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BEFORE THE SUPREME COURT OF THE STATE OF NEVADA

ALI PIROOZI, M.D.,

Petitioner,

v.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE JAMES BIXLER, DISTRICT COURT JUDGE,

Respondent.

TIFFANI D. HURST and BRIAN ABBINGTON, jointly and on behalf of their minor child, MAYROSE LILI-ABBINGTON HURST,

Real Parties in Interest.

Supreme Court No. 64946

EJDC Case No. A-10-616728-C

REAL PARTIES IN INTEREST, TIFFANI HURST, BRIAN ABBINGTON AND MAYROSE LILI-ABBINGTON HURST'S ANSWER TO PETITIONER'S EMERGENCY PETITION FOR WRIT OF MANDAMUS

Real Parties in Interest Tiffani Hurst, Brian Abbington and MayRose Lili-Abbington Hurst ("the Plaintiffs"), by and through their counsel of record, hereby respectfully submit this Answer to Petitioner's Emergency Petition for Writ of Mandamus. Plaintiffs respectfully ask this Court to deny this Petition as it is not the proper method to challenge a ruling on a motion in limine. Furthermore, with regard to the few exceptions wherein this Court has been willing to entertain Writs of Mandamus that pertain to rulings on Motions in Limine, none of the subject exceptions are applicable to or present in the instant case. Finally, Judge Bixler's ruling is based upon law that is clear and unambiguous, and Judge Bixler correctly applied the law and rendered the appropriate decision. Accordingly, the Petition should be denied.

DATED this 10th day of February, 2014.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

ANSWER TO PETITIONER'S EMERGENCY PETITION FOR WRIT OF MANDAMUS

I.

INTRODUCTION

Petitioner Ali Piroozi, M.D. is attempting to challenge the Honorable James Bixler's ruling on Plaintiffs' Motion in Limine wherein he ordered that (1) evidence "allocating" fault between existing defendants and a settled out defendant (Dr. Ralph Conti) is inadmissible; and accordingly (2) Dr. Conti may not be placed on the verdict form.

Nevada law is clear and the district court applied such law properly. The district court ruled that Petitioner is permitted to argue to the jury that he is not at fault for MayRose Hurst's injuries and/or that the settled-out defendant, Dr. Conti, is 100% at fault for her injuries. In addition, if the jury finds in favor of MayRose Hurst, the district court explained that under the governing statute, Petitioner will be entitled to receive a full credit off the verdict in the amount of the settlement amounts paid by the former defendants to this matter who settled out before trial.

In so ruling, the district court relied upon NRS 41.141, which is directly on point with regard to whether fault may be allocated to settled-out defendants and/or whether they may be placed on the verdict form. It also relied upon *Banks v. Sunrise Hospital*, which interprets NRS 41.141 in light of a nearly identical

situation involving a trial defendant attempting to allocate fault to a settled out defendant at trial.

Despite the clarity in Nevada law on this issue, Petitioner has filed his Petition for Writ of Mandamus claiming that the district court manifestly abused its discretion in issuing this ruling. The Petition lacks merit for several reasons.

This Court has repeatedly held that a writ of mandamus is not the proper method to challenge a ruling on a motion in limine. Rather, the appropriate method is through an appeal post-verdict. Furthermore, this Court will **only** grant writs of mandamus to review a ruling on a motion in limine when the petitioner has no other plain, speedy, and adequate remedy in the ordinary course of law and if the petitioner has a clear right to the relief requested. Petitioner has not and cannot show that either of these conditions apply. Nevada law regards a post-verdict appeal as an adequate remedy to challenge such rulings and Petitioner is not entitled to have Nevada law interpreted in the manner that suits him best.

This Court has historically reviewed a ruling on a motion limine **only** if (1) the applicable law requires clarification, (2) the issue presented is one of first impression, or (3) if intervention by the court can avoid future litigation. Above all else, this Court's decisions with regard to writs are based on judicial economy, regardless of the circumstances.

Here, Petitioner has made clear he will pursue post-verdict appeals on other

issues, regardless of how this Court rules on the present issue. Therefore, the court's intervention will effectively have no impact on future litigation. Further, the law being challenged is clear, unambiguous, and has been unequivocally applied and interpreted by this Court. Thus, the issues presented are hardly those of first impression. Finally, this Court's intervention will not promote judicial economy. The issues Petitioner raise are not yet ripe and it is likely that, based on the verdict at trial, this issue will be moot. Therefore, there is no reason for the court and the parties to expend the time and resources to resolve an "issue" that is not yet ripe for decision and that is well-supported by both case law and statute.

Based on the foregoing, this Court should deny the Petition and permit the parties to proceed with the trial of this matter on **February 18, 2014.** Any objections or challenges to the district court's rulings should be brought on appeal post-verdict, if an adverse verdict is rendered.

II.

BACKGROUND FACTS

Petitioner blatantly misrepresents to this Court the facts of this case and the nature of Plaintiffs' claims against him and his co-defendant as a basis to try to persuade this court to place Dr. Conti on the verdict form. Petitioner and his co-defendant moved for summary judgment on the issue of causation, claiming that Dr. Conti was the sole cause of Plaintiff's harm. In opposing that Motion,

Plaintiffs fully briefed and set forth the facts, bases, and arguments to support their claims against Petitioner and his co-defendant. Plaintiffs refer this Court to that Opposition Brief (attached hereto as Appendix A). However, given the gravity of this Court's potential ruling, Plaintiffs want the strength of their claims against Petitioner made clear and set forth the following:

Plaintiffs' negligence claims against both Dr. Blahnik and Dr. Piroozi arise out of their failure to properly care for MayRose. MayRose was born prematurely one day shy of 29 weeks gestation. During that time, she was primarily under the care of Defendant Martin Blahnik, M.D. (her admitting and attending physician) and Petitioner Ali Piroozi, M.D (her discharging physician). At the time of MayRose's admission to the NICU, Dr. Blahnik examined MayRose but did not inquire about or take a history of her prenatal course. *See*, NICU Admission History & Physical, attached as Exhibit B to Appendix A.

Before MayRose was born, a prenatal test was conducted that showed MayRose had an abnormal and significantly thick nuchal fold. MayRose's mother, Tiffani Hurst, was referred to a perinatologist for further testing due to the abnormal nuchal fold test result. The perinatologist advised MayRose's parents that due to the severity of the abnormal result, MayRose would most certainly be born with some form of genetic birth defect. With further testing, the perinatologist was able to rule out down syndrome as well as cardiac

abnormalities, but the perinatologist advised that there was no way to test for every possible genetic defect so the parents would simply have to wait until MayRose was born to see what the genetic defect would be. *See*, Deposition of Tiffani Hurst, attached as Exhibit A to Appendix A.

Shortly after her birth, MayRose developed necrotizing enterocolitis ("NEC") and required surgery to repair the same. When MayRose's parents were informed of this condition, they asked if the NEC was the genetic birth defect the abnormal nuchal fold test forecast. They were told it was not but was likely the result of the tocolytic medications administered to MayRose's mother in an attempt to prevent MayRose's premature delivery. *See* Exhibit A to Appendix A.

When MayRose was born, she was anemic and transfusion-dependent and remained so throughout her 88 day NICU stay, requiring 11 transfusions. Her anemia at birth was slightly macrocytic in nature. Dr. Blahnik was confused by MayRose's macrocytic anemia at birth and did not know the cause of it. He later attributed it to blood loss as a result of her NEC, even though macrocytic anemia is inconsistent with anemia caused by blood loss. Dr. Blahnik admitted at his deposition that he knew MayRose's anemia at birth was *not* "anemia due to prematurity." He also admitted that he knew macrocytic anemia is a characteristic of a genetic blood disorder called Diamond Blackfan Anemia. *See,* Deposition of Martin Blahnik, attached as Exhibit C to Appendix A. Several months after

MayRose's discharge from the NICU and after MayRose developed anemic shock and suffered the ensuing brain injury that gave rise to this action, it was determined that MayRose's unknown but anticipated birth defect was Diamond Blackfan Anemia. *See*, Discharge Summary from Denver Children's Hospital, attached as Exhibit D to Appendix A

Throughout MayRose's NICU stay, she continued to be anemic and to require transfusions. She had 11 transfusions in all. According to Plaintiffs' expert Marcus Hermansen, M.D., premature infants born with the same types of problems MayRose suffered during her NICU stay, namely NEC and sepsis, rarely require 1 transfusion, let alone 11. *See,* Expert Report of Marcus Hermansen, M.D. attached as Exhibit E to Appendix A. Notwithstanding the inordinate number of transfusions MayRose required, her NICU physicians maintained that MayRose's anemia was simply due to her prematurity and would go away. MayRose's parents questioned Defendants about MayRose's anemia and her need for transfusions. They asked if the anemia could be the genetic defect the perinatologist was expecting as a result of MayRose's abnormal nuchal fold test result. They informed the Defendants that MayRose's father had a family history of Thalassemia, a genetic blood disorder. However, Defendants maintained that MayRose's anemia was **not** the result of a genetic blood disorder. They repeatedly indicated that it was due to her prematurity; that it was perfectly

normal and commonplace in premature infants, and that it was not dangerous or anything about which to be concerned. *See* Exhibit A to Appendix A.

During the course of MayRose's NICU stay, two reticulocyte tests were ordered to determine if MayRose could produce red blood cells on her own. These tests were ordered even in light of the fact that repeated transfusions will temporarily suppress the recipient's red blood cell production and MayRose was receiving repeated transfusions. The subject tests were conducted approximately 3 ½ weeks apart, with the second test being taken the day before MayRose's discharge from the NICU. The test results established that MayRose's ability to produce red blood cells was compromised and, in fact, at the time of her discharge from the hospital, she was ***not producing any red blood cells at all***. *See* Labs, attached as Exhibit F to Appendix A. Of the 11 transfusions MayRose received during her hospitalization, two of them were within the two-week period prior to her discharge. On the day before her discharge and less than one week from her last transfusion, the NICU physicians took a CBC to measure MayRose's blood count to determine if she was able to maintain her blood count following her last transfusion. That test result demonstrated that MayRose's blood count was once again falling. *Id.*

Throughout MayRose's NICU stay, the longest she was able to go without requiring a transfusion was less than 2 ½ weeks. Usually, she required a

transfusion every one to two weeks. Notwithstanding these facts, MayRose was discharged home without any orders for further transfusions and with an order for a follow-up CBC in 30 days. *See*, Exhibit F and Neonatal Discharge Instructions, attached as Exhibit G to Appendix A.

At the time of her discharge, MayRose's parents were told that MayRose was "a healthy baby." Defendants did not tell MayRose's parents at discharge or at any time during her NICU stay that she was transfusion-dependent or had any ongoing anemia or concerns relating to the same. MayRose's parents understood at the time of discharge that MayRose's "Anemia due to prematurity" had resolved and there was nothing further that needed to be done with regard to the anemia. *See*, Exhibit A attached to Appendix A

The discharge instructions reported that MayRose received 5 transfusions while she was in the NICU. It also reported that MayRose was born with "Anemia due to Prematurity" that had resolved on July 21, 2010, nearly two weeks prior to MayRose's discharge. Specifically, the discharge instructions read under the "Hematology" section:

> **HEMATOLOGY**
> The initial hematocrit was 31% on 5/15/2008. The most recent hematocrit was 30% on 8/1/2008. She was given 5 transfusions. The blood type is O+. The DAT is negative. The highest bilirubin level was 10.34 mg/dl on 5/20/2008. The last bilirubin level was 2.8 mg/dl on 7/28/2008.
> DIAGNOSES:

Anemia of prematurity (5/15/2008 – 7/21/2008)
Jaundice due to prematurity (5/16/2008-5/26/2008)

See, Discharge Instructions attached as Exhibit G to Appendix A. The discharge instructions do not mention that MayRose had actually received 11 transfusions, nor do they mention the results of her reticulocyte tests demonstrating that she was not producing any red blood cells. The discharge instructions similarly are silent with respect to the fact that MayRose required two transfusions within the two week period prior to her discharge and that in spite of those transfusions, the results of the CBC drawn the day before her discharge demonstrated that she was not able to maintain her own blood count and that it was falling again. *Id.*

In the discharge summary, there is a section devoted to "special considerations" and those items are in bold-faced type and read:

> **Special Considerations: 1) The infant requires a Sweat Chloride test by 3 months of age due to abnormal CF (IRT) newborn screening test. 2) The infant requires a Head U/S within 1 month after discharge to follow grade 1 sub-acute IVH.**

There is no mention of any concerns pertaining to ongoing anemia or the need for close follow-up, testing or possible transfusions under the "Special Considerations" section of the discharge instructions. *See*, Discharge Instructions, attached as Exhibit G to Appendix A.

Towards the very end of the discharge instructions, it asks for a "CBC, Dif, Retic 1 month after discharge." The NICU physicians never discussed with

MayRose's parents MayRose's "reticulocyte" test results, what those results meant or even why those tests were performed. The NICU physicians similarly failed to discuss with MayRose's parents the recommendation for a follow-up CBC, Dif, Retic 1 month after discharge, what those tests were for or why they were needed. On the contrary, Dr. Piroozi told MayRose's mother that MayRose was a healthy baby and there was nothing to worry about, particularly with respect to her past diagnosis of Anemia due to prematurity. *See* Exhibit A to Appendix A. The NICU physicians also did not contact or have any discussions pertaining to MayRose or her NICU history with Dr. Ralph Conti, her pediatrician. *See* Deposition of Ali Piroozi, M.D. attached as Exhibit H to Appendix A; *see also* Deposition of Martin Blahnik, M.D. attached as Exhibit C to Appendix A.

When MayRose began treating with Dr. Conti, Dr. Conti had no reason to suspect that MayRose had any ongoing issues with anemia or that she was, indeed, transfusion-dependent. Over the course of the next two and half months, MayRose's condition slowly deteriorated until such time as she became ill and went into anemic shock. Following her episode of anemic shock, it was discovered that she sustained a massive watershed-distribution injury to her brain. *See* Discharge Summary from Summerlin Hospital, attached as Exhibit I to Appendix A. MayRose received treatment for her anemic shock at Summerlin hospital where she again required repeated transfusions. Following her discharge

from Summerlin, her mother took her to Denver Children's hospital for rehabilitation for her severe brain injury. While at Denver Children's, MayRose continued to require transfusions and a diagnosis of Diamond Blackfan Anemia was made. *See* Discharge from Denver Children's Hospital, attached as Exhibit D to Appendix A. The diagnosis was later confirmed with genetic testing at Schneider's hospital in New York.

Petitioner's recitation of facts suggests to the court that Dr. Conti was the sole cause of her harm and that both he and his co-defendant ("the Defendants") bear no culpability for MayRose's injuries. Such a contention is blatantly false and misleading and against the clear weight of the evidence. Indeed, it is the very negligence of the Defendants that led to and ensured Dr. Conti's negligent decision not to perform the follow-up CBC. The Defendants were apprised of all of the relevant and critical information needed to understand why a follow-up CBC was necessary. Unfortunately, Defendants chose not to share that information with either the parents or the pediatrician. Instead, Defendants told the parents that MayRose's anemia was innocuous and simply due to her prematurity—that it was commonplace and nothing to worry about. They failed to report the true number of transfusions she had during her NICU stay in the discharge instructions and again indicated that her anemia was "due to prematurity" and had resolved. There is nothing in the discharge instructions to indicate that MayRose had ongoing

anemia, that she continued to be transfusion dependent, or that there was any reason why she would need a follow-up CBC, despite the medical evidence known to Defendants at the time of MayRose's discharge.

Accordingly, the Defendants' negligence was a direct precipitator and predictor of Dr. Conti's negligence. Indeed, it is entirely foreseeable that based upon the false information given to the parents and contained in the discharge instructions, that Dr. Conti may determine that the requested follow-up CBC was not necessary. Thus, Dr. Conti's negligent decision not to perform the follow-up CBC was the direct result of the NICU physicians' negligence.

Defendants had many more opportunities to prevent MayRose's brain injuries from occurring. Defendants were the ones who possessed of all of the critical and relevant information to recognize that something was seriously wrong with respect to MayRose's ongoing anemia and transfusion dependence and should have taken action to discover the cause of MayRose's anemia or, at the very least, to ensure that she continued to receive the transfusions she needed until the cause of her anemia could be ascertained by others.

Defendants had many options available to them. They could have conducted the necessary tests themselves; they could have referred MayRose to a hematologist for testing; they could have provided discharge instructions that would ensure proper and timely transfusions until a specialist could diagnose the

cause of her anemia. They simply could have informed MayRose's parents, as well as her pediatrician, that MayRose had ongoing anemia of unexplained origin and would continue to need transfusions until a diagnosis could be made. Any one of these actions would have prevented MayRose's brain injury just as surely as the follow-up CBC that Dr. Conti failed to perform. Unfortunately, Defendants took none of these actions. Instead, they misdiagnosed MayRose with Anemia due to Prematurity, told her parents and her pediatrician that the anemia had resolved, misrepresented the number of transfusions she had during her NICU stay, gave no importance whatsoever to the anemia in the discharge instructions and provided no explanation as to why a follow-up CBC was being requested and/or was needed. Defendants' failures are a direct and proximate cause of MayRose's brain injury.

Said Defendants cannot escape liability because Dr. Conti also had an opportunity to prevent the brain injury and failed as well, particularly in light of the fact that the defendants' actions set the stage and are to blame for Dr. Conti's tragic and uninformed decision not to conduct the follow-up CBC. Based on the foregoing, it is **clear** that Plaintiffs have a valid claim against Petitioner and his co-defendant. The absence of Dr. Conti on the verdict form is in conformity with Nevada law. Petitioner's entitlement to a credit against the verdict in the amount of the settlement Dr. Conti has already paid more than adequately remedies any perceived injustice created by Nevada statute and case law that prohibits Dr. Conti

from being placed on the verdict form.

II.

ARGUMENT

THE PETITION SHOULD BE DENIED

Petitioner challenges Judge James Bixler's ruling on Plaintiffs' Motion in Limine concerning the allocation of fault to a settled out defendant and the placement of that defendant on the verdict form. In doing so, Petitioner claims that extraordinary relief is warranted because Judge Bixler manifestly abused his discretion by excluding this evidence and further contends that Petitioner has no plain, speedy, and adequate remedy in the ordinary course of the law. Petitioner's argument lacks merit.

A.

GOVERNING LAW AND STANDARD OF REVIEW

A writ of mandamus is an extraordinary remedy. Its purpose is to "control an arbitrary or capricious exercise of discretion". *Gumm ex rel. Gumm v. Nevada Dep't of Educ.*, 121 Nev. 371, 375, 113 P.3d 853, 856 (2005). The determination of whether to consider a petition is solely within the discretion of this Court. *Falk v. Eighth Judicial Dist. Court ex rel. Cnty. of Clark*, 124 Nev. 1465, 238 P.3d 810 (2008). A writ of mandamus is available to compel the performance of an act that the law requires, or to control a manifest abuse of discretion. *Id.* Subject to very

narrow exceptions, "[t]he petition will **only** be granted when **[(1)]** the petitioner has a clear right to the relief requested ***and*** **[(2)]** no plain, speedy, and adequate remedy in the ordinary course of law." *Id.* (emphasis added). Furthermore, the burden is on the petitioner to establish that mandamus relief is appropriate. *Id.*

B.

A WRIT OF MANDAMUS IS AN INAPPROPRIATE AND IMPROPER METHOD TO CHALLENGE A RULING ON A MOTION IN LIMINE

This court has repeatedly held that writs of mandamus seeking to challenge a district court's ruling on a motion in limine are improper and must be denied:

> This petition challenges the admissibility of evidence, a decision that is within the broad discretion of the district court. We have previously held that ***the determination regarding the admissibility of evidence is not ... a question properly addressed in a petition for a writ of mandate. The district court's decisions concerning admissibility of evidence are properly challenged on appeal from a final judgment.*** Accordingly, we ORDER the petition **DENIED**.

Falk v. Eighth Judicial Dist. Court ex rel. Cnty. of Clark, 124 Nev. 1465, 238 P.3d 810 (2008) (emphasis added) (quotations omitted). *See also Walton v. District Court*, 94 Nev. 690, 693, 586 P.2d 309, 311 (1978); *Raley's, Inc. v. Second Judicial Dist. Court of State ex rel. Cnty. of Washoe*, 124 Nev. 1501, 238 P.3d 847 (2008); *Beling v. Eighth Judicial Dist. Court of State ex rel. Cnty. of Clark*, 124 Nev. 1452, 238 P.3d 795 (2008); *Soder v. Eighth Judicial Dist. Court of State ex rel. Cnty. of Clark*, 124 Nev. 1509, 238 P.3d 856 (2008).

Petitioner is challenging the district court's ruling excluding evidence of allocation of fault to a previously settled out defendant, in accordance with NRS 41.141. In conformity with NRS 41.141 as interpreted by this Court in *Banks v. Sunrise Hospital*, 120 Nev. 822, 102 P.3d 52 (2004), the district court ruled that Petitioner and his co-defendant are still entitled to argue that either (a) they were not negligent in their care of MayRose, or (b) 100% of the fault lies on Dr. Conti. Such a ruling, no matter how it is couched, remains an evidentiary ruling, which the district court has broad discretion to make. *Sheehan & Sheehan v. Nelson Malley & Co.*, 121 Nev. 481, 492, 117 P.3d 219, 226 (2005). Thus, a writ of mandamus is the inappropriate method of challenging the ruling at issue and the Petition should be denied.

C.

AN APPEAL POST-VERDICT IS A PLAIN, ADEQUATE, AND SPEEDY LEGAL REMEDY

"Generally, a writ may issue **only** when petitioners have no plain, speedy, and adequate legal remedy, ***and this court has consistently held that an appeal is generally an adequate legal remedy precluding writ relief***." *Beling v. Eighth Judicial Dist. Court of State ex rel. Cnty. of Clark*, 124 Nev. 1452, 238 P.3d 795 (2008) (emphasis added); *see also Turnberry/Centra Sub, LLC v. Eighth Judicial Dist. Court of State*, 56927, 2010 WL 4068928 (Nev. Oct. 15, 2010) ("[T]his court has consistently held that an appeal is an adequate legal remedy precluding writ

relief. Here, petitioners have an adequate legal remedy precluding writ relief in the form of an appeal from any judgment.")

Petitioner (who bears the burden of proof) has not shown the court that he will be unable to lodge an appeal post-verdict. In fact, the opposite is true. Petitioner concedes in his Petition that he intends to appeal this case post-verdict regardless of this Court's ruling on the instant Writ. Under this Court's precedent for deciding writs of mandamus as to motions in limine, the Petition is improperly brought given the availability of a plain, adequate, and speedy legal remedy.[1]

In fact, this Court has flat out rejected the arguments Petitioner is making to justify this Court's intervention in this matter at this time. *See Turnberry/Centra Sub, LLC v. Eighth Judicial Dist. Court of State*, 56927, 2010 WL 4068928 (Nev. Oct. 15, 2010) ("A writ of mandamus may be issued only when petitioners have no plain, speedy, and adequate legal remedy, NRS 34 .170, and this court has consistently held that **an appeal is an adequate legal remedy precluding writ relief**."); *Williams v. Eight Judicial Dist. Court of State, ex rel. Cnty. of Clark*, 127 Nev. Adv. Op. 45, 262 P.3d 360, 364 (2011) ("...the opportunity to appeal a final judgment typically provides an adequate legal remedy."); *Health Plan of Nevada,*

[1] Petitioner also pleas for this Court to review the subject ruling, noting that this will be a two week trial where 12 experts will be testifying. However, "***[t]he fact that petitioners will be required to incur attorney fees and other litigation expenses in the course of trying the underlying case does not warrant this court's intervention by way of extraordinary relief.***" *Beling v. Eighth Judicial Dist. Court of State ex rel. Cnty. of Clark*, 124 Nev. 1452, 238 P.3d 795 (2008) (emphasis added).

Inc. v. Judicial Dist. Court of State ex rel. Cnty. of Clark, 62483, 2013 WL 328664 (Nev. Jan. 25, 2013).

Thus, regardless of Petitioner's preferences, this Court's strong precedent forecloses on the remedy Petitioner is seeking. Rather, Petitioner is entitled to pursue post-verdict relief, such as an appeal, should the jury render an adverse verdict for Petitioner. Therefore, the Petition should be denied.

D.

NO CLEAR RIGHT TO THE RELIEF REQUESTED EXISTS

Not only is the first prerequisite not satisfied due to the availability of a post-verdict appeal, Petitioner likewise cannot show that he has a "clear right to the relief requested". *Falk v. Eighth Judicial Dist. Court ex rel. Cnty. of Clark*, 124 Nev. 1465, 238 P.3d 810 (2008). Petitioner is certainly not entitled to present evidence at trial that is specifically excluded under both a Nevada statute (NRS 41.141) and this Court's decision applying the statute to a nearly identical situation (*Banks v. Sunrise Hosp.*, 102 P.3d 52 (Nev. 2004).) Therefore, Petitioner fails to satisfy this prerequisite and the Petition should be denied.

E.

THE NARROW EXCEPTIONS TO THIS ANALYSIS DO NOT APPLY

This court has permitted review of a motion in limine ruling from a writ of mandamus in very limited, narrow circumstances. Those circumstances are: (1)

when an important issue of law needs clarification and public policy is served by the court's intervention; (2) when the issue is of first impression and of fundamental public importance; (3) when resolution of the writ will mitigate or resolve related or future litigation. *Williams v. Eight Judicial Dist. Court of State, ex rel. County of Clark*, 127 Nev. Adv. Op. 45, 262 P.3d 360 (2011). However, above all else, this Court's decision will turn on the promotion of judicial economy. *Williams*, 262 P.3d at 365 (citing *Smith v. District Court*, 113 Nev. 1343, 1345, 950 P.2d 280, 281 (1997) ("The interests of judicial economy...will remain the primary standard by which this court exercises its discretion.")

1. THE APPLICABLE LAW DOES NOT REQUIRE CLARIFICATION.

The applicable law relied upon by the district court to rule on the subject Motion in Limine is clear, unambiguous, and does not require clarification from this court. The district court ruled:

> Plaintiffs' Motion in Limine No.2 regarding Dr. Conti's settlement is **GRANTED.** Specifically, (1) The fact that a settlement has occurred and the amount of the settlement paid by Dr. Conti and Foothills Pediatrics will not be discussed at trial; (2) Defendants are not permitted to allocate fault to Dr. Conti and/or Foothills Pediatrics, compare their fault to Dr. Conti's and/or Foothills Pediatrics' fault or place Dr. Conti and/or Foothills Pediatrics on the jury verdict form pursuant to NRS 41.141 and *Banks v. Sunrise Hospital*, 120 Nev. 822, 102 P.3d 52 (2004); (3) Defendants may argue to the jury that they are not at fault for MayRose's 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. (*See Pre-Trial Order*, attached as part of Appendix A.) As the Order makes clear, the district court relied on both NRS 41.141 and *Banks v. Sunrise Hospital*, 120 Nev. 822, 102 P.3d 52 (2004), which applies and interprets NRS 41.141 to a nearly identical situation. Therefore, the district court could hardly be said to have manifestly abused its discretion. Indeed, NRS 41.141 unambiguously provides:

> If a defendant in such an action settles with the plaintiff before the entry of judgment, **the comparative negligence of that defendant and the amount of the settlement must not thereafter be 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.

NRS 41.141(3) (emphasis added). In this case, it is undisputed that Dr. Conti and Plaintiffs reached a settlement as to Plaintiffs' claims against him well before trial in this matter. Accordingly, NRS 41.141 expressly prohibits the current trial defendants from allocating fault to Dr. Conti or placing him on the verdict form.

This Court addressed this issue in *Banks v. Sunrise Hosp.*, 102 P.3d 52 (Nev. 2004). Like the case at bar, *Banks* was a medical malpractice case against an orthopedic surgeon, an anesthesiologist, and the hospital where the subject surgery occurred. Mr. Banks underwent rotator cuff surgery, during which complications arose with the anesthesia being administered that ultimately killed Mr. Banks. His heirs later brought suit against these medical providers. Before trial, the heirs

settled their claims with both the orthopedic surgeon and the anesthesiologist, leaving the hospital as the sole defendant at trial. This Court in *Banks* reviewed whether the hospital was entitled to allocate fault to the orthopedic surgeon or anesthesiologist. The court held it could not, explaining:

> We likewise reject Banks's contentions that the jury reduced the verdict based upon alleged violations of NRS 41.141(3), which states that if a codefendant settles with the plaintiff in a case in which the remaining defendant asserts a comparative negligence defense, the jury may not consider the codefendant's comparative negligence or the settlement amount. We conclude that NRS 41.141(3) has no bearing on the issues of whether Sunrise could argue a nonparty's fault in this instance...NRS 41.141 only prevents admission of evidence in support of a "comparative fault" or apportionment analysis of the case as to nonparties, and a jury may only "compare" the negligence as between parties and nonparties. Nothing in NRS 41.141 prohibits a party defendant from attempting to establish that either no negligence occurred or that the entire responsibility for a plaintiff's injuries rests with nonparties, including those who have separately settled their liabilities with the plaintiff...[N]either party submitted a comparative negligence instruction nor requested special verdict forms delineating the comparative negligence of Sunrise and Dr. Kinsman. In light of the above, there is no indication that the jury accounted for Dr. Kinsman's negligence in its award of damages. Accordingly, we conclude that this argument is without merit.

This court ultimately held that the district court did not err by allowing the hospital to argue that the settled out defendants were 100% at fault for Mr. Bank's death, in accordance with NRS 41.141. This Court made clear that while NRS 41.141 prohibits a settled out defendant to be placed on the verdict form and to allocate fault to them, it does not prohibit them from blaming a settled out defendant for the

injuries caused.

In other words, Petitioner and his co-defendant cannot compare their fault with Dr. Conti's, but they may argue that (a) they were not negligent in their care of MayRose, and/or (b) Dr. Conti's fault is the sole and proximate cause of MayRose's injuries. That is what Nevada law permits in this circumstance, and that is exactly what Judge Bixler's order permits Petitioner to do.

In order to avoid this reality and to claim that Nevada law on this issue requires clarification, Petitioner argues that both NRS 41.141 and *Banks* are somehow not applicable due to the existence of NRS 41A.045, which provides in its entirety:

> 1. In an action for injury or death against a provider of health care based upon professional negligence, each defendant is liable to the plaintiff for economic damages and noneconomic damages severally only, and not jointly, for that portion of the judgment which represents the percentage of negligence attributable to the defendant.
>
> 2. This section is intended to abrogate joint and several liability of a provider of health care in an action for injury or death against the provider of health care based upon professional negligence.

NRS 41A.045. Petitioner claims this statute abrogates joint and several liability and thus the comparative fault statute – NRS 41.141 – does not apply. However, the comparative fault statute is in accord with NRS 41A.045 and also provides for several liability, not joint and several liability.

NRS 41.141 provides in pertinent part:

> Where recovery is allowed against more than one defendant in such an action, except as otherwise provided in subsection 5, ***each defendant is severally liable to the plaintiff only for that portion of the judgment which represents the percentage of negligence attributable to that defendant***.

NRS 41A.045(1) provides in pertinent part:

> In an action for injury or death against a provider of health care based upon professional negligence, each defendant is liable to the plaintiff for economic damages and noneconomic damages severally only, and not jointly, for that ***portion of the judgment which represents the percentage of negligence attributable to the defendant***.

These statutes are in harmony with one another, as neither statute can be said to impose joint and several liability on Petitioner and his co-defendant.

Petitioner also argues that NRS 41.141 does not apply because the "comparative negligence of Plaintiff is not at issue here." (See Petition 16:15-16). Rather, Petitioner argues that "[t]he issue is [the] comparative negligence of the current remaining non-settling Defendants and the former settling Defendants." (See *id.*) Petitioner's argument misses on two points. First, Petitioner misinterprets NRS 41.141 if he truly believes it pertains only to the comparative fault of the Plaintiff. On the contrary, it speaks directly to the issue of comparing fault among defendants—parties and non-parties. Second, Petitioner has already represented to the trial court that Plaintiffs' comparative negligence will be an issue at trial. Plaintiffs filed a Motion for Partial Summary Judgment specifically

on the defendants' affirmative defense that Plaintiffs were somehow negligent. Defendants vehemently opposed this Motion and argued to the district court that this Motion should be denied. In the opposition brief[2], Petitioner indicated that he believes there is a good faith basis to allocate fault to Plaintiffs at trial and all his actions to date make it clear that he intends to do so at trial. Therefore, Petitioner is incorrectly representing to this court that Plaintiffs' fault is not an issue in this case.

Finally, Petitioner argues that this Court's ruling in *Banks v. Sunrise Hospital* is superseded by the enactment of NRS 41A.045. The only evidence to support this contention is the mere fact that this statute was enacted after *Banks* was decided. However, the mere enactment of subsequent legislation does not automatically call the case's application (or the statute upon which it relies) into question.

Indeed, both NRS 41A.045 and NRS 41.141 (which this Court relied upon in *Banks*) are consistent and are not at odds with one another. They make one thing clear: in a medical malpractice action in Nevada, a doctor is only severally liable for his/her percentage of fault and if one defendant settles the claims against him before trial, the remaining defendants may not allocate fault to him at trial.

[2] Sunrise Hospital, one of the former defendants, filed its opposition to this Motion on October 18, 2013. Petitioner joined in that Motion on October 23, 2013.

See NRS 41.141. To remedy what appears to be an inequity to the remaining defendants at trial, Nevada law grants those defendants a full credit against the verdict for the entire amount of all settlement funds paid prior to trial. *See* NRS 41.141 ("...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.")

Thus, the remaining defendants are not held jointly liable for the settled-out parties' fault—they receive a credit against the verdict. Ironically, this credit may, in fact, work to allow the remaining defendants to escape responsibility for their own proportionate share of the fault. For example, if a jury renders a verdict for plaintiff in the amount of $500,000 but a settled out defendant has already paid that amount or more, the remaining defendants would escape all responsibility in the matter.

This Court has made clear that its role is to apply the express language of the statute. *Hernandez v. Bennett–Haron*, 287 P.3d 305, 315 (2012). This Court has also indicated courts should "avoid statutory interpretation that renders language meaningless or superfluous, and if the statute's language is clear and unambiguous, [the court will] enforce the statute as written." *George J. v. State (In re George J.)*, 279 P.3d 187, 190 (2012). Additionally, the court will construe "statutes to preserve harmony among them." *Canarelli v. Eighth Judicial Dist. Court*, 265

P.3d 673, 677 (2011). Adopting Petitioner's position would require this court to apply the statutes in a manner different than how they are written and in a manner which renders NRS 41.141 meaningless.

NRS 41.141 should be enforced as written. The scheme provided by NRS 41.141 does not impose joint and several liability upon a single defendant-doctor. While a jury may not consider the fault of former defendants, Petitioner and his remaining co-defendant are entitled to a full credit in the amount of all settlement amounts obtained by the plaintiffs before trial. Therefore, Petitioner cannot claim he is being held jointly and severally liable for all of Plaintiffs' damages when he will receive a credit in the amount of the "substantial amount" received from the settled out Defendants off any verdict the jury renders. Given the foregoing, Nevada law is clear and unambiguous. Judge Bixler did not commit manifest error or abuse his discretion in ruling on Plaintiffs' Motion in Limine. There is also no ambiguity in the applicable statutes that requires clarification. Therefore, this Petition is not properly before the Court and should be denied.

2. THERE IS NO ISSUE OF FIRST IMPRESSION THAT REQUIRES RESOLUTION.

The issues Petitioner raises through this Petition have already been addressed by the court. In addition, explicitly clear statutes exist that specifically explain how a trial defendant may address the fault of a prior defendant who settled the claims against him before trial. Petitioner can point to no issue of first impression

that requires the Court to stay this matter, which has been pending for four years now to address a ruling adverse to Petitioner that is based on well-established precedent and clear statutory authority. This is not a situation that requires the Court's "emergency" involvement. Against the clear weight of authority stating a writ of mandamus is an improper venue to challenge a ruling on a motion in limine, Petitioner is unable to point this court to any novel issue of law that rests beyond either the case law or Nevada's statutes. Accordingly, this exception also does not justify this court's involvement.

3. NO FUTURE LITIGATION CAN BE AVOIDED BY THIS COURT'S INTERVENTION AT THIS TIME.

This Court's intervention will not avoid future litigation and therefore there is no need for the Court's intervention at this time. The issue raised by Petitioner is not yet ripe because there is no verdict in favor of Plaintiffs at this time. Petitioner may succeed in his defense before the jury. Therefore, requiring the parties to engage in the appellate process at this time is both speculative and a waste of the parties' and the court's resources.

In addition, even if this issue requires the court's attention, it would be much more efficient if the issues were addressed collectively after the trial rather than piecemeal before and after the trial. As Petitioner makes clear in his Petition, he intends to file an appeal if any verdict is rendered against him. (See Petition at

3:11-13.) Therefore, as it appears, future litigation is imminent regardless of the outcome of the trial. Therefore, staying the case or intervening at this stage of the case will only seek to prolong Plaintiffs from having their day in court and unnecessarily expend the resources of both the parties and the court. Accordingly, it would make more sense for this Court to review all issues the parties wish to appeal post-trial.

4. JUDICIAL ECONOMY REQUIRES PROCEEDING WITH THIS MATTER AND RESOLVING ANY ISSUES POST-VERDICT OR ON APPEAL.

As explained above, the Court's interest in promoting judicial economy will not be served by granting the Petition. It is fundamental that the court has broad discretion regarding the admissibility of evidence and a writ of mandamus is not the proper avenue to challenge rulings made on admissibility of evidence. In addition, there is nothing that indicates the district court committed manifest error or that the law as applicable to the issue of Dr. Conti's fault is unclear. Therefore, by involving this Court at this time, it wastes both the court's resources and the parties' resources to clarify something that is already clear and ultimately may be of no importance. Defendants could win at trial. Plaintiffs could also win at trial but win an amount less than the "substantial amount" received from the settled out Defendants, effectively requiring Petitioner to pay nothing, which will also make this issue moot. (See Petition, 2:21.)

Given the uncertainty in outcome and the circumstances of this matter, the goal of judicial economy would be hindered by granting the Petition, staying this matter, and requiring the parties to fully brief an issue which may be of no importance to the case.

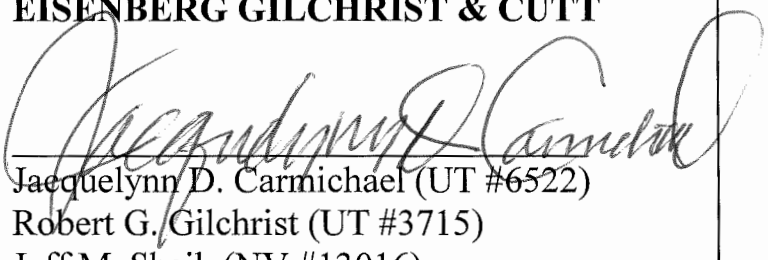
III.

CONCLUSION

Given the foregoing, the Emergency Petition for Writ of Mandamus should be denied given that it is the improper method to challenge Judge Bixler's rulings, no exception to this general rule applies to justify this Court's involvement at this time, and Judge Bixler correctly applied clear statutory law in a manner entirely consistent with this Court's very application of the same statute.

DATED this 10th day of February, 2014.

EISENBERG GILCHRIST & CUTT



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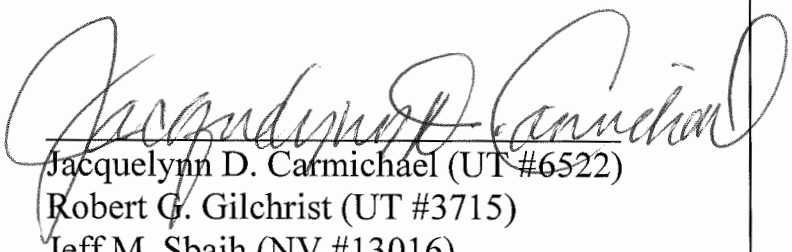
CERTIFICATE OF COMPLIANCE

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) because it has been prepared in proportionally spaced typeface in 14 point Times New Roman font.
2. I further certify that this brief complies with the page-or type volume limitations of NRAP 32(a)(7) because, excluding parts of the brief contemplated by NRAP 32(a)(7)(C), it is proportionally spaced with typeface font of 14, and contains 8,103 words.
3. Finally, I hereby certify that I have read the foregoing Response, 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(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the 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 the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 10th day of February, 2014.

EISENBERG GILCHRIST & CUTT



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CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of February, 2014, I emailed and mailed a true and correct copy, postage prepaid, of the foregoing **REAL PARTIES IN INTEREST, TIFFANI HURST, BRIAN ABBINGTON AND MAYROSE LILI-ABBINGTON HURST'S ANSWER TO PETITIONER'S EMERGENCY PETITION FOR WRIT OF MANDAMUS** to the following:

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