nearly immediately which would have prevented the arc flash from
15 occurring but that it did not trip as it should have at Page 14, lines 10 - 22 (*See* bates
16 no. AA000407):

17 And when that happened, two things are supposed to happen. One is just a
18 natural outgrowth of the laws of physics; there is going to be some kind of
19 an arcing event, and it may be a large explosion or a small explosion. The
20 second thing that can happen in the event where the circuit breaker protecting
21 that particular layout is not functioning properly, it's really important -- just
22 like the brakes on your car, when you're going 70 and somebody pulls in
23 front of you going 30 and you hit the brakes, you want to be able to stop
24 immediately.

25
26 Just like that, a circuit breaker controlling the electrical wiring in this panel,

1 when that arc occurred, the circuit breaker is supposed to trip almost
2 instantaneously. It should trip within just a very tiny fraction of a second. In
3 this particular instance, that circuit breaker did that trip for
4 several seconds.

5
6 Mr. Gifford offered further proof that the main breaker failed at Page 67, line
7 7 - page 68, line 5 (*See bates nos. AA000460 through AA000461*);

8
9 THE COURT: How does the witness determine the length of time the circuit
10 breaker was delayed?

11
12 THE WITNESS: That's a good question. Because of the description of this
13 arc flash and what happened, let me see if I can get technical but make it
14 simple at the same time. Not that you're -- can't deal with technical issues.

15
16 A circuit breaker can and should trip in about 25 milliseconds. Let me break
17 that down in different ways. You probably heard that with electricity in
18 alternating current, it kind of wave -- it goes along in a wave called the sign
19 wave. And every 60 seconds the sign wave goes from the top to the bottom
20 through center point 60 times in one second. If the circuit breaker were to trip
21 in one cycle, that would be about .017 of a second. That would be extremely
22 fast. The circuit breaker probably should have tripped maybe ten times faster
23 than that.

24
25 So when the arc flash -- when the -- when the event that --let's say that this
26 is the bus location between -- this is an insulator, and this is phase B and

1 phase C. So when the screw gets on those, 20 -- 25 milliseconds is so fast that
2 immediately the circuit breaker would trip. And that prevents the arc flash
3 from going into a big ball. In this particular instance, it took many cycles for
4 it to develop into a big ball. And, quite frankly, the other part is I've not seen
5 any evidence that the circuit breaker ever did trip. But with an arc flash of
6 that nature tells me that the circuit breaker was not maintained and was not
7 functioning properly.

8
9 Lastly, Mr. Gifford again noted that the breaker failed to trip at any time
10 during the event at Page 69, lines 13 - 25 (*See* bates nos. AA000462):

11 THE COURT: What was the instantaneous setting of the breaker -- question
12 mark. How was the breaker trip time known or estimated -- open parens --
13 several seconds was testified -- closed paren -- with no arc flash study, how
14 would the proper instantaneous setting be known?

15
16 THE WITNESS: That's an excellent question. We don't know. I haven't seen
17 the arc study on that particular breaker. I'm just telling you that it never
18 tripped. Therefore, no matter what the study showed or the what curve for the
19 electrical current, with respect to time and voltage with respect to time,
20 would be -- it would not be of value to me in determining, why didn't the
21 breaker trip. It didn't trip because it was faulty. There was enough -- there
22 was enough electrical energy that there's no question it should have tripped.

23 ...

24 ...

25 ...

26 ...

1 Mr. Myers noted that at no time did the main breaker trip during the event
2 that injured the Plaintiffs at Page 20, lines 2 - 18 (*See* bates nos. AA000579):

3 Q Okay. And at that point, everything went to hell?
4

5 A All I really remember was it just got really bright and believe I must have
6 put my arm up like this, and I -- just as hard as I could close my eyes it just
7 kept getting brighter and brighter. And I didn't understand why it wouldn't
8 end. Typically, that should have -- could have been an explosion, a bang.
9 That main breaker should have tripped that thing off right away.
10

11 Q Speaking of the main breaker, after this incident you went into the lobby?
12

13 A Yeah, after -- well, I was blinded for a minute or so temporarily because
14 it was so bright. And then -- yeah, then I walked out of the room, and they
15 were looking at me. I saw my arm, I go, well, you know, maybe somebody
16 ought to call 911.
17

18 Q Were the lights on?
19

20 A The lights never went off.
21

22 Q Okay. So the light in the room didn't go off?
23

24 A The breaker never tripped.
25 ...
26 ...
27
28

1 **SUMMARY OF THE ARGUMENT**

2 This is a claim for negligence including a failure to maintain the premises.
3 The Jury Instructions, (*See* bates nos. AA000038 *through* AA000041) required the
4 Defendants to maintain the property including the breakers. The Defendants did not
5 maintain the breakers, including the main breaker at issue in this case. All evidence
6 supports the Jury Instruction that the Defendants had a duty to maintain the breaker
7 and that they did not do so. Based on that evidence, the Jury was required to find
8 that the Defendants had a duty to maintain the breaker and breached that duty when
9 they failed to do so.

10
11 **LEGAL STANDARDS FOR JUDICIAL REVIEW**

12 The decision to grant or deny a motion for a new trial rests within the sound
13 discretion of the trial court, and this court will not disturb that decision absent
14 palpable abuse. *See, e.g., Southern Pac. Trans. Co. v. Fitzgerald*, 94 Nev. 241, 244,
15 577.

16 **ARGUMENT**

17 NRCP Rule 59(a)(1)(E) allows the Court to grant a Motion for New Trial
18 where the Jury Manifestly disregarded its Instructions. That Rule states, in pertinent
19 part:

20 Rule 59 - New trials; Amendment of Judgments

21 (a) In General.

22 (1) Grounds for New Trial. The court may, on motion, grant a new
23 trial on all or some of the issues-and to any party-for any of the
24 following causes or grounds materially affecting the substantial rights
25 of the moving party:

26 . . .

1 (E) manifest disregard by the jury of the instructions of the
2 court;. . .
3

4 The Nevada Supreme Court has addressed this issue holding, as discussed
5 below, that the Court should grant a new Trial where the Jury could not have
6 reached its verdict if it applied the law correctly.

7 In determining the propriety of the granting of a new trial under subdivision
8 (a)(5), the question is whether the court is able to declare that, had the jurors
9 properly applied the instructions of the court, it would have been impossible for
10 them to reach the verdict which they reached. *Weaver Bros. v. Misskelley*, 98 Nev.
11 232, 645 P.2d 438, 1982 Nev. LEXIS 437 (Nev. 1982); *Town & Country Elec. Co.*
12 *v. Hawke*, 100 Nev. 701, 692 P.2d 490, 1984 Nev. LEXIS 460 (Nev. 1984);
13 *Jaramillo v. Blackstone*, 101 Nev. 316, 704 P.2d 1084, 1985 Nev. LEXIS 422 (Nev.
14 1985). New trial where verdict for defendant impossible had law been
15 correctly applied. —

16 In a medical malpractice action, where the only two expert witnesses at the trial
17 testified that the defendant did not comply with the standard of care required of a
18 general practitioner, and if the jury had correctly applied the law, it would have
19 been impossible for them to reach a verdict in favor of defendants, accordingly, the
20 trial court did not err in ordering a new trial based upon the jury's manifest
21 disregard of the instructions. *Rees v. Roderiques*, 101 Nev. 302, 701 P.2d 1017,
22 1985 Nev. LEXIS 421 (Nev. 1985).

23 Court properly granted a new trial based on a manifest disregard by the jury
24 of the instructions of the court, where trial court concluded that had the jury paid
25 due regard to the instructions of the court, it was not possible to return a defense
26 verdict. *Groomes v. Fox*, 96 Nev. 457, 611 P.2d 208, 1980 Nev. LEXIS 618 (Nev.
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1 1980). If the jurors could not have reached the verdict that they reached if they had
2 properly applied the court's instruction on proximate cause, then the district court
3 is obligated to grant a new trial. *Taylor v. Silva*, 96 Nev. 738, 615 P.2d 970, 1980
4 Nev. LEXIS 694 (Nev. 1980).

5 Here, the Jury answered the first question on the Jury Verdict Form (*See*,
6 bates no. AA000943) in the negative, holding that the Defendants were not
7 negligent and concluded their deliberations as instructed in the Verdict Form. The
8 only way they could have come to this conclusion was to find that the Defendants
9 had no duty to maintain the breakers or that they did not breach that duty. Given the
10 evidence and the Jury Instructions set forth above, this is impossible. As noted
11 above, the Jury Instructions (27, 28 and 29) required the Defendants to maintain
12 their premises. Uncontradicted testimony showed that the Defendants had a specific
13 and codified duty to inspect and maintain the main breaker.

14 Defendants' own director of Maintenance testified that, at least during the
15 seven years between his start of employment and the arc flash at issue in this case
16 (and indeed, even after this arc flash event) there were no regular inspections or
17 maintenance of the main breaker - or any other equipment in the electrical panel.
18 As the Defendants had a duty and clearly breached that duty, the Jury must have
19 found that they were negligent in inspecting the main breaker which, as the
20 evidence cited above shows, failed to trip leading to the arc flash.

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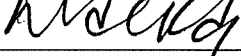
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DATED this 7~~th~~ day of February, 2023.

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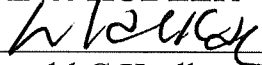
1 **CERTIFICATE OF COMPLIANCE**

2 1. I hereby certify that this brief complies with the formatting
3 requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and
4 the type style requirements of NRAP 32(a)(6) because this brief has been prepared
5 in a proportionally spaced typeface using Word Perfect - Version X3 in 14 point
6 Times New Roman.

7 2. I further certify that this brief complies with the page or type-volume
8 limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by
9 NRAP 32(a)(7)©, it is proportionally spaced, has a typeface of 14 points or more
10 and contains 13,456 words; and

11 3. Finally, I hereby certify that I have read this Appellants' Opening Brief
12 and to the best of my knowledge, information, and belief, it is not frivolous or
13 interposed for any improper purpose. I further certify that this brief complies with
14 all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1),
15 which requires every assertion in the brief regarding matters to the record to be
16 supported by a referenced to the page and volume number, if any, of the transcript
17 or appendix where the matter relied on is to be found. I understand that I may be
18 subject to sanctions in the event that this accompanying brief is not in conformity
19 with the requirements of the Nevada Rules of Appellate Procedure.

20 DATED this 7th day of February, 2023.

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1 **CERTIFICATE OF SERVICE**

2 I certify that on this 7th day of February, 2023, I served a copy of the
3 foregoing document upon all counsel of record by electronic service by filing the
4 foregoing with the Clerk of Court using the E-Flex system, which will electronically
5 mail the filing to the following:

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18 Dated this 7th day of February, 2023.

19 
20 _____
21 An Employee of **CAP & KUDLER**
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