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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ORANGE – CENTRAL JUSTICE CENTER

JOHANNA GARCIA, an individual, KATHERINE VANESSA GARCIA, an individual, and THE ESTATE OF ENRIQUE GARCIA SANCHEZ,

Plaintiffs,

vs.

ESSAM R. QURAISHI, M.D., and DOES 1 through 50, inclusive.

Defendants.

Case No: 30-2019-01060953
Assigned for all purposes to:
HON JAMES CRANDALL
Dept:C33

PLAINTIFF'S NOTICE OF MOTIOBN AND MOTION FOR NEW TRIAL

[*Filed and served concurrently with Declaration of Jorge Ledezma, with exhibits, Declaration of Claire Plotkin, Declaration of Trisha Renee Crow, with exhibits, and Notice of Lodgment*]

Date: TBD
Time: TBD
Dept.: C33

Complaint Filed: March 29, 2019

TO THE COURT AND TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that Plaintiffs, JOHANNA GARCIA, an individual, KATHERINE VANESSA GARCIA, an individual, and THE ESTATE OF ENRIQUE GARCIA SANCHEZ, will and hereby do move this court for a new trial. The court has set the hearing for this motion for August 4,

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2022. A new date and time are being requested pursuant to C.C.P. §629 and 660 because that date is more than 60 days after the Notice of Entry of Judgment in this case.

Pursuant to C.C.P., §§629 and 660, Plaintiffs respectfully request a ruling on the instant motion within 60 days of the mailing of the Notice of Entry of Judgment (June 6, 2022, see Ledezma Decl, ¶30, Exhibit P). The 60-day provision of Section 660 is a jurisdictional restriction, and therefore a decision cannot be rendered after the expiration of the 60-day time period. Accordingly, **the last day for the Court to rule on this motion is July 29, 2022**.

This motion is made under the provisions of C.C.P. §§629 and 657, and 659 and is based upon the grounds that a new trial is necessary. The motion is made on the following grounds, any or all of which individually or acting in concert materially affected the substantial rights of the moving party and prevented a fair trial:

1. Irregularity in the proceedings of the Court (CCP §657(1));
2. Accident or surprise, which ordinary prudence could not have guarded against (CCP §657(3)); and
3. Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial (CCP §657(4));

This motion will be further based upon this Notice, the attached Memorandum of Points and Authorities, the Declarations of Jorge Ledezma, Trisha Renee Crow and Claire Plotkin filed concurrently herewith, the records and files in this action, and upon such further evidence and argument as may be presented prior to or at the time of the hearing on this motion.

DATED: June 30, 2022

LEDEZMA ROBLES & BABAEE LLP

By: /s/ *Jorge Ledezma*

Jorge Ledezma
Jose R. Robles
Shireen Babaee
Attorneys for Plaintiffs
JOHANNA GARCIA, KATHERINE GARCIA, and THE ESTATE OF ENRIQUE GARCA

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND STATEMENT OF FACTS.

The Plaintiffs hereby request a new trial based on the following facts and occurrences which, individually and in the aggregate, warrant a new trial.

A. Basic Case Facts.

This is a medical malpractice action brought by Plaintiffs, Johanna Garcia, Katherine Garcia and The Estate of Enrique Garcia Sanchez. Plaintiffs alleged that Defendant Essam R. Quraishi, M.D. was negligent in his care and treatment of Enrique Garcia Sanchez. (Ledezma Decl., ¶2, Exh. C) Specifically, Plaintiffs claim that Dr. Quraishi was negligent in placing a feeding tube into the abdomen of the decedent, which ruptured organs, resulting in infection and sepsis, from which he ultimately passed away. (Ledezma Decl., ¶2, Exh. C; Exhibit F, p. 6-8)

Conversely, Defendant Essam R. Quraishi, M.D. denied any negligence and maintains that he complied with the standard of care in their treatment of decedent, ENRIQUE GARCIA SANCHEZ. (Ledezma Decl., ¶2, Exh. C) Specifically, Defendant argued that Dr. Quraishi was one of several physicians providing care to the decedent, and that his role in the care was minimal. Defendant disputed that there were alternative actions Dr. Quraishi could have taken to prevent his death. (Ledezma Decl., ¶2, Exh. C)

B. Voir Dire.

Voir Dire in this case began on March 16, 2022. The trial court began the Voir Dire process by asking the jurors some basic questions before the attorneys asked more specific follow up questions. The types of questions asked by the court were questions about their jobs, their life and work experiences, their training and their biases. At no point did any potential juror indicate that he had experience working as an insurance agent or adjuster. (Ledezma Decl., ¶9, Exh. F, G, generally which include the entirety of voir dire questions by the judge)

Specifically, the Judge asked all potential jurors about their family members or close friends who have sued or presented a med mal claim before. (Exhibit F, p. 15) He also asked if anyone had family members or close friends who have filed a lawsuit. (*Id.* at p. 20) He later asked if anyone had had any

special training in "law, medicine, nursing, or any other branch of the health arts." (*Id.* at p. 23) He even specifically asked what everyone does for a living (*Id*. at p. 63-64), and then asked a catch-all question as to whether "anything in your live experience that would prevent you from being fair to both sides." (*Id.* at p. 67) Jurors were also informed that they would need to be available for approximately 9 court days, and that trial is only held on Mondays, Tuesdays and Wednesdays (See Exhibit F, page 4), meaning at least three weeks of their lives, and probably more, were going to be occupied with this trial.

In response to the judge's questions, several jurors expressed concern about staying in a lengthy jury trial. (See Exhibit F, generally) In response to their concerns about financial hardship, the court told the jurors that the "rule we follow is if it's a severe financial hardship people can be excused. But we understand everybody coming in has some kind of financial hardship." (Exhibit F, p. 48-49)

After the trial in this case, Plaintiffs' counsel discovered a LinkedIn profile for Juror No. 57, which revealed he had experience working as an agent for Farmer's Insurance. (Ledezma Decl., ¶10, Exh. M) As an insurance agent, Juror 57 would have experience with claims being made, lawsuits, and related topics. Despite being asked the general questions by the judge which could have and should have prompted him to answer this question and reveal his insurance-related experience, Juror 57 concealed his insurance experience. When he was individually questioned, he did state, that "we all have our own life experience that we're gonna bring, and that's what you put in to making up your mind." (Ledezma Decl., ¶10, Exh. G, p. 126) Juror 57 was eventually elected foreperson, and was therefore in a position of authority and influence over the jury. (Ledezma Decl., ¶10)

Had Plaintiffs' counsel known of his previous insurance industry experience at the time of voir dire, they would have been much more likely to strike him for cause or use a peremptory challenge on him. The bias of insurance industry personnel toward people who make claims is significant and had they known of this work experience, they would at the very least have asked more questions to determine his level of bias or excluded him completely. (Ledezma Decl., ¶10)

After the trial, Plaintiff's counsel successfully contacted Mr. Sauer and asked him some questions about the trial proceedings. Mr. Sauer did not agree to give a declaration, most likely because he was unhappy with Plaintiffs' counsel's firm. Mr. Sauer stated that as a former Navy Veteran he felt that Mr. Robles hit below the belt in insulting someone who left to serve our country oversees. He further stated

that he could not find Dr. Quraishi liable because he didn't know when the PEG tube left the stomach, therefore, based upon his comments, it is obvious that the foreman misapplied the law. As foreman, it appears that Mr. Saur was able to influence the jury to agree with his logic. (Babaee Decl., ¶3)

C. The Two-Week Break Mid-Trial.

At the outset of trial, in an initial chambers conference and without a court reporter, defense counsel told the judge that he had a private mediation with Jay Horton in early April. Plaintiffs' counsel is informed and believes that the reason this arbitration could not be moved is because cancelling or rescheduling it would result in Defense counsel losing a large, non-refundable deposit and/or defense counsel would incur a large cancellation fee of some sort. Plaintiffs objected to a long delay in the middle of trial, however, the judge communicated that if the case was still going on March 30, he would suspend the trial temporarily so that defense counsel could go and do the private arbitration. (Ledezma Decl., ¶12) In this conference, the Court recommended that Defense counsel request that the scheduled arbitration be trailed by a day or two. (Robles Decl., ¶4)

On March 29, 2022, there was another unreported in-chambers conversation with the judge and opposing counsel regarding this break in trial. Plaintiffs' counsel again voiced his objections and noted that it would be prejudicial to the plaintiffs for the jurors to go home for over two weeks – especially with so little testimony set to be heard upon their return. (Ledezma Decl., ¶13) The court overruled Plaintiffs' objections and told the jury that day about the modified trial schedule. (See Exhibit D, p. 34)

On March 29, 2022, the trial court addressed what it called "scheduling issues" with the jury. The court stated that there were two days of trial testimony left, plus closing arguments and deliberations, but "the next time all the lawyers are available isn't until April 13th." (Exhibit H, page 200) The trial court decided the trial would resume on April 18 and 19th in part because of at least one juror's unavailability to return on the 13th. (Exhibit H, page 200-203) The court planned to start another trial during the break in this trial. (Exhibit H, page 202)

First thing on March 30, 2022, Juror #10 notified the court that he would be out of town for the last week of trial, and consequently, he was excused as a juror and replaced with the first alternate. (See minute order, Exhibit D, page 35) The trial court said, "I think we do want to get this finished." (See Exhibit I, p. 3-4) The jury was sent home at the end of the day on March 30, 2022, and was told to return

on April 18, 2022. (See Exhibit D, page 35)

The break was 19 calendar days mid-trial. The Defense rested mid-afternoon on April 18th – the first day back from the break (Exhibit D, p. 40) Closing arguments, jury instructions, deliberations and a verdict all happened the following day on April 19, 2022. (Exhibit D, p. 42-47) That means, everyone took a two and a half week break only to come back for a partial day of testimony, and then closing arguments. The only testimony heard on the last day was that of Dr. Jonathan Ellis and Defendant Dr. Quraishi. Testimony concluded at about 2:30 p.m. (See Exhibit D, page 38-41)

Concerned the two-and-a-half-week break would cause the jurors to forget the testimony of Plaintiffs' experts, on April 18, 2022, Plaintiffs' counsel asked the court to allow Plaintiffs to bring back some of their experts for a short factual "rebuttal." The intention of Plaintiffs' counsel was to ask the experts some factual questions designed to refresh the jurors' recollection as to their opinions which had been stated weeks ago. The Plaintiffs' request was denied on the basis that it was not technically rebuttal testimony as there had been no new or surprising opinions by Defendant's doctors, and anything they testified to previously was already on the record. (Ledezma Decl., ¶16, Exhibit J, p. 156-161)

Plaintiffs' counsel was able to reach Mr. Dow, Juror No. 9 in this case, who agreed that the mid-trial break made it difficult to deliberate on the case because when he came back from the break, he could not remember the names of all the doctors, much less which doctor testified to what opinions or any substance. (Babaee Decl., ¶4) Mr. Dow also stated that he did not hear or see any evidence of negligence by Dr. Quraishi, despite Plaintiffs' experts testifying otherwise. Finally, Mr. Dow communicated that he believed the empty chair arguments of Defense counsel, and that all of the doctors who cared for the decedent could have done something different. (Robles Decl., ¶3)

D. <u>Plaintiff's Motion in Limine to preclude "Empty Chair Arguments</u>"

On March 15, 2022, the court heard motions in limine. Plaintiffs brought a Motion in Limine (No. 8) to preclude Defendant from making empty chair arguments. (Ledezma Decl., ¶6, Exhibit L)

Oral argument on Plaintiff's MIL No. 8 occurred on March 15, 2022. During this oral argument, Mr. McKenna said "There'll be no evidence presented … the defense will not say anyone was negligent or acted below the standard of care. So if that's the concept of the empty chair, that's not gonna happen."

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(See Exhibit E, page 26-28) The court denied the motion, but left the door to revisit the issue it if it came up during trial. (*Id.*, see also, Exhibit D, p. 3)

In defendant's closing arguments, Mr. McKenna argued that the only person the plaintiffs brought into this courtroom to make an accusation against was the Defendant. With all the doctors giving care to the decedent, Plaintiffs picked only this particular doctor, defense argued. (See Exhibit K, p. 61) This argument amounts to an empty chair argument – without saying someone else specifically is at fault, the defendant gets to point out that there is probably someone out there responsible, it's just not the Defendant. Defendant made a similar argument in his mini-opening at voir dire. (See Exhibit F, p. 10)

Therefore, the Defendant did not follow his own promise at oral argument. And this empty chair issue is related to actions by Defense counsel which occurred after the trial and verdict.

E. Closing Arguments and Verdict.

Defendant's closing arguments were inflammatory and improper. He called Plaintiffs' case the most "insulting, factually devoid presentation" he had ever seen in a 30-year career. (Ledezma Decl., ¶17, Exhibit K, p. 58)

Additionally, Defense counsel equated Plaintiffs' counsel's questioning of Dr. Kuncir with ingratitude for Dr. Kuncir's military service. In other words, Defendant argued that it was un-American for Plaintiffs' counsel to question him, his methods, his acts or his omissions simply because of his military service. (See Exhibit K, p. 58, 81) None of Plaintiffs' counsel's questions or closing argument can be construed as criticism of him as a Veteran or of his Veteran status. Plaintiffs' counsel did question his qualifications and his actions in this case, which is not only acceptable in a trial, but mandatory. (Ledezma Decl., ¶18)

Most insulting to Plaintiffs and to Plaintiffs' counsel and his colleagues personally, were defense counsel's comments which are critical of plaintiffs in general, and these specific plaintiffs. Specifically, he argued that plaintiffs' case was nothing less than "extortion." (Exhibit K, p. 60-61) In a trial in conservative Orange County, California, the Plaintiffs in this case are LatinX, as are Plaintiffs' attorneys. The closing arguments questioned the motives of the Plaintiffs who were allegedly trying to "extort" the Defendant doctor, get a big pay day and live the easy life. "Welcome to America!" Mr. McKenna shouted

across the Courtroom. He was also critical of personal injury lawyers and the legal industry calling it the "personal injury machine" and the "personal injury industrial complex." (Exhibit K, p. 60-65) These comments are meant to inflame biases and incentivize jurors to ignore logic and evidence in favor of their emotions. These are not arguments about what evidence came out at trial. They are arguments to punish the Plaintiffs for bringing a claim.

Finally, the Defense counsel's comments in closing related to the Coroner's report and the Death Certificate are improper, and unsupported by facts. Defense counsel argued, in essence that even though the Coroner testified that she would not change her mind about the cause of death, the jurors should consider that she has a reputation to consider and if she waffles here or changes her mind in this case, it affects her credibility in other cases, including ones already decided, which could be reopened or reconsidered. Defense counsel also argued that it would affect her ability to continue to do work putting bad guys like abusive husbands and murderers away. (Exhibit K, p. 82-83) The argument was that the Coroner is wrong on this and she knows it, but for selfish reasons (and even, maybe reasons for the greater good of the public) she will not change her mind. "People maybe have something wrong, even on an official document, that's all I'm suggesting." (*Id.*) This entire line of argument is speculative, conjecture and based on no factual foundation.

Defense counsel's arguments were peppered with platitudes about justice and a search for the truth and allowing the defendant his day in court. (Exhibit K p. 60-62)

F. Post-Trial Events.

1. **The Viral Video Posted by Defense Counsel.**

At some point shortly after the conclusion of the trial, a video was posted on the Instagram page for the defense counsel's law firm. Plaintiffs' counsel was notified of the video's existence by a colleague, and they acted quickly to preserve the video. (Ledezma Decl., ¶20; Crow Decl., Exh. A, and Exhibit A to the Notice of Lodgment)

In this video, counsel for defense, Robert McKenna, is standing at a podium with a laptop in front of him, and he appears to be giving a presentation to other members of his office about recent trials, one of which is the instant trial. He makes the following statements about this trial:

> "Ummm, a guy that was probably negligently killed, but we kind of made it look like other people did it. And we actually had a death certificate that said he died the very way the Plaintiff said he died, and we had to say, no, you really shouldn't believe what that death certificate says. Or the coroner from the Orange County Coroner's Office who says it says what it says, and that its right.
>
> Overcoming all of those hurdles, we managed to sock three lawyers in the face.
>
> And it was the fastest defense verdict Esther has ever gotten. And it's the fastest defense verdict I've ever gotten, and it was a 12-0 defense verdict in 26 minutes. So here here, Esther. Go ahead, ring the bell.

At his instructions, a woman runs to ring a bell, while the rest of the office claps. (Ledezma Decl., ¶21, Crow Decl., ¶4, Exhibit A)

Mr. McKenna appears to be saying that he knows his client was negligent, but that he and his team were able to trick the jury into believing something that was not true. He specifically uses the phrase "probably negligently killed" about the Plaintiff and we "made it look like other people did it." Additionally, there was counsel for defendant Esther Kim ringing a victory bell about a case involving someone who died, and it felt insensitive, unprofessional and in poor tasted to be celebrating a victory over that. This was not just celebrating a win for his team, Mr. McKenna was gloating and disparaging Plaintiffs' counsel and his colleagues. His phrase of "we managed to sock three lawyers in the face," felt unnecessarily cruel and gleefully hateful. (See Exhibit A)

There is a difference here between the tone of the video and the tone Mr. McKenna struck during his closing argument. Both statements were full of strong language and heated passion, but at trial, that passion fueled comments about searching for the truth and justice and giving the defendant Doctor a chance to have his day in court. Mr. McKenna took a hard line, and he was not kind to Plaintiffs or Plaintiffs' counsel, but he at least he framed his commentary as advocating for his client. This video does not follow that line. In it he is gloating and bragging and he does not once mention justice or righteousness or a search for truth. Instead, it implies that the truth does not matter – only winning matters. Getting to ring that victory bell matters. Socking lawyers in the face matters – even if you have to make it look like someone else did it at the expense of the truth.

Though it was quickly removed from Instagram, this video went viral. It was shared and forwarded across the Southern California legal community and beyond. Multiple news outlets picked it up, and there were articles about it, including one written by the LA Times and another written by the ABA Journal. (Ledezma Decl., ¶23, 24, Exh. N) The articles include reference to the video, quotes from it, and even stills from the video. They note that the video was removed from Instagram shortly after it was posted, but it was too late to stop the tide of public opinion about Mr. McKenna's comments. The articles indicate that the video now exists online as a posting to the Twitter account of TortHub. (*Id.*)

2. The Apology Video.

Mr. McKenna later recorded and posted another video as an apparent an apology for the comments he made in the viral video. This video appeared on the defense firm's Instagram stories and existed online only for a short time – approximately 24 hours – but it was downloaded and preserved by counsel for Plaintiffs. (Ledezma Decl., ¶25; Crow Decl., ¶5, Exh. B, and Exhibit B to the Notice of Lodgment)

In this apology video, Mr. McKenna acknowledges that the first video is him speaking, and that he made the statements in that video. He even quotes some of the things he said in the viral video. Among other things, he claims that he did not know that the remarks he made that day were being videotaped, nor did he know that a "snippet of those comments would be posted online." He asserts that the comments on the video were taken out of context and acknowledges that the comments in that video communicate that "something was done wrong, that my client was negligent, or that I did something inappropriate or unprofessional during the course of this trial." (Ledezma Decl., ¶26; Crow Decl., ¶5. Exh. B, and Exhibit B to the Notice of Lodgment) This is regret that he got caught, not that he made the comments in the first place. In their own homes and small office settings, people feel comfortable and are more likely to reveal themselves at their inner core. Making closing arguments to a jury at trial is much different than what it said once everyone goes back to the office.

In the apology video, Mr. McKenna says "when I said that this man likely died of negligent killing, but we made it look like somebody else was responsible, that was not my opinion. That was the opinion of the experts who had reviewed all the materials and testified in this case." This appears to be

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an acknowledgement and admission that Defendant's intention and goal was to point to an empty chair. (Ledezma Decl., ¶27; Crow Decl., ¶5. Exh. B, and Exhibit B to the Notice of Lodgment) At no point does Mr. McKenna state which experts had that opinion, and it is unclear from a review of the record which "experts" made such an assertion. (Ledezma Decl., ¶27)

The apology is not an actual apology. It deflects responsibility and states that the comments were taken out of context, and therefore it only *seems* like he did something wrong. He does not give any context other than to say that the broader "discussion involved cases we had handled over the past two years, wins and losses during the course of the global pandemic, and how the jury system seemed to be during that point in time." (Crow Decl., ¶5. Exh. B, and Exhibit B to the Notice of Lodgment) This does not give context to help understand statements like the Plaintiff "was probably negligently killed, but we kind of made it look like other people did it." Nor does it give context or help statements like "we managed to sock three lawyers in the face."

Mr. McKenna stated: "To be clear, I want to apologize to my client and the medical community as a whole for making comments that, when taken out of context, would suggest that something was done wrong, that my client was negligent, or that I did something inappropriate or unprofessional during the course of this trial." (Crow Decl., ¶5. Exh. B, and Exhibit B to the Notice of Lodgment) Ultimately, this is an "I'm sorry I got caught" apology, not an "I'm sorry" apology.

3. Defendant's Memorandum of Costs.

On or about June 21, 2022, Plaintiffs were served with a Memorandum of Costs from counsel for Defendant. This Memorandum includes fees for Defense Expert Michelle Melany that are shocking. The merits of the cost memorandum will be saved for the Plaintiff's Motion to Tax Costs, but the notations related to Dr. Melany are relevant to the Motion for New Trial, because they affect her credibility and bias. Dr. Melany billed the Defense counsel for two full days of trial testimony at $7000 a day, for a total of $15,000. First, that math does not add up. Second, the record shows that Dr. Melany only testified on a single day at trial – March 30, 2022. (See Exhibit D, generally) So she has certainly overbilled defense counsel, and defense counsel wants to pass on the costs of that overbilling to the Plaintiff.

Also, at trial, Dr. Melany testified that she estimated that the time she spent on this case was

somewhere in the range of 15 to 20 hours. (Exhibit I, p. 81) However, the memorandum of costs shows more than three times that amount of time billed to defense – 62 hours at $600 an hour. This also goes to her credibility, and Plaintiffs should be allowed to question Dr. Melany on these anomalies and impeach her credibility.

The reason Dr. Melany underplayed the actual time spent on the case was presumably to mislead the jury into thinking that she was reasonable and less biased. If the jury heard that she had spent over 60 hours in the case and billed almost $40,000 dollars, it would damage her credibility with the jury who would be likely to believe that she is more interested in money and billing the file rather than forming reasonable opinions in a search for truth.

II. LEGAL ARGUMENT.

A. *Grounds for New Trial*.

Plaintiff respectfully requests an order granting a new trial. Courts have no inherent power to grant a new trial. Instead, the "right to a new trial is purely statutory, and a motion for a new trial can be granted only on one of these grounds enumerated in the statute." (*Fomco, Inc. v. Joe Maggio, Inc.* (1961) 55 Cal.2d 162, 166). *California Code of Civil Procedure* §657 governs new trial motions. Plaintiff brings this motion on grounds 1, 3, and 4 of section 657. It is in rare instances and on very strong grounds that a reviewing court will set aside an order granting a new trial. (*Morgan v. Los Angeles Pac. Co.* (1910) 13 Cal.App. 12). As shown below, a new trial is warranted on several independent bases.

B. *Plaintiffs are Entitled to a New Trial Due to Irregularity in the Proceedings*.

A motion for new trial may be granted if there is an irregularity in the proceedings of the court, jury, or adverse party, or any order of the court or abuse of discretion by which a party was prevented from having a fair trial. (Code Civ. Proc. § 657(1)) An irregularity is any overt act of the trial court, jury, or adverse party that violates the right to a fair and impartial trial and amounts to misconduct (*Gray v. Robinson* (1939) 33 Cal.App.2d 177) The irregularity must materially affect the substantial rights of a party (Code Civ. Proc. § 657(1); *Gay v. Torrance* (1904) 145 Cal. 144, 148)

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1. The Lengthy Break Allowed by the Trial Court is an Irregularity in the Proceedings which violated the Plaintiffs' right to a fair and impartial trial.

At the start of trial, jurors were already concerned about the length of the trial. Though the parties and the court knew of the Arbitration that Defense counsel had scheduled toward the end of trial, the jurors were not told about it until just before the break was about to start. This break resulted in the replacing of one juror, and presumably, resentment by the other jurors. The break was 19 calendar days, during which time the jurors returned to their normal lives. When they came back there was testimony offered by the Defendant for only part of one day – it was over by 2:30 p.m. Jurors went into deliberations with only the immediate recollection of testimony on one side. There were closing arguments of course, during which Plaintiffs' counsel did his best to remind the jury of the testimony provided previously.

Certainly, the break was difficult on the Plaintiffs and Plaintiffs counsel who were sitting around waiting in some kind of holding pattern while Defense counsel went on to arbitrate another case and the court itself even started a new trial while waiting. This break was a favor to Defense counsel, and nothing more. This trial had been scheduled for many months, had already been continued multiple times, and Defense counsel should not have scheduled a non-refundable arbitration proceeding right in the middle of it.

2. Defense Counsel's Misconduct Amounts to an Irregularity in the Proceedings which violated the Plaintiffs' right to a fair and impartial trial.

When misconduct by the attorney for an adverse party is alleged as grounds for new trial, prejudicial error is committed only when the attorney's conduct consists of a willful or persistent effort to place before a jury clearly incompetent evidence, or the statements or remarks of counsel are of such a character as to manifest a design on his or her part to arouse the jury's resentment, prejudices, or passions against the moving party, or to enlist the jury's sympathy in favor of his or her client and against the moving party, and any jury instructions to disregard such offered evidence or objectionable remarks cannot be deemed to have cured the evil or ill effect (*Tingley v. Times Mirror* (1907) 151 Cal. 1, 23, 89 P. 1097; *Jackson v. Park* (2021) 66 Cal.App.5th 1196, 1216–1217, (attorney's reference to unadmitted evidence prejudiced opposing party); *Dominguez v. Pantalone* (1989) 212 Cal.App.3d 201, 210–211) In assessing that prejudice, each case ultimately must rest on the court's view of the overall record, taking

into account such factors, among others, as the nature and seriousness of the remarks and misconduct, the general atmosphere, including the judge's control, of the trial, the likelihood of prejudicing the jury, and the efficacy of objection or admonition under all the circumstances. (*Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App.5th 276, 295–296 (prejudice required for new trial); *Garcia v. ConMed Corp.* (2012) 204 Cal.App.4th 144, 148–149, 159–162; *see Pope v. Babick* (2014) 229 Cal.App.4th 1238, 1249–1251, (admonition cured counsel's improper questioning of witness)]

The defense counsel's misconduct during trial comes from two different places: 1) his remarks in violation of his promise not to bring an empty chair argument; and 2) his inflammatory and highly prejudicial closing statement.

i. Defense Counsel's "Empty Chair" Arguments Violate his Promise to the Court not to Make Such an Argument.

Plaintiffs were concerned that the defendant was going to make an argument that the Plaintiffs injuries were some other doctor's fault. After all, the decedent was hospitalized and had several treatment providers. Accordingly, Plaintiffs filed a motion in limine to preclude such an argument, since in discovery there was not any evidence as to how someone else could have caused the injuries and ultimate death of the decedent. (Ledezma Decl., ¶6, 7, Ex. L) At oral argument, Mr. McKenna said "There'll be no evidence presented … the defense will not say anyone was negligent or acted below the standard of care. So if that's the concept of the empty chair, that's not gonna happen." (See Exhibit E, page 26-28) The court denied the motion, but left the door to revisit the issue it if it came up during trial. (Id., see also, Exhibit D, p. 3)

Then, at least twice on the record, Mr. McKenna made an empty chair argument by noting that the Plaintiffs only sued the Defendant when there were so many other treatment providers responsible for the decedent's care. (Ledezma Decl., ¶8, Exhibit F, p. 10, Exhibit K, p. 61)

This on its own is sufficient prejudice, but when compared with Mr. McKenna's comments on the viral video which came out after trial, it shows that defense counsel's intention all along was to try to make the jurors believe that someone else was responsible for the decedent's death. He specifically says, "but we kind of made it look like other people did it." (Ledezma Decl., ¶21, Crow Declaration, Exhibit A, Notice of Lodging, Exhibit A) Mr. McKenna went on to say that they got the jury to believe it was

someone else's fault in spite of the fact that there was a death certificate and Coroner's report that said the decedent "died the very way the Plaintiff said he died." (*Id.*)

This is prejudicial to the Plaintiffs because not only does it show bad faith on the part of the defense counsel who appears to be violating his duty of candor, it is a subtle way to confuse the jury and arouse the jury's resentment, prejudices, or passions against the moving party, or to enlist the jury's sympathy in favor of his client. (See *Tingley v. Times Mirror* (1907) 151 Cal. 1, 23, 89 P. 1097) Without the idea spoken by defense counsel that the blame falls on some other treatment provider, there is no evidence that anyone else's actions in this case fell below the standard of care. Defense counsel knows he cannot prove this, which is why he felt safe promising the court that he did not plan to point to an "empty chair" at trial. But he did. The fact that it was sneaky and subtle makes the attempts even more prejudicial.

ii. Defense Counsel's Closing Argument Remarks Amount to Misconduct and an Irregularity of the Proceedings.

a. Defense Counsel Weaponized Dr. Kuncir's status as a Veteran.

Defense counsel characterized Plaintiffs' counsel's cross-examination and closing argument criticisms of Dr. Kuncir as anti-Veteran and anti-American. As if anyone who is a Veteran is above blemish and above-critique. There is no evidence that Plaintiffs' counsel mocked, criticized or belittled Dr. Kuncir's service or his status as a veteran, but it is Plaintiffs' counsel's job to question the defense experts. Doing so does not mean that Plaintiffs' counsel is anti-American. Such an assertion is highly prejudicial at any time, let alone these highly politicized times. Such an accusation would certainly arouse the jury's resentment, prejudices, or passions against the moving party, or to enlist the jury's sympathy in favor of his expert and his client. (*Tingley v. Times Mirror* (1907) 151 Cal. 1, 23, 89 P. 1097)

b. Defense Counsel Villainized the Plaintiffs and Plaintiffs' Counsel.

Additionally, Defense counsel blatantly characterized both the Plaintiffs and Plaintiffs' counsel as being greedy, money-hungry villains extorting a poor doctor who was just trying to help someone. He said they were cogs in a "personal injury machine" and part of the "personal injury industrial complex" as opposed to people who are grieving the inexplicable loss of their father. (Exhibit K, p. 60-61)

"Welcome to America!" Mr. McKenna shouted across the Courtroom. He was also critical of personal injury lawyers and the legal industry calling it the "personal injury machine" and the "personal injury industrial complex." (Exhibit K, p. 60-65)

It was a good tactic to deploy in this trial in conservative Orange County, California, where the Plaintiffs and their counsel are LatinX, and defense counsel is a middle aged, conservative white man making comments about Veterans and greedy Plaintiffs.

The only possible benefit of these comments is to inflame biases and incentivize jurors to ignore logic and evidence (like that pesky death certificate and coroner's report which support the plaintiff's theory of liability) in favor of their emotions.

c. Defense Counsel Used Conjecture and Speculation to Accuse the Coroner of Lying in her Report.

No evidence was admitted at trial that confirms the Coroner's Report and the Death Certificate are wrong. There was expert opinion testimony that offered possible alternative causes of death, or at least the idea that the decedent would have died regardless of the poorly placed feeding tube. But the Coroner stood by her opinion and conclusion. Rather than spend his time in closing arguments highlighting what the differing opinions are, and the evidence presented by the experts that may conflict with the Coroner's conclusions, Defense counsel decided instead to convince the jurors that she is lying to save her career. Beyond that, he insinuated that the lie is understandable and even forgivable because it is preferable to have a Coroner who is trustworthy and steadfast so that we can continue to convict wife-beaters and murderers. God forbit the Cornoer changes her mind, and someone wants to come along and look into all of her prior opinions and the causes of death she assigned in other cases. (See generally, Exhibit K, p. 82-83) "People maybe have something wrong, even on an official document, that's all I'm suggesting." (*Id.*) That is all the defense counsel has – a suggestion. There is no evidence that she is lying to save face or save her career. There is no evidence her opinions have ever been called into question. There is nothing but a defense attorney coming up with reasons to get a jury to hate evidence that supports the Plaintiffs' arguments.

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d. Defense Counsel's Anticipated Argument re Lack of Objection by Plaintiffs' Counsel is Without Merit

We anticipate that defendant will argue that there was no objection to the misconduct Plaintiffs are accusing him of at the trail. However, this argument is without merit. When there are extreme and/or repeated instances of misconduct that the court either cannot correct (because the bell has been rung) or re-fuses to recognize, prejudicial misconduct may be present regardless of objections, admonitions, or their absence. (*Hoffman v Brandt* (1966) 65 Cal.2d 549; *Garden Grove Sch. Dist. v Hendler* (1965) 63 Cal.2d 141; *Simmons v Southern Pac. Transp. Co.* (1976) 62 Cal.App.3d 341; *Love v Wolf* (1964) 226 Cal.App.2d 378.) When the trial court grants a motion for new trial after flagrant and repeated instances of misconduct, and the offended party failed to object at the trial, the appellate court will not use that failure to overturn the order for new trial unless the order was a clear abuse of discretion. (See *Malkasian v Irwin* (1964) 61 C2d 738, 747; *Miller v National Am. Life Ins. Co.* (1976) 54 CA3d 331, 346.)

3. A Juror's Lack of Candor Amounts to an Irregularity in the Proceedings which violated the Plaintiffs' right to a fair and impartial trial.

Jury misconduct gives rise to a rebuttable presumption of prejudice (*see* C.C.P. § 371.63(3)(c).) Thus, a party seeking a new trial on the grounds of jury impropriety must usually present, in addition to other affidavits showing jury misconduct, a "no knowledge" affidavit showing that neither the moving party nor that party's counsel knew of that misconduct before the verdict was returned (*Weathers v. Kaiser Foundation Hospitals* (1971) 5 Cal.3d 98, 103; *Nissan Motor Acceptance Cases* (2021) 63 Cal.App.5th 793, 812 (party submitted declarations denying knowledge of juror's misleading statements); *see* C.C.P. §§ 371.305, 371.63(3)(d)).

It is jury misconduct for which a new trial may be granted if a juror has concealed during voir dire examination a state of mind that prevents his or her acting impartially (*see In re Boyette* (2013) 56 Cal.4th 866, 888–889 (juror's failure to disclose family's criminal history did not reveal substantial likelihood of actual bias); *Nissan Motor Acceptance Cases* (2021) 63 Cal.App.5th 793, 819 (new trial motion granted based on scope of juror's nondisclosures)). The concealment need not be intentional (*City of Pleasant Hill v. First Baptist Church* (1969) 1 Cal.App.3d 384, 431).

Juror 57's failure to disclose his prior experience in the insurance industry may seem small, and likely unintentional. But it is not the juror's culpability that matters – what matters is the prejudice to Plaintiffs. Plaintiffs' counsel has submitted a declaration that states not only how he discovered the juror's potential bias, but also that he had no knowledge of this information at the time of voir dire. Plaintiffs' counsel has also declared that had he known of his experience in the insurance industry at the time of voir dire, he would have excused him for cause or used a peremptory challenge on him.

C. *Plaintiffs are Entitled to a New Trial Due to Newly Discovered Evidence*.

1. McKenna's post-trial videos are Newly Discovered Evidence of Defense Counsel's Bad Faith, Warranting a New Trial.

Under Code Civ. Proc. § 657(4), a motion for new trial may be granted on the grounds of newly discovered evidence, material for the party making the application, that he or she could not with reasonable diligence have discovered and produced at trial (Code Civ. Proc. § 657(4)) "Newly discovered evidence" under Code Civ. Proc. § 657(4) must be evidence that existed at the time of the trial or hearing on the dispositive motion (*Aron v. WIB Holdings* (2018) 21 Cal.App.5th 1069, 1079). All of the following elements must be established to justify granting the motion for new trial (*People v. Williams* (1962) 57 Cal.2d 263, 270): 1) The evidence, and not merely its materiality, is newly discovered; 2) The evidence is not merely cumulative; 3) The evidence is such as to render a different result probable on retrial of the cause; 4) The party could not with reasonable diligence have discovered and produced it at the trial.; 5) These facts are shown by the best evidence of which the case admits.

Here, it would be easy to argue that the viral video and apology video are not evidence which existed at the time of trial. After all, the videos did not exist until after the trial. The fact is, however, that the true personality, ethics, and morals of defense counsel were hidden at the time of trial. His bad faith intentions existed at the time of trial, and bits and pieces were evident in his closing arguments and at other times in trial. But this admission of trickery, sneaky behavior and bias against Plaintiffs really became evident only after trial. The evidence was there at trial, but not the full extent of it.

That does not, however mean that this newly discovered evidence is cumulative. It is new evidence of his intentions and character that was not evident at trial, and which could not have been discovered until after the trial when he felt comfortable enough to let it out. This is evidence of a different

bent than the biases and comments at closing arguments meant to inflame the passions of the jury. Without a defense counsel intent on making things "look like" something else happened, in spite of the fact that the decedent was "probably negligently killed" and the death certificate and coroner's report support the Plaintiffs' theory of liability, a different result at trial is probable. Neither Plaintiffs nor Defendants could have discovered this evidence prior to the time of trial, because by its very nature this evidence is the type that normally stays hidden, but it is the most dangerous. Finally, there is no better evidence of a person's mindset than their very own words and admissions.

In addition, the trial court may consider the credibility as well as materiality of the evidence in its determination of whether introduction of the evidence in a new trial would render a different result reasonably probable (*Aron v. WIB Holdings* (2018) 21 Cal.App.5th 1069, 1078). This evidence is highly credible. It is obviously Mr. McKenna in both videos and the second video authenticates the first video.

2. Defendant's Cost Memorandum is Newly Discovered Evidence of Defense Witness Dr. Melany's Lack of Credibility, Warranting a New Trial.

The same analysis applies here – without this new impeachment evidence, Plaintiffs' counsel would not have known to ask specific questions about Dr. Malany's credibility or ethics. In fact, the evidence directly contradicts her testimony at trial about the number of hours she had spent on the case and how much it meant to her to get a good result. It is new evidence which warrants a new trial, because if her testimony is no longer believed, or if her testimony is more closely scrutinized by jurors, a different result is probable.

D. Plaintiffs are Entitled to a New Trial Due to Accident or Surprise Related to the McKenna Videos and the Defendant's Memorandum of Costs.

The motion for new trial may be granted on the ground of accident or surprise, which ordinary prudence could not have guarded against (Code Civ. Proc. § 657(3)) The terms "accident" and "surprise," although not strictly synonymous, have substantially the same meaning, as each is used to denote some condition or situation in which a party to a cause is unexpectedly placed to that party's injury and without any negligence of his or her own (*Kauffman v. De Mutiis* (1948) 31 Cal.2d 429, 432; *see In re Marriage of Liu* (1987) 197 Cal.App.3d 143, 154–155 (negligence of party's counsel is not a ground on which a new trial may be granted under Code Civ. Proc. § 657(3))].

Both videos by Mr. McKenna were a surprise for which ordinary prudence could not have guarded against, and the impact on the trial and the obvious prejudice exposed in the videos warrant a new trial. Similarly, the credibility and ethics of Dr. Melany is now called into question, and that is a surprise for which no one could have been prepared. In fact, Plaintiffs' counsel tried to be prepared for such a thing and even asked her how many hours she had spent on the case.

III. CONCLUSION.

Based on the foregoing, the Plaintiffs respectfully request that the current judgment be vacated and that a new trial be ordered.

DATED: June 30, 2022

LEDEZMA ROBLES & BABAEE LLP

/s/ *Jorge Ledezma*

By: ______________________________

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the County of Orange, State of California. I am over the age of eighteen years and not a party to the within action. My business address is 1851 E. First Street, Suite 850, Santa Ana, CA 92705.

On June 30, 2022, I served the foregoing document described as **PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR NEW TRIAL,** by delivering a true copy on all interested parties in this action, as seen in the **ATTACHED SERVICE LIST,** as follows:

☐ **BY MAIL:** I am "readily familiar" with Ledezma Robles & Babaee LLP's practice of collection and processing correspondence for mailing. Under said practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Santa Ana, California, in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one (1) day after date of deposit for mailing in affidavit.

☒ **BY ELECTRONIC SERVICE:** I caused a copy of such document(s) to be delivered via electronic service pursuant to C.C.P. § 1010.6 and Cal. Rules of Court, rule 2.256; and by agreement of the recipient pursuant to Cal. Rules of Court, rule 2.251 and/or by Court Order pursuant to Cal. Rules of Court, rule 2.253.

☐ **BY EXPRESS MAIL**: I caused such envelope to be deposited in the U.S. Mail at Santa Ana, California. The envelope was mailed with Express Mail postage thereon fully prepaid pursuant to C.C.P. § 1013(c).

☐ **BY OVERNIGHT DELIVERY**: I caused such envelope to be deposited in the U.S. Mail at Santa Ana, California. The envelope was mailed with Express Mail postage thereon fully prepaid pursuant to C.C.P. § 1013(c).

☐ **BY PERSONAL SERVICE** pursuant to C.C.P. § 1011, as follows: I caused a copy of such document(s) to be delivered by hand to the offices of the addressee between the hours of 9:00 A.M. and 5:00 P.M.

☐ **BY FACSIMILE**: I caused such documents to be transmitted to the telephone number of the addressee listed on the attached service list, by use of facsimile machine telephone number. The facsimile machine used complied with California Rules of Court, rule 2.306 and no error was reported by the machine.

☒ **STATE** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

☐ **FEDERAL** I declare that I am employed in the office of a member of the bar of this court at whose direction this service was made.

Executed on June 22, 2022 at Santa Ana, California.

/s/ *Brooke L. Bove*

Brooke L Bove

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