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Tracie K. Lindeman
Clerk of Supreme Court

9
10 **BEFORE THE SUPREME COURT OF THE STATE OF NEVADA**

11 ALI PIROOZI, M.D.,

12 Petitioner,

13 v.

14 THE EIGHTH JUDICIAL DISTRICT
15 COURT OF THE STATE OF NEVADA,
16 IN AND FOR THE COUNTY OF
17 CLARK; AND THE HONORABLE
JAMES BIXLER, DISTRICT COURT
18 JUDGE,

Respondent.

19
20 TIFFANI D. HURST and BRIAN
21 ABBINGTON, jointly and on behalf of
22 their minor child, MAYROSE LILI-
23 ABBINGTON HURST; MARTIN
BLAHNIK, M.D.,

Real Parties in Interest.

Supreme Court Case No.: _____

EJDC Case No.: A-10-616728-C

**EMERGENCY PETITION FOR
WRIT OF MANDAMUS**

**RESPONSE REQUESTED PRIOR
TO TRIAL COMMENCING ON
FEBRUARY 18, 2014**

25 Petitioner, Ali Piroozi, M.D., by and through counsel of record Cotton,
26 Driggs, Walch, Holley, Woloson & Thompson hereby brings this Petition on an
27 emergency basis due to the fact that trial is set to begin in this matter on February
28

1 18, 2014 and end February 28, 2014. The issue in this Petition is limited in scope
2 to the questions of: (1) Whether or not settling former defendants in a medical
3 malpractice case who was alleged to be negligent can be placed on the jury verdict
4 form so that a jury can properly allocate fault to the settling defendants per NRS
5 41A.045; and (2) whether or not remaining defendants in a medical malpractice
6 case can do more than simply argue no negligence or 100% negligence of settling
7 defendants. Respondent in this case improperly Ordered that, pursuant to NRS
8 41.141 and Banks v. Sunrise Hospital, 120 Nev. 822, 102 P.3d 52 (2004), the
9 remaining Defendants could not: (1) Allocate fault to settling defendants; nor (2)
10 place the settling defendants on the verdict form. Respondent further held that, the
11 remaining Defendants could only argue to a jury that they were not at fault and/or
12 that the settling defendants were 100% at fault.

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16 DATED this 19 day of February, 2014.

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18
19 **COTTON DRIGGS, WALCH,
20 HOLLEY, WOLOSON &
21 THOMPSON**

22 
23 JOHN H. COTTON, ESQ.

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26 Nevada Bar No. 010730

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Attorneys for Petitioner

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Nevada Rules

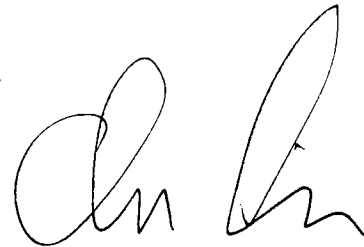
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VERIFICATION

Under penalty of perjury, the undersigned declares that he is the attorney for Petitioner named in the foregoing Petition and knows the contents thereof; that the pleading is true of his own knowledge, except as to those matters stated on information and belief, and that as such matters he believes to be true. This verification is made by the undersigned attorney pursuant to NRS 15.010, on the ground that the matters stated, and relied upon, in the foregoing Petition are all contained in the prior pleadings and other records of the District Court, true and correct copies of which have been attached hereto.

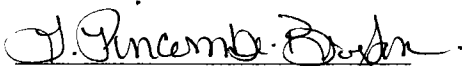
Executed this 4th day of February 2014.



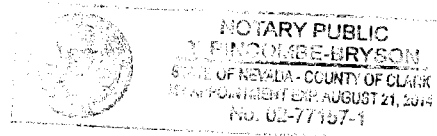
Christopher G. Rigler, Esq.

SUBSCRIBED AND SWORN to before me

this 4th day of February, 2014



NOTARY PUBLIC in and
for said County and State



PETITION FOR WRIT OF MANDAMUS

I. INTRODUCTION

Below is a general background of the case. The Statement of Facts provides citations to specific relevant facts this Court needs to evaluate the instant Petition.

This is a medical malpractice cases involving treatment of an extremely premature child (born at 28.2 weeks gestation weighing 2 pounds, 13 ounces), MayRose Lili Abbington-Hurst (hereinafter "MayRose"), who was ultimately diagnosed with an extremely rare condition called Diamond Blackfan Anemia. The child was under the care of two neonatologists, the remaining Defendants Ali Piroozi, M.D. (hereinafter "Petitioner Piroozi") and Martin Blahnik, M.D. (hereinafter "Defendant Blahnik"), at Sunrise Hospital and Medical Center (hereinafter "Sunrise") from May 14, 2008 (date of birth) until August 2, 2008 being treated for various medical conditions. At discharge, Petitioner Piroozi ordered, among other things, follow-up CBC, Dif and Retic testing within one month and sent the child for a pediatrician follow-up. Thereafter, the parents of MayRose passed along the discharge instructions to former Defendant Ralph Conti, M.D. (hereinafter "Conti") during the first appointment with him at former Defendant Foothills Pediatrics (hereinafter "Foothills") just three days after the discharge from Sunrise. MayRose would attend six total visits with either Conti or other physicians at Foothills. The orders provided at discharge from Petitioner Piroozi were never carried out but, during the last visit at Foothills on October 24,

1 2008, a non-defendant Kathleen Weber, D.O., ordered blood testing to rule out a
2 viral infection. The tests ordered by Dr. Weber were carried out on October 28,
3 2008 but, unfortunately, the very next day, MayRose went into anemic shock and
4 was taken to Summerlin Hospital. Notably, the anemic shock incident took place
5 nearly three months after Petitioner Piroozi discharged the child from Sunrise
6 (discharge took place on August 2, 2008). It was later determined that the child
7 suffered a significant brain injury after the anemic shock incident. It wasn't until
8 April 7, 2009 that the child was diagnosed with Diamond Blackfan Anemia.
9

10
11 Prior to his passing, Conti testified in a deposition that he did not perform
12 the follow-up testing ordered by Petitioner Piroozi because he did not feel as
13 though such was necessary after examination of the child during the follow-up
14 appointments. As he was not sure whether or not he read the discharge summary
15 that was given to him by MayRose's mother, Conti testified that: "...If I had read
16 it, and I'm looking at this kid, and I'm looking at this, I'm looking at MayRose,
17 and I think she absolutely didn't need this, I probably wouldn't do it..." Prior to
18 his passing, both Conti and Foothills settled for a substantial amount.¹
19
20
21

22 During expert testimony in the case, Plaintiff's experts testified that: (1)
23 Neonatal physicians have a right to rely upon pediatricians to follow discharge
24
25

26 ¹ The amount of settlement is not disclosed herein as the Motion to Compromise
27 Minor's Claim in connection with the settlement was filed under seal. Upon Order
28 from this Court, the documentation regarding said Motion which references the
settlement amount can be filed under seal for the Court's review.

1 instructions; (2) neonatal physicians cannot be held responsible for actions of a
2 follow-up physician if orders are communicated to that follow-up physician and
3 not carried out; and (3) if Conti had followed the discharge instructions, it could
4 have prevented the profound anemia that allegedly ultimately led to the brain
5 injury.
6

7
8 The expert testimony discussed above prompted a Motion for Summary
9 Judgment on the issue of causation which was filed by Sunrise² and Joined by
10 Petitioner Piroozi and Defendant Blahnik. Respondent denied the Motion for
11 Summary Judgment finding that there was a question of fact as to causation.
12 Although an improper ruling, that ruling is not challenged at this time but will be
13 challenged on direct appeal should an adverse verdict be rendered. However, that
14 Motion for Summary Judgment is important as it provides the factual predicates in
15 this case and also contains important information relevant to the issues presented in
16 this Petition.
17
18
19

20 After the Motion for Summary Judgment was decided, Respondent also
21 heard and decided various Motions in Limine filed by Plaintiff. Specific to this
22 Petition is Motion in Limine No. 2 entitled: "Exclude Dr. Conti's Settlement from
23 Trial". Through that Motion in Limine, Plaintiff sought to: (1) Prohibit mention of
24 the Conti and Foothills settlement to the jury during trial; (2) prohibit
25 apportionment or comparison of fault (with offset after trial and removal of Conti
26
27

28 ² Sunrise is no longer a Defendant in this case as they also settled.

1 and Foothills from the verdict form); and (3) allow for introduction of all alleged
2 reasonable charged medical expenses. Regarding this particular Motion in Limine,
3
4 Respondent found:

5 Plaintiffs' Motion in Limine No. 2 regarding Dr. Conti's settlement is
6 **GRANTED**. Specifically, (1) The fact that a settlement has occurred
7 and the amount of the settlement paid by Dr. Conti and Foothills
8 Pediatrics will not be discussed at trial; (2) **Defendants are not**
9 **permitted to allocate fault to Dr. Conti and/or Foothills**
10 **Pediatrics, compare their fault to Dr. Conti's and/or Foothills**
11 **Pediatrics' fault or place Dr. Conti and/or Foothills Pediatrics on**
12 **the jury verdict form pursuant to NRS 41.141 and Banks v.**
13 **Sunrise Hospital, 120 Nev. 822, 102 P.3d 52 (2004); (3) Defendants**
14 **may argue to the jury that they are not at fault for MayRose's**
15 **injuries and/or that Dr. Conti and/or Foothills Pediatrics is 100%**
16 **at fault for her injuries; and (4) Plaintiffs are permitted to introduce**
17 **the full measure of their damages and the Defendants will receive an**
18 **offset if any verdict is rendered in the amount of any previous**
19 **settlement amounts pursuant to NRS 41.141.**

20 (Emphasis added).³

21 As will be discussed in the argument section, the findings that are
22 highlighted are in direct opposition of Nevada law and are challenged through this
23
24 Petition.

25 **II. STATEMENT OF FACTS**

26 Below is a comprehensive statement of facts that are relevant to the instant
27
28 Petition.

³ Of note, in the same Order granting Motion in Limine No. 2, Respondent also denied the above referenced Motion for Summary Judgment filed by Sunrise and Joined by Petition Piroozi and Defendant Blahnik.

1 1. Complaint

2 The Complaint in this matter was filed on was filed on May 14, 2010. (APP
3 1-86). Within the Complaint are allegations that Petitioner Piroozi, Defendant
4 Blahnik and Conti were negligent in their care of MayRose. (APP 9-11). There
5 are also allegations of vicarious liability against Foothills and Sunrise. (APP 11-
6 13). Attached to the Complaint are various affidavits including an affidavit from
7 Alan H. Rosenthal, M.D. who details the alleged negligence of Conti and, by way
8 of vicarious liability, Foothills. (APP 16-19). Dr. Rosenthal was eventually
9 disclosed as an expert against Conti and, by way of vicarious liability, Foothills.
10

11
12
13 2. General Statement of Facts

14 MayRose was born May 14, 2008 when Ms. Hurst was 28 6/7 weeks
15 pregnant and weighed 2 pounds 13 ounces. (APP 107-111) (discharge summary).
16 Mayrose was treated by various physicians for a plethora of serious medical
17 conditions and had multiple surgical procedures performed. (APP 107-111).
18 MayRose was in the Neonatal Intensive Care Unit (hereinafter "NICU") at Sunrise
19 for a period of 80 days from May 14, 2008 until August 2, 2008. (APP 107-111).
20 In the discharge summary, Petitioner Piroozi noted, among other things:
21
22

23 The family was instructed to call Dr. Conti for an appointment in 3
24 days...Follow-up tests: 1) Sweat test; 2) Head U/S; 3) **CBC, Dif,**
25 **Retic 1 month after discharge...**CC's to Ralph M. Conti, M.D....

26 (APP 111) (emphasis added).
27
28

1 On August 5, 2008, MayRose, Ms. Hurst and Mr. Abbington attended a
2 follow-up with Conti. (APP 113) (Foothills records). Ms. Hurst testified during
3 her deposition:
4

5 "Well Brian and I took [MayRose] and I handed [Conti] the
6 paperwork...I told him about our entire traumatizing experience from
7 day one with the thick nuchal fold all the way to discharge..."

8 (APP 236) (Hurst Depo at 110:10-16).

9 During the appointment, Conti noted that the child was a "well child." (APP
10 113). Conti did not order the follow-up blood testing. (APP 113). Regarding this,
11
12 Conti provided the following testimony during his deposition:

13 Q: Okay, so to be clear, in this case, is it your testimony that even if
14 you had read this discharge order on the first day that MayRose came
15 to you, on August 5, 2008, based on your assessment of her as time
16 goes on that she was not anemic, you would have chosen not to do
this test, the CBC with differential?

17 ...

18 A: I don't recall whether I read the discharge summary or not. If I
19 had read it, and I'm looking at the kid, and I'm looking at this, I'm
20 looking at MayRose, and I think she absolutely didn't need this, I
21 probably wouldn't do it...

22 (APP 169) (Conti Depo at 122:16-123:7).

23 Q: Okay. In any event, whether you read it or whether you didn't,
24 you did not comply with the NICU doctors' request that you draw a
25 CBC and diff with retic count 30 days after discharge, Correct?

26 ...

27 A: I did not order a CBC with retic count at the time. We order what
28 the child needs and nothing more.

1 Q: And it was your opinion based on your examination of MayRose,
2 that she did not require a follow-up CBC with differential and retic
3 count. Correct?

4 A: Yes.

5 (APP 171) (Conti Depo at 130:19-131:9).

6 Subsequent to the initial appointment, Conti and/or other physicians at
7 Foothills examined MayRose five other times over a nearly three month period
8 (from September 9, 2008 through October 24, 2008) but did not follow the
9 discharge instructions from Petitioner Piroozi. (APP 115-120) (Foothills records).
10 It is undisputed that on October 29, 2008 (nearly three months after discharge from
11 Sunrise), MayRose went into anemic shock. Plaintiff alleges that this anemic
12 shock caused significant brain injury. (APP 7-8). It is undisputed that MayRose
13 was eventually diagnosed with Diamond Blackfan Anemia.
14

15
16 3. Plaintiff's Experts Deposition Testimony
17

18 Plaintiff disclosed two experts regarding the standard of care required by
19 Petitioner Piroozi and Defendant Blahnik and causation. Those experts are Marcus
20 C. Hermansen, M.D. and John Strouse, M.D., Ph.D. (APP 129-136) (expert
21 reports). Both were deposed in connection with the lawsuit. (APP 174-194)
22 (Strouse Deposition Transcript); (APP 196-213) (Hermansen Deposition
23 Transcript).
24

25 During Dr. Strouse's deposition, the following colloquy took place:
26

27 Q: But you agree if the pediatrician in this case had ordered the
28 recommended tests for Mayrose within one month of her discharge

1 that that likely would have shown some anemia?

2 A: I think it would have almost certainly shown significant
3 anemia.

4 Q: And would you agree with me if that pediatrician had ordered
5 those tests and looked at the results that the episode of profound
6 anemia here could have been prevented?

7 A: I do.

8

9 Q: Okay. Would you expect – at least, based on the
10 recommendations here – would you expect a competent pediatrician
11 to actually order and assess the complete blood count and retics
12 recommended by Doctor Piroozi within one month post-discharge?

13 A: Yes.

14 ...

15 Q: The practical matter is, if once the child's in the pediatrician's
16 hands, whether he had diagnosed it in two weeks or thirty days, still
17 would have had the same outcome here if he doesn't do the test,
18 correct?

19 A: That is true.

20 (APP 186-187) (Strouse Depo at 50:5-15; 50:21-51:6; 55:12-17).

21 During Dr. Hermanson's deposition, the following colloquy took place:

22 ...But basically the answer is, if I've come up with a good plan
23 [discharge plan] and get that plan into the pediatrician's functions, to
24 get the pediatrician aware of the plan, agreeing to the plan and taking
25 it over, I think the neonatologist is off the case at that point.

26 Q: Okay. And once you've done that and gotten the plan into the
27 hands of the pediatrician, if subsequently the pediatrician decides to
28 ignore portions of your plan but doesn't tell you, do you think you're
responsible for the conduct?

A: Not if I've given him a good plan and communicated it. If I've
done those then – and – no, I don't feel responsible if they go on their
own route.

(APP 203-204) (Hermansen Depo at 32:14-33:3).

1 4. Stipulations By Plaintiff Regarding Evidence At Trial

2 Via stipulation, the parties agreed as follows regarding evidence that can or
3 cannot be presented at trial:
4

5 ...It is uncontested and agreed by all parties that Plaintiff's Diamond
6 Blackfan Anemia not being diagnosed in the NICU by Defendants
7 Martin Blahnik, M.D., and Ali Piroozi, M.D., was not below the
8 standard of care. All parties agree that it will not be argued before the
9 jury that Plaintiff's Diamond Blackfan Anemia should have been
10 diagnosed in the NICU by Defendants Martin Blahnik, M.D. and Ali
11 Piroozi, M.D.; however, Plaintiff specifically reserves the right to
12 argue, among other things, that the standard of care did require
13 Defendants Martin Blahnik and Ali Piroozi to recognize (1) that
14 MayRose Hurst's anemia was not 'due to prematurity'; (2) that there
15 was an undiagnosed pathological cause for the anemia; and (3) that
16 further investigation into the cause of MayRose's anemia was
17 warranted by said Defendants; and...

18 It is uncontested and agreed by all parties and their respective experts
19 that MayRose Hurst did not require further hospitalization at the time
20 of her discharge from the NICU. However, [Plaintiff] reserve[s] the
21 right to argue that MayRose Hurst's hematocrit and hemoglobin were
22 not stable at the time of discharge and were in fact on a downward
23 decline which indicated MayRose's need for both (1) investigation
24 into the cause of her ongoing anemia on either an inpatient or
25 outpatient basis; as well as (2) instructions to MayRose's parents and
26 pediatrician that she had ongoing anemia that would need to be
27 closely followed to determine if she would continue to require
28 transfusions on a weekly and/or bi-weekly basis as she had done from
the date of her birth. All parties agree that Defendants Martin
Blahnik, M.D., and Ali Piroozi, M.D., did not fall below the standard
of care by discharging Plaintiff from the NICU on August 2, 2008;
however, [Plaintiff] reserve[s] the right to argue that the method and
manner of MayRose's discharge, including the discharge plan,
instructions, orders, as well as the information given to the parents
and/or pediatrician at the time of discharge was below the standard of
care...

(APP 383-384) (Stipulation and Order).

1 5. Motion For Summary Judgment Regarding Causation

2 Based on the information available to the parties after all depositions were
3 taken and after Conti and Foothills were dismissed via settlement, on October 1,
4 2013, Sunrise moved for summary judgment regarding causation. (APP 87-213)
5 (Motion); (APP 220-281) (Reply). Petitioner Piroozi and Defendant Blahnik filed
6 Joinders to that Motion. (APP 214-216; APP 217-219).⁴ Respondent denied the
7 Motion for Summary Judgment finding that there was a question of fact regarding
8 causation. (APP 374).
9

10
11 6. Motion In Limine Regarding Conti/Foothills Settlement

12 On November 8, 2013, Plaintiff filed a Motion in Limine to exclude the
13 Conti and Foothills settlement from trial (entitled "Motion in Limine No. 2:
14 Exclude Dr. Conti's Settlement from Trial"). (APP 282-291). Specifically, the
15 Motion sought to: (1) Prohibit mention of the Conti and Foothills Settlement to the
16 jury during trial; (2) prohibit apportionment or comparison of fault (with offset
17 after trial and removal of Conti and Foothills from the verdict form); and (3) allow
18 for introduction of all alleged reasonable charged medical expenses. (APP 282-
19 291). On December 9, 2013, Petitioner Piroozi filed an Opposition to the Motion
20 in Limine. (APP 292-297). On December 9, 2013, Defendant Blahnik filed an
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26 ⁴ As the ruling on the Motion for Summary Judgment is not specifically challenged
27 in this Petition, all of the pleadings regarding this Motion are not attached.
28 Specifically, Plaintiff's Opposition is not attached as it is rather lengthy. Should
the Court wish to review the Opposition, it can be provided upon Order from this
Court.

1 Opposition to the Motion in Limine. (APP 298-304). On December 9, 2013,
2 Sunrise filed an Opposition to the Motion in Limine. (APP 305-314). On
3 December 30, 2013, Plaintiff filed a Reply to the Oppositions. (APP 315-324).
4 During the subsequent hearing on all Motions in Limine, Respondent requested
5 additional briefing regarding Motion in Limine No. 2. (APP 325-326) (Court
6 Minutes). On January 15, 2014, Sunrise filed Supplemental Briefing. (APP 351-
7 359). On January 17, 2014 Petitioner Piroozi filed Supplemental Briefing. (APP
8 327-334). On January 17, 2014, Defendant Blahnik filed Supplemental Briefing.
9 (APP 335-350). On January 17, 2014, Plaintiff filed Supplemental Briefing. (APP
10 360-370). After hearing on the issue, Respondent found as follows:

14 Plaintiffs' Motion in Limine No. 2 regarding Dr. Conti's settlement is
15 **GRANTED**. Specifically, (1) The fact that a settlement has occurred
16 and the amount of the settlement paid by Dr. Conti and Foothills
17 Pediatrics will not be discussed at trial; (2) **Defendants are not**
18 **permitted to allocate fault to Dr. Conti and/or Foothills**
19 **Pediatrics, compare their fault to Dr. Conti's and/or Foothills**
20 **Pediatrics' fault or place Dr. Conti and/or Foothills Pediatrics on**
21 **the jury verdict form pursuant to NRS 41.141 and Banks v.**
22 **Sunrise Hospital, 120 Nev. 822, 102 P.3d 52 (2004); (3) Defendants**
23 **may argue to the jury that they are not at fault for MayRose's**
24 **injuries and/or that Dr. Conti and/or Foothills Pediatrics is 100%**
at fault for her injuries; and (4) Plaintiffs are permitted to introduce
the full measure of their damages and the Defendants will receive an
offset if any verdict is rendered in the amount of any previous
settlement amounts pursuant to NRS 41.141.

25 (APP 374-375) (Emphasis added).

26 Petitioner challenges the findings in bold as discussed below.
27
28

1 **III. ISSUES PRESENTED**

2 Whether Respondent manifestly abused its discretion by: (1) Prohibiting the
3 remaining Defendants from allocating fault to Conti and/or Foothills and placing
4 Conti and Foothills on the verdict form; and (2) only allowing remaining
5 defendants to argue that they are not at fault and/or Conti and/or Foothills are
6 100% at fault.
7

8
9 **IV. STATEMENT OF REASONS WHY THIS COURT SHOULD ISSUE A WRIT OF MANDAMUS**

10
11 A. Writ Of Mandamus Standard/Request For Relief

12 A writ of mandamus is an extraordinary remedy by this Court available (1)
13 “to compel the performance of an act which the law requires as a duty resulting
14 from an office, trust or station”; (2) “to control a manifest abuse of or arbitrary or
15 capricious exercise of discretion”; or (3) “to clarify an important issue of law.”
16 Bennett v. Eighth Judicial Dist. Court, 121 Nev.Adv.Rep. 78, ___, 121 P.3d 605,
17 608 (2005) (internal quotation marks and citations omitted); NRAP 21. The
18 decision whether to issue a writ lies within this Court’s discretion, where the Court
19 “considers the interests of judicial economy and sound judicial administration.” Id.
20 (citing State v. Eighth Judicial Dist. Ct. (Riker), 121 Nev. ___, 112 P.3d 1070,
21 1074 (2005)). “[A] writ will not be issued by this court ‘where the petitioner has a
22 plain, speedy, and adequate remedy in the ordinary course of law.’” Id. (quoting
23 Riker, 121 Nev. at ___, 112 P.3d at 1074)).
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1 In the instant case, Respondent committed manifest abuse of discretion
2 because there was evidence specially submitted by Plaintiff in discovery that Conti
3 and Foothills are responsible for the injuries to Plaintiff and, to prohibit arguing
4 allocation of fault and placing both former defendants on the verdict form will
5 subject the remaining Defendants to joint and several liability. Such an error of
6 law calls for this Court to issue a Writ of Mandamus to prevent Petitioner from
7 incurring exorbitant and unwarranted legal fees⁵ to continue through a two week
8 trial that will most certainly have to be redone due to obvious error by Respondent.
9 There is no adequate and speedy remedy available to Petitioner to address this
10 problem as Petitioner should not have to adjudicate a trial that will be unfair which,
11 due to clear error, could subject Petitioner to a rather sizable verdict that will take
12 some time for appellate review.⁶

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16
17 B. Respondent Manifestly Abused Its Discretion When It Essentially
18 Reinstituted Joint And Several Liability In A Medical Malpractice
19 Case

20 Nevada Revised Statute 41A.045, in clear and unambiguous terms,
21 abrogates joint and several liability for medical malpractice defendants as the
22 statute provides:
23

24 In an action for injury or death against a provider of health care based
25 upon professional negligence, **each defendant is liable to the**
plaintiff for economic damages and noneconomic damages

26 ⁵ Along with Drs. Strouse and Hermansen, it is expected that Plaintiff will call a
27 total of 8 retained experts while the remaining Defendants will likely call at least 4
28 retained experts.

⁶ Plaintiff is seeking in excess \$10,000,000.00 in damages in this case.

1 **severally only, and not jointly, for that portion of the judgment**
2 **which represents the percentage of negligence attributable to the**
3 **defendant.**

4 This section is intended to **abrogate joint and several liability** of a
5 provider of health care in an action for injury or death against the
6 provider of health care based upon professional negligence.

7 (emphasis added).

8 By its terms, NRS 41A.045 is not limited to certain types of medical
9 malpractice cases and must be construed as applying to all medical malpractice
10 cases. In a medical malpractice case, a defendant can only be held liable for
11 his/her/its percentage of negligence. A defendant in a medical malpractice case
12 cannot be liable for his/her/its “percentage of negligence” if all reasonable parties
13 who could be responsible for the negligence are not included in the jury’s analysis.
14 In this statute, the word “percentage” must have meaning.⁷ To remove potentially
15 responsible parties from the verdict form would essentially subject medical
16 malpractice defendants to the concept of “joint and several” liability, which was
17 specifically abrogated by its terms through NRS 41A.045. The Nevada Legislature
18 left it to the Courts to protect the clear and unambiguous intention of ensuring that
19 no defendant in a medical malpractice case is held liable for more than his/her/its
20 percentage of negligence/fault for an alleged injury by a plaintiff. Accordingly,
21 this Court must correct Respondent’s decision that essentially allows a jury to find

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26 ⁷ This Court has held that a statute, “must be construed as a whole and not be read
27 in a way that would render words or phrases superfluous or make a provision
28 nugatory. . . . Further, every word, phrase, and provision of a statute is presumed to
 have meaning.” Butler v. State, 120 Nev. 879, 892-893, 102 P.3d 71, 81 (2004)
 (internal citations omitted).

1 the remaining Defendants subject to liability beyond those Defendants' percentage
2 of fault.

3
4 To make its finding, Respondent relied upon NRS 41.141 and Banks v.
5 Sunrise Hospital, 120 Nev. 822, 102 P.3d 52 (2004). As is discussed below, such
6 is not in alignment with current Nevada law.

7
8 Nevada Revised Statute 41.141 provides as follows:

9 **When comparative negligence not bar to recovery; jury**
10 **instructions; liability of multiple defendants.**

11 1. In any action to recover damages for death or injury to
12 persons or for injury to property in which comparative negligence is
13 asserted as a defense, **the comparative negligence of the plaintiff or**
14 **the plaintiff's decedent** does not bar a recovery if that negligence
was not greater than the negligence or gross negligence of the parties
to the action against whom recovery is sought.

15 2. In those cases, the judge shall instruct the jury that:

16 (a) The plaintiff may not recover if the plaintiff's
17 comparative negligence or that of the plaintiff's decedent is greater
than the negligence of the defendant or the combined negligence of
multiple defendants.

18 (b) If the jury determines the plaintiff is entitled to recover,
it shall return:

19 (1) By general verdict the total amount of damages the
20 plaintiff would be entitled to recover without regard to the **plaintiff's**
comparative negligence; and

21 (2) A special verdict indicating the percentage of
22 negligence attributable to each party remaining in the action.

23 3. If a defendant in such an action settles with the plaintiff
24 before the entry of judgment, the comparative negligence of that
25 defendant and the amount of the settlement must not thereafter be
26 admitted into evidence nor considered by the jury. The judge shall
deduct the amount of the settlement from the net sum otherwise
recoverable by the plaintiff pursuant to the general and special
verdicts.

27 4. **Where recovery is allowed against more than one**
28 **defendant in such an action, except as otherwise provided in**

1 subsection 5, each defendant is severally liable to the plaintiff only
2 for that portion of the judgment which represents the percentage
3 of negligence attributable to that defendant.

4 5. This section does not affect the joint and several
5 liability, if any, of the defendants in an action based upon:

- 6 (a) Strict liability;
- 7 (b) An intentional tort;
- 8 (c) The emission, disposal or spillage of a toxic or
9 hazardous substance;
- 10 (d) The concerted acts of the defendants; or
- 11 (e) An injury to any person or property resulting from a
12 product which is manufactured, distributed, sold or used in this State.

13 6. As used in this section:

- 14 (a) "Concerted acts of the defendants" does not include
15 negligent acts committed by providers of health care while working
16 together to provide treatment to a patient.
- 17 (b) "Provider of health care" has the meaning ascribed to it
18 in NRS 629.031.

19 (Emphasis added).

20 Respondent went astray by interpreting this statute because **comparative**
21 **negligence of the Plaintiff** is not the issue here. The issue is comparative
22 negligence of the current remaining non-settling Defendants and the former
23 settling Defendants and, as such, NRS 41.141 has no application and this Court
24 must correct such an error.

25 Respondent also relied upon this Court's ruling in Banks v. Sunrise
26 Hospital, 120 Nev. 822, 102 P.3d 52 (2004). In Banks, this Court held, in pertinent
27 part:

28 Nothing in NRS 41.141 prohibits a party from attempting to establish
that either no negligence occurred or that the entire responsibility for a
plaintiff's injury rests with non-parties, including those who have
separately settled their liabilities with the plaintiff.

1 Banks, 120 Nev. at 845, 102 P.3d at 67.

2
3 Respondent erred herein by applying Banks to this issue because, once
4 again, we are not dealing with an instance wherein comparative negligence of
5 Defendants (current and former) and Plaintiff is at issue, we are dealing with solely
6 apportionment of all former and current Defendants' allocation of fault. In
7 addition, Banks was issued after a trial that occurred in 1999, prior to the
8 enactment of NRS 41A.045 which did not come into effect until 2004. Id. at 829-
9 830, 102 P.3d at 57-58. As such, this Court must evaluate the current state of the
10 law on the issue of allocating percentage of negligence of all Defendants.
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14 Finally, it is worth noting that, although this Court does not have a case
15 directly on point, other states have allowed the placement of all possible current
16 and former Defendants on a verdict form and argument for a jury to compare the
17 negligence of all possible parties. See e.g. Le'Gall v. Lewis County, 129 Idaho
18 182, 185, 923 P.2d 427, 430 (1996) (citing Hickman v. Fraternal Order of Eagles,
19 114 Idaho 545, 547, 758 P.2d 704, 706 (Idaho 1988)) (holding in a non-medical
20 malpractices case "...the jury should consider the negligence of all actors involved
21 in the event giving rise to the negligence, even if the actors are not parties to the
22 particular action or they cannot be liable to the plaintiff by operation or law or
23 settlement...if the jury could conclude, based on the evidence, that an actor
24 negligently contributed to the plaintiff's injury, then the actor must be included on
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1 the special verdict form”).

2 Respondent clearly has abrogated several liability in this case by removing
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4 Conti and Foothills from the jury verdict form and by limiting the arguments of the
5 current Defendants at trial. Plaintiff herself has contended through her pleadings
6 and expert testimony that Conti and Foothills (by way of vicarious liability) were
7 negligent and caused damages. (APP 10-13; APP 16-19) (Complaint with
8 Rosenthal affidavit); (APP 186-187) (Strouse Depo at 50:5-15; 50:21-51:6; 55:12-
9 17); (APP 203-204) (Hermansen Depo at 32:14-33:3). As such, this Court must
10 issue a Writ of Mandamus to Respondent and Order that Respondent allow
11 placement of Conti and Foothills on the verdict form (or allow for special
12 interrogatories) and permit argument regarding apportionment of fault to those
13 former Defendants. As asserted at the outset, Petitioner requests that this Court
14 issue the requested Writ of Mandamus prior to the trial which commences on
15 February 18, 2014. Should this Court need additional time to evaluate this issue,
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1 **V. CONCLUSION**

2 For the foregoing reasons, Petitioner respectfully requests that this Court
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4 grant this Petition for Writ of Mandamus. Specifically, the Court should Order
5 Respondent to: (1) Place Conti and Foothills on the verdict form so that the jury
6 can allocate appropriate fault to them; and (2) allow for the remaining Defendants
7
8 to argue that the jury should allocate fault to Conti and Foothills and that the
9 remaining Defendants are not limited to only arguing that no negligence occurred
10 or that Conti and Foothills are 100% negligent.

11
12 Finally, should this Court need additional time to review this issue,
13 Petitioner request that, if such is necessary, this Court issue an Order staying the
14 case until resolution of this Petition.

15
16 Dated this 4th day of February, 2014.

17 **COTTON DRIGGS, WALCH,**
18 **HOLLEY, WOLOSON &**
19 **THOMPSON**

20 
21 JOHN H. COTTON, ESQ.

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27 Attorneys for Petitioner, Ali Piroozi,
28 M.D.

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[X] Proportionally spaced, has a typeface font of 14 points or more, and contains 6,203 words.

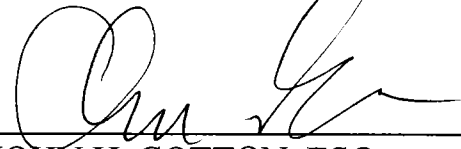
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1 requirements of this Nevada Rules of Appellate Procedure.

2 DATED this 4/12 day of February, 2014.

3 **COTTON DRIGGS, WALCH,**
4 **HOLLEY, WOLOSON &**
5 **THOMPSON**

6 

7 JOHN H. COTTON, ESQ.

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13 *Attorneys for Petitioner, Ali Piroozi,*
14 *M.D.*

CERTIFICATE OF MAILING

I HEREBY CERTIFY that, on the 4 day of February, 2014 and pursuant to NRCP 5(b), I deposited for mailing in the U.S. Mail a true and correct copy of the foregoing **EMERGENCY PETITION FOR WRIT OF MANDAMUS**, postage prepaid and addressed to:

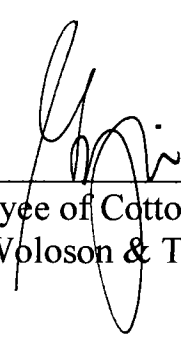
The Honorable Judge James Bixler
The Eighth Judicial District Court
Regional Justice Center
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Respondent

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