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

No. 85441



**JEFFREY A. MYERS and ANDREW JAMES**

Appellants,

vs.

**THI OF NEVADA AT CHEYENNE, LLC; HEALTHCARE REALTY OF CHEYENNE, LLC; FUNDAMENTAL ADMINISTRATIVE SERVICES, LLC**

Respondents

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# RESPONDENTS' ANSWERING BRIEF

Appeal from the Eighth Judicial District Court for Clark County

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

(Honorable Mark Gibbons)

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**NRAP RULE 26.1 DISCLOSURE STATEMENT**

Pursuant to Rule 26.1 of Nevada Rules of Appellate Procedure, Respondents THI OF NEVADA AT CHEYENNE, LLC dba COLLEGE PARK REHABILITATION CENTER (hereinafter referred to as "College Park") identifies:

1. College Park as the sole member of THI of Nevada at Cheyenne, LLC;
2. Giovanniello Law Group as its only law firm of record for purposes of the District Court proceedings and the Appeal filed within this Honorable Court; and
3. Rourke Law Firm as its previous counsel of record prior to retaining Giovanniello Law Group and terminated upon filing of the Substitution of Attorney on December 6, 2021.

Pursuant to Rule 26.1 of Nevada Rules of Appellate Procedure, Petitioner Healthcare Realty of Cheyenne, LLC identifies:

1. Cheyenne Healthcare Holdings, LLC as its parent company;
2. Giovanniello Law Group as its only law firm of record for purposes of the District Court proceedings and the Petition filed within this Honorable Court;

and

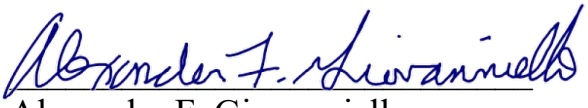
3. Rourke Law Firm as its previous counsel of record prior to retaining Giovanniello Law Group and terminated upon filing of the Substitution of Attorney on December 6, 2021.

Pursuant to Rule 26.1 of Nevada Rules of Appellate Procedure, Petitioner Fundamental Administrative Services, LLC identifies:

1. Hunt Valley Holdings, LLC as its parent company;
2. Giovanniello Law Group as its only law firm of record for purposes of the District Court proceedings and the Petition filed within this Honorable Court; and
3. Rourke Law Firm as its previous counsel of record prior to retaining Giovanniello Law Group and terminated upon filing of the Substitution of Attorney on December 6, 2021.

Dated: March 9, 2023

**GIOVANNIELLO LAW GROUP**

By: 

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## STATEMENT OF ISSUES ON APPEAL

1. Did the Jury err in finding that College Park did not breach any duty of care owed to Appellants?

2. Did the District Court err in denying Appellants' Motion for New Trial?

3. Did Appellants Properly Appeal the District Court's Order Granting Respondents' Motion for Judgment as a Matter of Law?

## STATEMENT OF THE CASE

This is an action filed by Appellants Jeffery Myers and Andrew James (hereinafter referred to as "Appellants") for negligence against Defendants THI of Nevada at Cheyenne, LLC dba College Park Rehabilitation Center (hereinafter referred to as "College Park"); Healthcare Realty of Cheyenne, LLC (hereinafter referred to as "Healthcare Realty"); and Fundamental Administrative Services, LLC (hereinafter referred to as "FAS") (hereinafter collectively referred to as "Respondents"). Appellants allege that employees of College Park negligently left a screw in an electrical box, causing an arc flash while Appellants were performing repair work on the electrical box, with the arc flash causing Appellants' alleged injuries. Appellants made no mention of breakers until trial.

We first note that Respondents' current counsel replaced its previous counsel at a very late stage in the litigation. Upon Respondents' current counsel taking over its litigation strategy, Respondents' previous counsel had done considerable damage to Respondents' ability to defend itself. The court denied Respondents' motion to reopen discovery so that it could retain experts, depose the Appellants and Appellants' expert witness, and later denied their ability to proffer its own previously approved damages expert witness.

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## STATEMENT OF FACTS

On May 31, 2022, the matter came on for trial. After the close of Appellants' case-in-chief, Respondents' case-in-chief, and Appellants' rebuttal, Respondents moved for a Judgment as a Matter of Law regarding Respondents Healthcare Realty and FAS, arguing that Appellants failed to prove a prima facie case against those two Respondents. The Court granted the Motion for a Judgment as a Matter of Law and adjudicated in favor of Respondents Healthcare Realty and FAS, removing them from the suit. Respondents note that Appellants have failed to even address the District Court's ruling on Respondents' Motion for Judgment as a Matter of Law, and thus have failed to adequately appeal that decision of the District Court. Therefore, Appellants' appeal regarding Respondents Healthcare Realty and FAS is moot as Appellants failed to adequately and timely appeal that decision.

After five days of testimony, the case went to the jury. Included in this jury panel was a professional electrical engineer, who noted during voir dire that he was aware and accustomed to the electrical systems at issue, including breakers. The jury returned a unanimous verdict in favor of College Park, finding no negligence. College Park notes that the jury had multiple avenues in which it could determine that College Park was not negligent, such as: the jury did not believe the testimony of Appellants finding them not credible; the jury did not believe the testimony of Appellants' expert; the jury determined the Appellants were negligent and caused their own injuries; or the jury determined the Appellants were not wearing proper protective gear ("PPE") in completing their work; and that College Park properly maintained its premises. Despite these likely determinations, Appellants nevertheless filed their Motion for New Trial, arguing that the jury manifestly disregarded three jury instructions of the court, promptly requiring Respondents to file the instant opposition.

On August 15, 2022, Appellants' Motion for New Trial came on for hearing. After oral arguments, Honorable Mark Gibbons denied Appellants' Motion for New

Trial. Thus, Appellants have now filed the instant Appeal of the District Court's Order Denying their Motion for New Trial.

## SUMMARY OF THE ARGUMENT

Appellants failed to show a "manifest disregard" of the jury instructions by the jury in the trial at issue, and simply gloss over the fact that the jury simply did not believe Appellants; did not believe Appellants' expert; or the jury could have determined that the Appellants were the cause of their own injuries. Based on the ruling in *Hawke*, the Nevada Supreme Court essentially held that if there are any other possibilities for the jury to have reached its conclusion—other than a "manifest disregard" for the jury instructions—than there is no ground for new trial under NRCP 59(a)(1)(E). 100 Nev. 701, 703, 692 P.2d 490, 491 (1984). In fact, the Court specifically noted it "strictly construes" NRCP 59, which again supports the notion that for NRCP 59(a)(1)(E) to apply, there must be no other possible reason for the jury to have reached its verdict without disregarding the jury instructions. *Id.* at 702, 491.

Further, Appellants failed to raise any issue with the trial court granting its Motion for Directed Verdict in favor of Defendants Healthcare Realty and FAS. As this court is well aware, it is well established in Nevada that an appellant's failure to timely raise an issue in its briefing on appeal, even if it raised the issue before the district court, generally results in a waiver of that issue. *Kahn v. Morse & Mowbray*, 121 Nev. 454, 480 n.24, 117 P.3d 227, 238 n.24 (2005). Therefore, Appellants failure to address the trial court granting Respondents Healthcare Realty's and FAS' Motion for Judgment as a Matter of Law bars them from addressing this motion in the instant appeal.

## LEGAL STANDARDS FOR JUDICIAL REVIEW

An appellant's failure to timely raise an issue in its briefing on appeal, even if it raised the issue before the district court, generally results in a waiver of that issue. *Kahn v. Morse & Mowbray*, 121 Nev. 454, 480 n.24, 117 P.3d 227, 238 n.24

(2005).

## ARGUMENT

### I. NRCP Rule 59(a)(1)(E) Is Inapplicable Because There Was No Manifest Disregard by the Jury of the Instructions of the Court

NRCP 59(a) states, in pertinent part:

> (1) Grounds for New Trial. The Court may, on motion, grant a new trial on all or some of the issues—and to any party—for any of the following causes or grounds materially affecting the substantial rights of the moving party:
>
> (E) Manifest disregard by the jury of the instructions of the court.

Here, Appellants rely upon a variety of cases to support their position that the jury in the instant matter disregarded jury instructions (the majority of which held that a new trial was *not* warranted), even though the jury was unanimous in its decision finding no liability on behalf of Respondent College Park.

First, Appellants rely upon *Weaver Bros. v. Misskelley*, 98 Nev. 232, 645 P.2d 438 (1982). In *Weaver Bros*., an action was brought to recover damages for alleged breach of construction contract. *Id.* The jury returned a verdict for the plaintiff, and the judge granted a new trial, which plaintiff appealed. *Id*. On appeal, the Supreme Court of Nevada determined the main issue was whether the district court erred by granting a new trial on the ground that the jury disregarded the instructions regarding prevention of performance. *Id.* at 234, 439.

In *Weaver Bros.*, the defendant hired a subcontractor to clear the property and prepare the dirt pad upon which the building was to be constructed. *Id*. at 234-5, 439. The plaintiff presented evidence that the defendant did not properly supervise the subcontractor. *Id*. According to the plaintiff, there was a delay in the excavation and the specifications were not being followed, causing the plaintiff to fire the defendant. *Id.* at 235, 440. In concluding that the jury instructions regarding prevention of performance had been misapplied, the district judge apparently

reasoned that, by failing to file a financial statement and by terminating the defendant's employment, the plaintiff had prevented the defendant's performance. *Id.*

The Supreme Court of Nevada did not agree with the district court judge's reasoning, holding that the jury may well have found that the plaintiff's failure to file a financial statement was a minor breach which did not prevent or affect the defendant's ability to perform because it was ignored by the parties. *Id.* The court also held that the jury may have further concluded that the defendant's failure to supervise the subcontractor properly was a breach of sufficient magnitude to warrant his dismissal and termination of the contract. *Id.* Therefore, the Supreme Court of Nevada was unable to declare that it was impossible for the jury, correctly applying the instructions, to have reached the verdict they reached. *Id.*

Similarly, here, Appellants argue that College Park had a duty to maintain its breakers, that College Park failed to do so, and that the main breaker failed. [Appellants' Opening Brief, pgs. 9-21] Appellants base these allegations upon testimony of Appellants Andrew James and Jeffrey Myers, Appellants' expert witness, Don Gifford, and College Park employee Roy Comstock. What Appellants have seemed to conveniently leave out of this testimony, is the various questions the jury asked each of the above-noted witnesses. The jury was permitted to ask follow-up questions of each witness who provided testimony at trial. Each witness received follow-up questions from the jury, which only proves that jury was more than attentive and received and processed the entirety of each witnesses' testimony.

Appellants also conveniently leave out the possibility that the jury simply did not believe the testimony of Appellants or Appellants' expert, and that they did in fact believe the testimony of Mr. Comstock. Like in *Weaver Bros*., there are more likely instances for the jury's unanimous verdict than simply ignoring jury instructions—the probable reason for the jury's unanimous verdict was that they simply did not believe the testimony provided by Appellants and Appellants' expert

and put more weight behind the testimony of Roy Comstock. It is also more than possible that the jury could have simply determined that College Parks' evidence that Appellants were the cause of the arc flash at issue in this case was the more likely scenario. The jury simply disregarding or not putting weight into expert testimony does not equate to a "manifest disregard" of the jury instructions as Appellants would like this court to believe. In fact, a fact finder determines the facts, not the experts. *In re Scott*, 61 P.3d 402, 424 (2003). Indeed, fact finders may even reject the unanimity of expert opinion. *Id*. Here, the jury rejected Appellants' expert opinion that College Park was at fault and determined that College Park was not negligent.

Like in *Weaver Bros.*, there is clearly no "manifest disregard" of the jury instructions because Appellants simply failed to prove that the breaker was not properly maintained or that that the breaker failed. Even further, Appellants fail to note the testimony from Appellants Andrew James, who testified that an inspector arrived at College Park before Appellants began their work, who noted that there was an issue with the main panels (where Appellants would be working) and provided information that the breaker needed to be replaced. [*See* bates nos. AA000627, lines 12-25, AA000628, lines 1-12] In fact, Appellants Andrew James testified that Appellants work at College Park included replacing the breaker at issue, and further testified (without any evidentiary support) that College Park was to provide said breaker to Appellants prior to their beginning work. [*See* bates nos. AA000628, lines 18-25, AA000629, lines 1-16] It simply does not follow that College Park failed to maintain its premises if an inspector notified College Park and Appellants of an issue with the breaker, and Appellants work at College Park included replacing that same breaker.

Next, Appellants rely upon *Town & Country Elec. Co. v. Hawke*, 100 Nev. 701, 692 P.2d 490 (1984). In *Hawke*, a tenant plaintiff brought action against a seller and installer of a light fixture (defendants) after the fixture fell from the

ceiling of the plaintiff's apartment and struck her on the head. *Id*. the district court granted the plaintiff a new trial after the jury returned a verdict in the defendants' favor, and the defendant appealed. *Id.*

In *Hawke*, the plaintiff argued that there was no locknut in the fixture apparatus and that about one-half of the threaded pipe which formerly held the glass diffuser had been threaded up into the socket base on the ceiling and that the lowest three or four threads of the pipe had been stripped. *Id.* at 702, 490. The plaintiff's theory at trial was that the lack of a locknut in the apparatus had been a substantial cause of the light fixture's fall, contending that the absence of the locknut was the result of negligence by the installer defendant, marketing of a defective product, or both. *Id.* The jury heard testimony during trial on the function of a locknut as a safety device to prevent the threaded pipe from being screwed so far into the socket that there was insufficient pipe on which to attach the ornamental knob holding the diffuser in place. *Id*. The jury also heard testimony, however, on the stripped condition of the threaded pipe. *Id.* The jury returned a general verdict finding neither defendant liable causing the plaintiff to appeal. *Id.*

On appeal, the plaintiff argued the jury disregarded the jury instructions under NRCP 59. *Id.* at 702, 491. The court noted that it "strictly construes" NRCP 59, and that the jury was instructed on negligence, proximate cause, and strict products liability. *Id.* Given the testimony at trial, the Supreme Court of Nevada held that the jury may have concluded that the missing locknut was not the proximate cause of the accident; or inferred that the condition was caused by a previous tenant; or that the fixture was not unreasonably dangerous as manufactured; or that the light was not negligently installed. *Id*. The Nevada Supreme Court concluded that **it need not determine how the jury reached its conclusion that neither defendant was liable; it need only determine whether it was possible for the jury to do so**. *Id.* (emphasis added). The Court determined it was indeed possible for the jury to reach a defense verdict on the evidence, and

thus the trial court erred by granting a new trial. *Id.* at 703, 491.

Similarly, here, there are multiple avenues for which the jury could have reached its unanimous verdict in favor of College Park. As noted above, the jury could have disregarded Appellants' testimony; the jury could have disregarded Appellants' expert testimony; or the jury could have determined that the Appellants were the cause of their own injuries. The jury could easily determine that the breaker was not the proximate cause of the arc flash. The jury could easily determine the arc flash was caused by Appellants.

Based on the ruling in *Hawke*, the Nevada Supreme Court essentially held that if there are any other possibilities for the jury to have reached its conclusion—other than a "manifest disregard" for the jury instructions—than there is no ground for new trial under NRCP 59(a)(1)(E). *Id*. at 703, 491. In fact, the Court specifically noted it "strictly construes" NRCP 59, which again supports the notion that for NRCP 59(a)(1)(E) to apply, there must be no other possible reason for the jury to have reached its verdict without disregarding the jury instructions. *Id.* at 702, 491. Clearly, that is not the case here, and NRCP 59(a)(1)(E) inapplicable to the instant matter.

Next, Appellants cite *Jaramillo v. Blackstone*, 101 Nev. 316, 704 P.2d 1084 (1985). In *Jaramillo*, a pedestrian plaintiff was struck and injured by an automobile and brought action against the driver and driver's employer. *Id*. After the jury returned a verdict indicating the plaintiff had been 63% negligent and that the driver was 37% negligent, the district court granted the plaintiff's motion for new trial, and the driver and driver's employer appealed. *Id*. The Supreme Court of Nevada held that it was not impossible for the jury to conclude that plaintiff was more at fault than the driver. *Id*.

The jury was instructed on contributory negligence, and the right of way of the pedestrian. *Id.* at 319, 1086. From the evidence presented at trial, **the Supreme Court of Nevada noted that it was possible** the jury concluded that the plaintiff

suddenly left the center turn lane, a place of safety, and walked into the path of the vehicle when it was so close that it was impossible for the driver to stop the vehicle to yield to the plaintiff. *Id*. (emphasis added). The Court additionally noted that the testimony at trial indicated that it was not impossible for the jury to conclude that the plaintiff was more at fault than the driver and reach their verdict. *Id.* at 319, 1087.

Again, here, like *Jaramillo*, there are multiple avenues wherein the jury could have determined that College Park was not negligent in the instant matter as addressed above. Appellants simply failed to prove a prima facie case, and the jury either disregarded Appellants' expert testimony, or believed that Appellants were the cause of their own injury. Instead, Appellants place blame on the jury, instead of themselves, for failing to prove their theory of the case. Here, the jury was properly instructed, Appellant Andrew James specifically testified that there was an inspector on scene prior to Appellants beginning their work who noted there was an issue with the breaker, and Appellants work included replacing the breaker that the inspector noted was an issue. [*See* bates nos. AA000627, lines 12-25, AA000628, lines 1-12] Despite Appellants argument, College Park must have properly determined that the breaker needed to be replaced and hired Appellants to replace said breaker—which is assuredly what the jury determined. Appellants' argument that the only way the jury could come to their verdict was by determining College Park had no duty to maintain the breakers is clearly misplaced and can only be viewed as Appellants sour grapes that they failed to prove their theory of the case.

Next, Appellants rely upon *Rees v. Roderiques*, 101 Nev. 302, 701 P.2d 1017 (1985). In *Rees*, the plaintiff brought action against the defendant doctor claiming the defendant was negligent in her medical treatment of the plaintiff and, as a result, the lower portion of the plaintiff's leg required amputation. *Id.* The district court granted the plaintiff's motion for new trial on the basis that the jury misapplied and/or misunderstood instructions dealing with standard of care and proximate

cause, causing the defendant to appeal. *Id*.

In *Rees*, the plaintiff visited the defendant doctor with her right leg in severe pain, exhibited difficulty walking, and her lower right leg was swollen. *Id*. at 303, 1018. The defendant examined the plaintiff, diagnosing her with varicose veins, instructed the plaintiff to wear an elastic stocking to support the veins and reduce the swelling, and scheduled another appointment for the plaintiff two days later. *Id*. When the plaintiff returned to the defendant's office, she exhibited a black right foot with red streaks, causing the defendant's office to send the plaintiff to another doctor, who diagnosed the plaintiff with early gangrene of the right foot. *Id*. at 303-4, 1018. The plaintiff received surgery on the right leg, but the leg could not be saved and required amputation below the knee. *Id*. Upon conclusion of the trial, the jury found for the defendant, causing Plaintiff to move for a new trial. *Id*. The district court granted the motion for new trial on the basis the jury had misapplied and/or misunderstood the instructions of law dealing with standard of care and proximate cause. *Id.* at 304, 1019. The defendant's appeal followed. *Id.*

The instant case is distinguishable from the facts of *Rees*. Clearly, there was no alternative theory as to why the jury reached its verdict in *Rees*—no fault could be attributed to the plaintiff, and multiple experts testified that the defendant breached the standard of care. *Id.* at 304-5, 1019-20.

Here, however, as noted above, there are multiple possibilities as to why the jury reached its verdict, namely that they simply did not believe (and thus disregarded) Appellants' expert's testimony (which is not grounds for a new trial pursuant to *In re Scott*, *infra*), or that the jury believed the Appellants were the cause of their own injury. Further, Appellant Andrew James' own trial testimony reflects that there was an inspector present prior to Appellants beginning their work that noted the breaker at issue required replacement, and Appellants were hired to replace the same breaker. [*See* bates nos. AA000627, lines 12-25, AA000628, lines 1-12] As such, whereas in *Rees* the defendant had no evidence to contradict the

testimony provided by the plaintiff, here College Park had evidence to contradict Appellants' testimony with testimony of Roy Comstock, and with Appellant Andrew James' own testimony that an inspector had inspected the area prior to his beginning work at College Park. [*See* bates nos. AA000627, lines 12-25, AA000628, lines 1-12; *see also* bates nos. AA000628, lines 18-25, AA000629, lines 1-16] Therefore, *Rees* is inapplicable to the instant matter.

Further, Appellants conveniently failed to note that the *Rees* holding was recently distinguished in *Rives v. Center*, 485 P.3d 1248, 2021 WL 1688014 (2021). *Rives* held that it was distinguishable from *Rees* because there, the defendant failed to proffer any evidence to the contrary of the plaintiff's testimony, whereas in *Rives* there was ample testimony to contradict the plaintiff's testimony. *Id.* at *4. *Rives* held that the jury's verdict was not "impossible" because the jury could have reasonably found based on the evidence presented that the plaintiff was solely responsible for the compensable injury even if the settled defendant's conduct fell below the standard of care, or that the jury could have disregarded the expert's testimony that the settled defendants contributed to the injuries in some measurable or compensable way, per *In re Scott*. The *Rives* court further held that the decision to grant or deny a motion for new trial rests within the sound discretion of the trial court, and it would not disturb that decision absent **palpable abuse**. *Id.* at *3 (emphasis added).

Again, in the instant matter College Park presented contradictory evidence to Appellants' testimony and Appellants' expert's testimony, namely that the area was inspected prior to the Appellants beginning their work, and that Appellants caused their own injuries due to their own negligence. Given this evidence, it is not impossible for the jury to have reached their verdict without disregarding the jury instructions. Therefore, *Rees* is inapplicable to the instant matter whereas *Rives* is applicable, as there was no "manifest disregard" or "palpable abuse" in the instant matter.

Next, Appellants rely upon *Groomes v. Fox*, 96. Nev. 457, 611 P.2d 208 (1980), a decision containing roughly three paragraphs of information. In *Groomes*, the taxicab passenger plaintiffs brought action to recover damages from the taxicab driver and his employer for injuries sustained in an automobile collision. *Id.* The jury found for the defendant, and the district court granted a new trial on the ground that there had occurred manifest disregard by jury of instructions of the court, particularly instruction concerning duty of care owed by a common carrier to its passengers. *Id.* The defendant appealed. *Id*.

The plaintiffs in *Groomes* were passengers for hire in the cab driven by the defendant. *Id.* at 458, 208. Before picking up the plaintiff, the defendant noticed that his brakes were "mushy," radioed that information to the dispatcher and was told to bring the cab back to dispatch after his next fare. *Id.* The plaintiffs were the defendant's next passengers. *Id.* While proceeding south on Las Vegas Boulevard, the defendant entered the left turn lane to enter the Sands Hotel when the car in front stopped suddenly—the defendant applied his brakes but could not stop. *Id*. The Supreme Court of Nevada held that had the jury paid due regard to the instructions of the court regarding the heightened duty of care owed by a common carrier to its passengers, it was not possible to return a defense verdict. *Id*.

*Groomes* is clearly inapplicable to the instant matter, as in *Groomes* there were no other possibilities for the jury to determine that the defendant was not negligent, especially considering the heightened duty of care owed by a common carrier to its passengers. Here, as noted above, there are multiple theories in which the jury determined College Park was not negligent, such as the jury disregarded the testimony of Appellants; the jury disregarded the testimony of Appellants' expert's testimony; the jury determined the Appellants were negligent and caused their own injuries; or the jury determined the Appellants were not wearing proper protective gear ("PPE") in completing their work. Appellants allege that the jury disregarded the instructions regarding College Park's duty of care to maintain its

premises but fail to rectify Appellant Andrew James' testimony that an inspector had previously inspected the area, and that College Park retained Appellants to replace the breaker at issue. [*See* bates nos. AA000627, lines 12-25, AA000628, lines 1-12; *see also* bates nos. AA000628, lines 18-25, AA000629, lines 1-16] Clearly, there is no evidence that the jury disregarded the jury instructions and simply did not believe Appellants' theory of their case.

Finally, Appellants rely upon *Taylor v. Silva*, 96 Nev. 738, 615 P.2d 970 (1980). In *Taylor*, the plaintiff brought action against the defendant earthmoving company to recover for personal injuries sustained when the defendant's earthmover turned right, hitting the front left fender of the plaintiff's car, throwing the plaintiff across the inside of her car. *Id.* After trial, a jury returned a special verdict finding that defendants were negligent but that their negligence was not the proximate cause of the plaintiff's injuries, causing the plaintiff to move for new trial. *Id.* The district court granted the plaintiff's motion for new trial, causing the defendant to appeal. *Id.* The Supreme Court of Nevada held that under all the circumstances including the fact that there was no intervening force between the defendant's negligence and the collision, the jury could not have found an absence of proximate cause if it correctly applied the law, and a new trial was required. *Id.*

The plaintiff in *Taylor* was driving eastbound on Williams Street following an earthmover driven by the defendant. *Id.* at 740, 971. The earthmover straddled both eastbound lanes, and as the vehicles approached the intersection of Williams and Taylor Streets, the traffic signal turned red. *Id.* Believing the earthmover would continue upon Williams Street, the plaintiff drove her car to the right of the earthmover, in what would have been a parking lane but for the red curb and prepared to turn right onto Taylor Street. *Id.* As the plaintiff was about to turn, the earthmover turned right, hitting the front left fender of the plaintiff's car causing the plaintiff to suffer neck injuries. *Id.* During the trial, the plaintiff argued that the defendant negligently failed to signal the turn, to equip the earthmover with signals,

to look before turning, to equip the earthmover with a rearview mirror, and to have an escort car. *Id.*

The Supreme Court of Nevada held there was no intervening force between the defendant's negligence and the collision, the type of harm was foreseeable, and that the plaintiff's contributory negligence could reduce her recovery under comparative negligence but does not negate a finding that the plaintiff's negligence was a proximate cause of her injuries. *Id.* at 741, 971. The Court concluded that the jury was adequately instructed as to proximate cause, and had the jury correctly applied the law, it could not have found an absence of proximate cause. *Id.* The Court continued that a general verdict in favor of the defendant would only have been correct if the plaintiff's negligence was greater than the defendant's, and since that was not the case, the only remaining possibility for the jury's verdict was that it did not understand the difference between proximate cause and comparative negligence. *Id.* at 741, 972.

Again, as with the previously noted cases relied upon by Appellants, the *Taylor* matter is wholly inapplicable to the instant matter. In *Taylor*, there was no other possible reason the jury could have reached the verdict it reached without misunderstanding the difference between comparative negligence and proximate cause, as the jury did not apportion fault to the plaintiff. *Id*. Here, there are multiple possibilities as to why the jury found College Park to not be negligent, as noted *infra*. Again, there is simply no contradictory evidence that College Park failed to maintain the area when an inspector was retained to inspect the area at issue, the inspector notified both College Park and Appellants of an issue with the breaker, and Appellant Andrew James' testimony that he was retained to replace the breaker at issue. [*See* bates nos. AA000627, lines 12-25, AA000628, lines 1-12; *see also* bates nos. AA000628, lines 18-25, AA000629, lines 1-16]

Given the above, none of case law relied upon by Appellants applies to the instant matter. As noted throughout this brief, there were multiple reasons for the

jury to determine College Park was not negligent, including the jury found the testimony of Appellants as not credible; the jury found the testimony of Appellants' expert's testimony as not credible; the jury determined the Appellants were negligent and caused their own injuries; or the jury determined the Appellants were not wearing proper protective gear ("PPE") in completing their work; or that College Park maintained its duty to maintain the breaker based upon Appellant Andrew James' testimony that an inspector had inspected the area prior to Appellants beginning their work along with his testimony that Appellants were hired to replace the breaker at issue. [*See* bates nos. AA000627, lines 12-25, AA000628, lines 1-12; *see also* bates nos. AA000628, lines 18-25, AA000629, lines 1-16] NRCP 59(a)(1)(E) requires a manifest disregard of the jury instructions wherein the court must find that the only reason the jury reached its verdict was because it failed to understand or follow jury instructions. College Park provided contradictory evidence to Appellants' allegations, including evidence that refutes the testimony of Appellants Andrew James and Jeffrey Myers, and Appellants' expert's testimony. There is simply no avenue the court can take to find that there was palpable abuse, as the court need not determine how the jury reached its conclusion; it need only determine whether it was possible for the jury to do so. *Town & Country Elec. Co. v. Hawke*, 100 Nev. 701, 702, 692 P.2d 490, 491 (1984). As noted above, the court will determine that it was more than possible that the jury reached the conclusion that College Park was not negligent.

## II. Appellants Did Not Raise the Issue of the Motion for Judgment As A Matter Of Law in Their Moving Papers and Thus Admit that Respondents Healthcare Realty of Cheyenne, LLC, and Fundamental Administrative Services, LLC, Were Properly Adjudicated from this Matter

Respondents note that Appellants failed to raise any issue with the trial court granting its Motion for Directed Verdict in favor of Defendants Healthcare Realty and FAS. As this court is well aware, it is well established in Nevada that an

appellant's failure to timely raise an issue in its briefing on appeal, even if it raised the issue before the district court, generally results in a waiver of that issue. *Kahn v. Morse & Mowbray*, 121 Nev. 454, 480 n.24, 117 P.3d 227, 238 n.24 (2005). As such, as Appellants failed to raise this issue in its Motion for New Trial, it has waived any ability to argue that the Motion for Directed Verdict was improper. Further, Respondents note that Appellants simply ignored the District Court's ruling regarding Respondents' Motion for Judgment as a Matter of Law in an attempt to lump all the Respondents into one order that Appellants failed to adequately address in their Opening Appellate Brief. As such, Appellants failed to address Respondents' Motion for Judgment as a Matter of Law at both the trial stage and the appellate stage and thus any argument including Respondents Healthcare Realty and FAS are moot as untimely.

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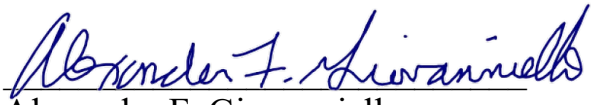
## CONCLUSION

Respondents respectfully request that this Court deny Appellants' Appeal from the District Court's Order to Deny Appellants' Motion for New Trial. Should the Supreme Court grant Appellants' Appeal from the District Court's Order to Deny Appellants' Motion for New Trial, Respondents respectfully request that the Supreme Court maintain the District Court's ruling on Respondents' Motion for Judgment as a Matter of Law regarding Respondents Healthcare Realty of Cheyenne, LLC, and Fundamental Administrative Services, LLC, as Appellants failed to proffer any evidence whatsoever regarding liability for these two Respondents and is not properly pled within Appellants' Opening Brief.

Dated: March 9, 2023

**GIOVANNIELLO LAW GROUP**

By: 

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## CERTIFICATE OF COMPLIANCE

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

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it is proportionally spaced, has a typeface of 14 point and contains 5,352 words; and

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

Dated: March 9, 2023

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## CERTIFICATE OF MAILING

The undersigned, designee of Alexander F. Giovanniello, Esq., hereby certifies that on this 8th day of March 2023, a true and correct copy of **RESPONDENT'S ANSWERING BRIEF** was served to the following person(s) as indicated below:

[xx] Via E-Service through email or the Court's Electronic Service system pursuant to NEFCR 4(b) on the following

by placing a true and correct copy of the above-mentioned document(s) in a sealed envelope, first class postage fully pre-paid, in the United States mail.

| | |
|---|---|
| Donald C. Kudler<br>CAP & KUDLER<br>3202 W. Charleston Boulevard<br>Las Vegas, NV 89102<br>Tel: (702) 878-8778<br>Fax: (702) 878-9350<br>Email:<br>donaldkudler@capandkudler.com<br>Email: lizcarrion@capandkudler.com | Attorneys for Plaintiffs<br>*Jeffrey A. Myers and Andrew James* |

By: _____
Carolina I. Olmos, an employee of
Giovanniello Law Group