IN THE SUPREME COURT OF THE STATE OF NEVADA

LEE E. SZYMBORSKI,

Appellant,

vs.

SPRING MOUNTAIN TREATMENT CENTER; and DARRYL DUBROCA, in his official capacity,

Respondents.

Supreme Court No. 66398
District Court Case No. A700178

RESPONDENTS SPRING MOUNTAIN TREATMENT CENTER AND DARRYL DUBROCA'S ANSWERING BRIEF

Michael Prangle, Esq.
Nevada Bar No. 8619
Tyson J. Dobbs, Esq.
Nevada Bar No. 11953
HALL PRANGLE & SCHOONVELD, LLC
1160 N. Town Center Dr., Ste. 200
Las Vegas, NV 89144
(702) 889-6400 – Office
(702) 384-6025 – Facsimile
efile@hpslaw.com
Attorneys for Respondents
Spring Mountain Treatment Center
and Darryl Dubroca

NRAP 26.1 DISCLOSURE STATEMENT

COMES NOW, Respondents, Spring Mountain Treatment Center and Darryl Dubroca, by and through their counsel of record, Michael E. Prangle, Esq. and Tyson J. Dobbs, Esq. of the law firm of Hall Prangle & Schoonveld, LLC, and hereby submits their NRAP 26.1 disclosure as follows:

The undersigned counsel certifies that Spring Mountain Treatment Center is owned by UHS of Spring Mountain, Inc. UHS of Spring Mountain, Inc., is owned by UHS Delaware, Inc. UHS Delaware, Inc., is owned by Universal Health Services.

The undersigned counsel certifies that Darryl Dubroca has no known interested parties other than those participating in the case.

These representations are made to enable judges of the Court to evaluate possible disqualifications or recusal.

DATED this 5th day of November, 2015.

HALL PRANGLE & SCHOONVELD, LLC

/s/: Tyson J. Dobbs

MICHAEL E. PRANGLE, ESQ.
Nevada Bar No. 8619
TYSON DOBBS, ESQ.
Nevada Bar No. 11953
1160 N. Town Center Dr., Ste. 200
Las Vegas, NV 89144
Attorneys for Respondents
Spring Mountain Treatment Center
and Darryl Dubroca

TABLE OF CONTENTS

PAGE NO:

TABLE OF CASES AND OTHER AUTHORITIES

CASES: **PAGE NO:**

STATUTES: **PAGE NO:**

RULES: **PAGE NO:**

ADMINISTRATIVE COMPILATIONS:

4810-6713-6809, v. 1

JURISDICTIONAL STATEMENT

This Court has jurisdiction over plaintiff's appeal pursuant to NRAP 3A(b)(1) governing appeals as of right following a final judgment of a district court in a civil case. On June 24, 2014, the district court entered an order granting Defendants Spring Mountain Treatment Center's (hereinafter "Spring Mountain") and Darryl Dubroca's (hereinafter "Mr. Dubroca") (collectively hereinafter "Defendants") motion to dismiss Plaintiff's Complaint. (R. at 88-89). Notice of written entry of that order was served on July 30, 2014. (R. at 91-94). On August 7, 2014, Plaintiff-Appellant Lee Szymborski ("Lee" or "Plaintiff") timely filed a "Motion for Reconsideration, or In the Alternative, Motion to Set Aside" (hereinafter "Motion for Reconsideration"). (R. at 95-130). On August 25, 2014, while his motion was pending, Plaintiff filed a notice of appeal from the "Notice of Entry of Order On Defendant Spring Mountain Treatment Center and Darryl Dubroca's Motion to Dismiss Entered on The 23rd Day of July, 2014." (R. at 131). On September 23, 2014, the district court entered an order denying Plaintiff's Motion for Reconsideration. (R. 224-31). Pursuant to NRAP 4(a)(6), Plaintiff's premature notice of appeal "shall be considered filed on the date of and after entry of the order. . .of the last-remaining timely motion." NRAP 4(a)(6). Accordingly, Plaintiff's Notice of Appeal was timely because it is considered filed on September

23, 2014, the same day the district court entered final judgment on plaintiff's last-remaining post-judgment motion.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether a complaint alleging the failure of a physician, hospital or hospital employee to use "reasonable care, skill or knowledge" "in rendering services" to a hospital patient sounds in medical malpractice under NRS 41A.009 and thus requires compliance with NRS 41A.071's affidavit requirement?

2. Notwithstanding Plaintiff's failure to comply with NRS 41A.071, whether the district court's judgment can also be affirmed on the alternative ground that defendants did not owe Plaintiff – a non-patient third-party – a duty to protect him against the unforeseeable destruction of his property by Sean Szymborski?

STATEMENT OF THE CASE

This appeal arises from an action filed by Lee E. Szymborski, father of Sean Szymborski, an adult, ("Sean") against Spring Mountain Treatment Center, a mental health treatment hospital, and Darryl Dubroca, its CEO/Managing Director, for damages caused to Lee's residence by Sean following Sean's discharge from Spring Mountain. (R. at 1-21). On May 2, 2014, Plaintiff filed a complaint asserting four causes of action against the defendants, including

- "NEGLIGENCE" (Count I) in allegedly failing to comply with their own internal policies and the Nevada Administrative Code section 449.332 governing medical and other related facilities in their discharge of Sean from the hospital and with NRS 449.765-449.786 governing the "Use of Aversive Intervention or Forms of Restraints On Patients with Disabilities";

- "Professional Negligence" (Count II) pursuant to NRS 41A.015 "in their capacity as a for profit hospital providing medical care" by "failing to function as a patient advocate by providing proper care to the patients at the time of discharge";

- "Malpractice, Gross negligence, Negligence Per Se" (Count III) by a hospital-employed licensed social worker who owed a duty "to patients and a duty to provide adequate medical treatment, to protect the patient and the public at large" but who's "conduct [fell] [] below the standard of care"; and

- "Negligent Hiring, Supervision, and Training" (Count IV) for failing to properly "hire, train, and/or supervise competent medical and staff personnel, including supervisors, and LSW, to provide care and treatment to its patients." (R. at 1-21).

Attached to plaintiff's complaint was a letter from the State of Nevada, Department of Health and Human Services, Health Division, signed by Johna Thacker as an "AAII/Complaint Intake Coordinator". (R. at 12). A "Division of Public and Behavioral Health Survey" was also attached to Plaintiff's Complaint. (R. at 13-21). Plaintiff's Complaint did not attach an affidavit of merit signed by a medical expert pursuant to NRS 41A.071.

On May 22, 2014, Defendant Spring Mountain filed a motion to dismiss Plaintiff's Complaint, arguing that the complaint was void *ab initio* because each of the claims asserted sound in medical malpractice and Plaintiff failed to file an

NRS 41A.071 expert affidavit in support of his claims. (R. at 31-62). Defendant Dubroca subsequently joined Spring Mountain's motion. (R. at 65-67). On June 24, 2014, after hearing extensive argument, the district court granted Defendants' motion to dismiss pursuant to NRS 41A.071. The district court found that "Mr. Szymborski's claims are based upon allegations of medical malpractice" and thus, his failure to provide the requisite affidavit pursuant to NRS 41A.071 rendered his complaint void ab initio and must be dismissed. (R. at 88-89). Notice of entry of the July 23, 2014 Order was served on July 30, 2014. (R. at 91-94).

On August 7, 2014, Plaintiff filed a "Motion for Reconsideration, or in the alternative, Motion to Set Aside". (R. at 95-130). During the pendency of Plaintiff's Motion, he filed a Notice of Appeal from the July 23, 2014 Order granting Defendants' motion to dismiss. (R. at 131). On September 23, 2014, the district court denied plaintiff's motion for reconsideration, finding as a matter of law that "Mr. Szymborski's claims are based upon allegations of medical malpractice" and having offered no new law or facts, its initial ruling dismissing Plaintiff's Complaint as void *ab initio* was "legally sound and in accordance with applicable statutes and caselaw." (R. at 229-30). This appeal followed.

STATEMENT OF FACTS

The following "facts" are taken from plaintiff's complaint and other documents submitted by the parties in support of their motion to dismiss, plaintiff's

opposition to same, plaintiff's motion to reconsider and defendants opposition to same, including various medical records.

Sean Is Admitted To Spring Mountain Treatment Center

On May 3, 2013, Sean Szymborski was admitted to Spring Mountain Treatment Center for care and treatment. (R. at 14). At approximately 12:00 p.m. that afternoon, the Comprehensive Assessment Tool documented that Sean had multiple scab areas on his legs and that his father had reported that the wounds were self-inflicted with a sharp object. (R. at 19). A few days later, a hospital employee licensed social worker ("LSW") documented that there were weapons at Sean's mother's home but not at his father's home. (R. at 20). The LSW did not identify or confirm what weapons were located at his mother's home. According to the May 14, 2013 Patient Continuing Care Plan, safety concerns were identified, including that "weapons in the patient's home were non-applicable and verified by the patient's father". (R. at 20).

Sean's Father (Plaintiff) Contacts Sean's Case Manager And Ultimately Advises That He Wanted Sean To Return To His Home.

On May 10, 2013 at 9:00 a.m., a hospital LSW documented that a case manager had received a voice mail message from Sean's father Lee saying that the patient was not to return to his home. (R. at 17). The LSW documented that the case manager would assist the patient with alternative placement. Later that day at approximately 11:15a.m., it was documented that Lee wanted the patient to return

to his home, but not to be discharged "today". (R. at 17). On May 13, 2013, Sean's nurse(s) noted that he "had much trepidation about going back to the father's home. The patient was restless when talking about the father." (R. at 14).

Sean Meets With Hospital Employees To Discuss His Discharge And Advises That He Needed To Stop By His Father's Home To Retrieve His Debit Card.

The Patient Continuing Care Plan, dated May 14, 2013, noted that the patient was to go to his father's house first, then to an address in North Las Vegas. (R. at 55). At 8:50 a.m. that morning, an acute physician progress note indicated that Sean did not want to return to his father's home due to "on-going conflict." (R. at 55). The progress note further indicated that Sean participated in treatment planning to find housing. (R. at 55-56). Sean subsequently met with hospital personnel to discuss his discharge and confirm the address of the apartment where he would be transported at the time of his discharge. (R. at 55). Sean was vague about the apartment's address but advised the hospital personnel that he needed to first stop at his father's home to retrieve his debit card prior to going to the new apartment. (R. at 55). According to the hospital social services discharge note, Sean would live at the apartment upon discharge. At approximately 2:30 p.m., Sean requested his father's telephone number and advised him that he was being discharged and that a taxi would transport him to his father's home. (R. at 58). At or about that same time, Sean asked the hospital personnel if the taxi would be able to take him to his mother's house after retrieving his debit card from his father's

house. (R. at 61). Sean was advised that he would have to pay for any taxi after being dropped off at his father's house. (R. at 61).

Sean Is Discharged And Transported By Taxi To His Father's Home To Retrieve His Debit Card.

On May 14, 2013, at approximately 3:30 p.m., Sean was discharged from Spring Mountain Treatment Center with diagnoses including psychosis not otherwise specified and spice abuse. (R. at 2, 58). Sean was subsequently transported by taxi to his father's home. (R. at 2). Upon arriving and entering Plaintiff's home, Sean proceeded to cause approximately $20,000 in damage to the interior of the home. (R. at 7). Sean thereafter went missing for three weeks. (R. at 7). He was later located, charged, and convicted of criminal charges relating to the damage caused to Plaintiff's home. (R. at 5).

Plaintiff Files Complaint With The Department Of Health And Human Services – Health Division.

On May 22, 2013, Plaintiff filed a complaint with the State of Nevada Department of Health and Human Services – Health Division (hereinafter "Department") concerning Sean's admission, transfer, discharge and quality of care he received at Spring Mountain Treatment Center. (R. at 53). Plaintiff further alleged that he was not notified of Sean's "change in condition, patient not assessed after change in condition, [and] patient's medications improperly administered." (R. at 53). Thereafter, the Department initiated an investigation

into Plaintiff's complaints and on July 9, 2013, completed its investigation and reported its findings that Plaintiff's complaints were "substantiated with deficiencies cited." (R. at 54). Those findings included:

- Spring Mountain Treatment Center "failed to assure the patient was discharged to a safe environment" (R. at 54);
- Spring Mountain Treatment Center "failed to notify [the patient's] famil[y] prior to discharge" (R. at 57); and
- Spring Mountain Treatment Center "failed to identify what weapons were at [Sean's] mother's home and if [he] would have access to the weapons." (R. at 60).

Plaintiff Files Complaint In The District Court

On May 2, 2014, Plaintiff filed a complaint asserting four causes of action against the defendants, as follows:

- "NEGLIGENCE" (Count I) in allegedly failing to comply with their own internal policies and the Nevada Administrative Code section 449.332 governing medical and other related facilities in their discharge of Sean from the hospital and with NRS 449.765-449.786 governing the "Use of Aversive Intervention or Forms of Restraints On Patients with Disabilities";
- "Professional Negligence" (Count II) pursuant to NRS 41A.015 "in their capacity as a for profit hospital providing medical care" by "failing to function as a patient advocate by providing proper care to the patients at the time of discharge";

- "Malpractice, Gross negligence, Negligence per se" (Count III) by a hospital-employed licensed social worker who owed a duty "to patients and a duty to provide adequate medical treatment, to protect the patient and the public at large" but who's "conduct [fell] [] below the standard of care"; and

- "Negligent Hiring, Supervision, and Training" (Count IV) for failing to properly "hire, train, and/or supervise competent medical and staff personnel, including supervisors, and LSW, to provide care and treatment to its patients." (R. at 1-21).

In addition to seeking compensatory damages, Plaintiff's Complaint also sought a temporary restraining order and/or preliminary injunction and permanent injunction enjoining Defendants from "continuing or repeating the unlawful policies, procedures and conduct complained of herein;" declaratory judgment that Defendants' "policies, practices and conduct as alleged herein [are] in violation of patient rights, and the safety of the public at large"; and punitive damages. (R. at 51). Attached to plaintiff's complaint was a letter from the State of Nevada, Department of Health and Human Services, Health Division, signed by Johna Thacker as an "AAII/Complaint Intake Coordinator". (R. at 12). A "Division of Public and Behavioral Health Survey" was also attached to Plaintiff's Complaint. (R. at 13-21). Plaintiff's Complaint did not attach an affidavit of merit signed by a medical expert pursuant to NRS 41A.071.

Spring Mountain Treatment Center Moves To Dismiss Plaintiff's Complaint Pursuant To NRS 41A.071

On May 22, 2014, Defendant Spring Mountain filed a motion to dismiss Plaintiff's Complaint pursuant to NRCP 15(b) and NRS 41A.071, arguing that the complaint was void ab initio because each of the claims asserted sound in medical malpractice and Plaintiff failed to file an NRS 41A.071 expert affidavit in support of his claims. (R. at 31-62). Defendant Dubroca subsequently joined Spring Mountain's motion. (R. at 65-67).

On June 13, 2014, Plaintiff filed an opposition to Defendants' Motion to Dismiss but no NRS 41A.071 affidavit was attached. (R. at 68-77). In his opposition, Plaintiff argued that his action is for "negligence" and for the violation of "codes and statutes pertaining to the safe release of patients, and NOT medical issues relation [sic] to its former patients." (R. at 69) (emphasis in original). Plaintiff further argued that the allegations in the complaint are for "Malpractice, Gross Negligence, Negligence Per Se" "but it is NOT medical malpractice; not in the process of a surgery or operation, but in the context of the mandatory social work that is required – and EXPECTED of a 'for profit' psychological facility that earns in excess of TWO BILLION DOLLARS ANNUALLY." (R. at 69) (all emphasis in original).

District Court Grants Defendants' Motion To Dismiss

On June 24, 2014, after hearing extensive argument, the district court granted Defendants' motion to dismiss pursuant to NRS 41A.071. The district court found that "Mr. Szymborski's claims are based upon allegations of medical malpractice" and thus, his failure to provide the requisite affidavit pursuant to NRS 41A.071 rendered his complaint void ab initio and must be dismissed. (R. at 88-89). Notice of entry of the July 23, 2014 Order was served on July 30, 2014. (R. at 91-94).

Plaintiff Files Motion For Reconsideration And Notice Of Appeal.

On August 7, 2014, Plaintiff filed a "Motion for Reconsideration, or in the alternative, Motion to Set Aside". (R. at 95-130). Plaintiff Motion asserted that reconsideration was necessary because his complaint did not assert claims for medical malpractice and therefore, no NRS 41A.071 expert affidavit was required. To the extent that his complaint did assert a cause of action for medical malpractice, Plaintiff argued that the court overlooked the report of the Department of Health and Human Services attached to his complaint in ruling that he failed to comply with NRS 41A.071. (R. at 95-96). Specifically, Plaintiff argued that "[t]here is no better expert and that the results of 'The Bureau Of Health Care Quality Control And Compliance[']investigation is the best certification you can get in determining a safe or an unsafe discharge." (R. at 96).

On August 25, 2014, during the pendency of his Motion for Reconsideration, Plaintiff filed a Notice of Appeal from the July 23, 2014 Order granting Defendants' motion to dismiss. (R. at 131). That same day, Defendants filed their Opposition to Plaintiff's Motion, arguing that Plaintiff failed to set forth a proper basis for seeking reconsideration under EDCR 2.24 and NRCP 60(b). (R. at 135, 137). To the extent reconsideration was justified, Defendants further argued that the district court's order should still not be disturbed because Plaintiff's Complaint was properly dismissed for failing to comply with NRS 41A.071's affidavit requirement and the Department's report was insufficient to meet this threshold requirement. (R. at 139-44).

District Court Denies Plaintiff's Motion for Reconsideration.

On September 23, 2014, the district court entered an order denying plaintiff's motion for reconsideration. (R. at 223-31). In reaching this conclusion, the district court held that Plaintiff had failed to provide any new facts or evidence and that its prior decision was clearly erroneous or that there was any mistake, inadvertence, surprise, or excusable neglect. (R. at 227). The district court further explained that

> 10. It is clear that the allegations in the Complaint all fall under the definition of medical malpractice as defined by statute. The Complaint alleges failures on the behalf of physicians, a hospital and employees of a hospital in treating a patient which resulted in harm to Plaintiff. Nowhere in the statute is medical malpractice defined in such a way that the harms resulting must be felt only by the patient in order to be

considered malpractice. As such, although Plaintiff was not a patient, the damages sought still fall under the definition of medical malpractice.

11. There is also nothing in the record to suggest even minimal compliance with Nev. Rev. Stat. § 41A.071. The only document attached to the Complaint was a letter from a Complaint Intake Coordinator for the Department of Health. The letter does not claim to support any of the allegations in the Complaint nor does its author claim to be a medical expert of any kind. In opposition to the Motion to Dismiss, Plaintiff argued only that the claims were ordinary negligence, and did not claim that a conforming affidavit was ever attached to the Complaint. (R. at 229).

Accordingly, because "its previous Order was legally sound and in accordance with applicable statutes and case law," the district court denied Plaintiff's Motion for Reconsideration. In addition, the district court held that "although leave to amend the Complaint was not requested, it would not be appropriate as noncompliance with Nev. Rev. Stat. §41A.071 renders a complaint *void ab initio,* and no subsequent amendments can cure the defect." (R. at 229-30). This appeal followed.

ARGUMENT

I. STANDARD OF REVIEW.

The district court's order granting Defendants' NRCP 12(b)(5) motion to dismiss on the ground that the complaint failed to comply with NRS 41A.071 is reviewed *de novo*. *Washoe Med. Ctr. v. Second Jud. Dist. Ct.,* 122 Nev. 1298, 1302, 148 P.3d 790, 792-93 (2006), holding that a complaint filed without the

requisite medical expert affidavit is void ab initio and therefore the defect cannot be cured by amendment after the statute of limitations has expired.

II. THE DISTRICT COURT PROPERLY DISMISSED PLAINTIFF'S COMPLAINT AGAINST SPRING MOUNTAIN AND MR. DUBROVCA BECAUSE PLAINTIFF'S CLAIMS FELL WITHIN THE DEFINITION OF MEDICAL MALPRACTICE UNDER NRS 41A.009 AND THUS REQUIRED COMPLIANCE WITH NRS 41A.071.

The district court properly dismissed Plaintiff's Complaint against Spring Mountain and Mr. Dubrovca because his complaint stated causes of action for medical malpractice as defined by NRS 41A.009[1], and thus he was required to comply with NRS 41A.071[2] and attach an affidavit of a qualified medical expert supporting those allegations.

NRS 41A.009 defines "medical malpractice" as

> the failure of a physician, *hospital or employee of a hospital, in rendering services*, to use the reasonable care, skill or knowledge ordinarily used under similar circumstances. NRS 41A.009 (emphasis added).

Under NRS 41A.071,

---

[1] After the filing of Plaintiff's notice of appeal, the Legislature amended Nevada's statutory scheme governing actions for medical malpractice, dental malpractice and professional negligence (Chapter 41A of NRS). Specifically, it repealed various provisions, including NRS 41A.009 defining medical malpractice, and provided a new definition for "professional negligence" under NRS 41A.015 which incorporated the provisions of the previously used definition of medical malpractice. *See* 2015 Nev. Stat. ch. 439, §§ 1.5, 2, 6, 12, at 2526-29. In addition, the Legislature broadened the definition of "provider of healthcare" to include additional professionals not previously identified. *See Id* at § 2.

[2] *See* fn.1.

> [i]f an action for *medical malpractice* or dental malpractice is filed in the district court, the district court *shall dismiss the action*, without prejudice, if the action is filed without an affidavit, supporting the allegations contained in the action, submitted by a medical expert who practices or has practiced in an area that is substantially similar to the type of practice engaged in at the time of the alleged malpractice. NRS 41A.071 (emphasis added).[3]

Thus, contrary to Plaintiff's arguments, NRS 41A.071 is not limited to actions against physicians, but also includes actions against "a hospital or employee of a hospital" for failing to use reasonable care, skill, or knowledge "in rendering services." NRS 41A.009. *Accord Egan v. Chambers,* 299 P.3d 364, 367, 129 Nev. Adv. Op. 25 (2013) *citing* NRS 41A.009; *Fierle v. Perez,* 125 Nev. 728, 740, 219 P.3d 906, 913 (2009) *overruled in part on other grounds*, *see Egan,* 299 P.3d at 367. Ultimately, when determining the nature of a complaint for purposes of evaluating whether the claims asserted therein are governed by a specific statutory provision, this Court has held that "it is the nature of the grievance rather than the form of the pleadings that determines the character of the action." *State Farm Mut. Auto. Ins. Co. v. Wharton,* 88 Nev. 183, 186, 495 P.2d 359, 361 (1972).

Here, the district court properly dismissed Plaintiff's Complaint pursuant to NRS 41A.071 because the "nature" of the allegations of his complaint plainly

---

[3] *See Washoe Med. Ctr. v. Second Jud. Dist. Ct.,* 122 Nev. 1298, 1304, 148 P.3d 790, 794 (2006), finding that a timely filed complaint alleging medical malpractice that fails to attach an affidavit of a medical expert in compliance with NRS 41A.071 cannot be amended after the statute of limitations to cure the affidavit defect because the original complaint was void ab initio, "does not legally exist and thus [] cannot be amended."

asserted claims alleging "medical malpractice" as defined in NRS 41A.009. Indeed, in Count I ("Negligence") Plaintiff alleged that the Defendant hospital and its employee(s) were negligent in failing to comply with Nevada Administrative Code section 449.332[4] ("Discharge Planning") and the hospital's own internal "discharge policies" in discharging Sean on May 14, 2013. (R. at 6-7). In addition, Count I further alleged that the Defendant hospital and its employee(s) failed to comply with NRS 449.765-449.786 governing the "Use of Aversive Intervention or Forms of Restraints On Patients with Disabilities". By its own terms, the "nature of the grievance" described in these allegations is that the Defendant hospital and its employee(s) failed to exercise reasonable care in "rendering services" to a hospital patient, *e.g.,* identifying Sean as a patient "who is likely to suffer adverse health consequences upon discharge" and deciding against the use of "aversive intervention or forms of restraint" as an alternative to discharging him. Thus, by its own language, Count I asserted a claim for medical malpractice and required compliance with NRS 41A.071.

The "gravamen" or "nature" of the allegations in Count II of Plaintiff's Complaint are no different. Specifically, Plaintiff alleged that "Defendants in the capacity of a for profit hospital providing medical care to the public", including its

[4] NAC 449.332 requires hospitals to "identify each patient who is likely to suffer adverse health consequences upon discharge if the patient does not receive adequate discharge planning." NAC 449.332(3).

"registered nurses, psychiatrists, and the hospital administrator," "owed Plaintiff a duty to employ medical staff adequately trained in the care and treatment of patients consistent with the degree of skill and learning possessed by competent medical personnel" and to comply with NRS 41A.015. (R. at 7). Indeed, Count II specifically alleges in pertinent part that "Defendants breached its duty of care by failing to function as a patient advocate by providing *proper care to the patients at the time of discharge. . . .*" (R. at 7) (emphasis added). Count II specifically alleged negligence by Spring Mountain's "providers of healthcare" including its "licensed nurse" and "licensed psychologist" and other employees of a hospital. Thus, by its own terms Count II asserts a claim for medical malpractice requiring compliance with NRS 41A.071.

Count III of Plaintiff's Complaint, asserting claims for "malpractice, gross negligence, negligence per se", similarly alleges a failure by a "hospital or employee of a hospital" to "use [] reasonable care, skill or knowledge" used "in rendering services" and thus required compliance with NRS 41A.071. Specifically, Count III alleges that Defendants by and through a hospital-employed licensed social worker, had a duty "to patients and *a duty to provide adequate medical treatment*, to protect the patient and the public at large" but who's "conduct [fell] [] below the standard of care". (R. at 8) (emphasis added). Moreover, similar to the allegations of Count I, Count III also alleges violations of

NAC 449.332 and hospital internal policies concerning the discharge of patients. (R. at 8). For the same reasons discussed *supra* concerning the allegations contained in Count I, Plaintiff's allegations in Count III similarly, by their plain language, allege medical malpractice as defined by NRS 41A.009 requiring compliance with NRS 41A.071.

Lastly, Count IV of Plaintiff's Complaint asserting a claim for failing to properly "hire, train, and/or supervise competent medical and staff personnel, including supervisors, and LSW, to provide care and treatment to its patients" likewise falls under NRS 41A.071's affidavit requirement for two reasons. First, it still alleges a failure by "a hospital or employee of a hospital" to "use [] reasonable care, skill or knowledge" "in rendering services" at the hospital to a hospital patient. Second, any claim of negligent hiring, training and supervision still requires Plaintiff to prove that the hospital employees in question were negligent "in rendering services" to his son, again falling squarely within the requirements of NRS 41A.009 and NRS 41A.071. Absent proof of any underlying negligence by the employee of the hospital, Plaintiff's negligent hiring/supervision/retention claim fails. *See e.g., Frigo v. Silver Cross Hosp. and Med. Ctr.,* 377 Ill. App. 3d 43, 72, 876 N.E.2d 697, 724 (1st Dist. 2007) (negligent hiring, training, and supervision irrelevant unless plaintiff can establish negligently hired, trained, and

supervised employee was negligent *and* that his negligence caused plaintiff's injury).

In sum, Plaintiff's argument that compliance with NRS 41A.071 was excused or was not required for those portions of his complaint alleging negligence by hospital-employed social workers or other non-physician hospital employees is without merit. Each of Plaintiff's claims is an allegation that "a hospital or an employee of a hospital" failed to "use reasonable care, skill and knowledge" "in rendering services" to a hospital patient falling squarely within the definition of medical malpractice set forth in NRS 41A.009, thereby requiring compliance with the affidavit of merit provisions of NRS 41A.071.

III. THE ATTACHD LETTER FROM THE DEPARTMENT OF HEALTH AND HUMAN SERVICES – HEALTH DIVISION IS INSUFFICIENT TO SATISFY NRS 41A.071's AFFIDAVIT REQUIREMENT.

In the alternative and as the primary basis for his Motion to Reconsider, Plaintiff argues that document attached to his complaint – a letter from a Complaint Intake Coordinator at the Department of Health and Human Services – was sufficient to satisfy NRS 41A.071's affidavit requirement. Plaintiff's assertion is without merit.

Nevada law is clear in that even when a plaintiff attaches an "opinion letter" or other document provided by a medical expert for purposes of complying with NRS 41A.071's affidavit requirement, such documents will not comply with the

statute unless they contain a jurat and a declaration by the medical expert that the statements contained therein were made under penalty of jury. In *Mountainview Hospital, Inc. v. Eighth Jud. Dist. Ct.,* 273 P.3d 861, 128 Nev. Adv. Op. 17 (2012) (the plaintiff filed a complaint alleging medical malpractice after she contracted Methicillin-resistant Staphylococcus aureus (MRSA) and went into septic shock following an elective back surgery. *Id.* at 863. In an effort to comply with NRS 41A.071's affidavit requirement, the plaintiff attached an "opinion letter" from Dr. Bernard T. McNamara supporting her claims with a "California All-Purpose Acknowledgment" form attached to the letter. *Id.*

The *Mountainview* Court ultimately concluded that Dr. McNamara's "opinion letter" and attached acknowledgment failed to satisfy NRS 41A.071's affidavit requirement. While the Court remanded for an evidentiary hearing in which the plaintiff would be required to prove that Dr. McNamara appeared before the notary public and swore under oath that the statements contained in his opinion letter were true and correct, it found that absent such proof, neither the "opinion letter" nor the acknowledgement on their face would satisfy NRS 41A.071 because neither contained a jurat or declaration by Dr. McNamara that he swore an oath that the statements were true and correct and that his statements were made under penalty of perjury. *Id.*

Here, there is no claim that the author of the Department letter appeared before a notary public and swore under oath that the statements contained in the letter were true and correct under penalty of perjury or that it contains the required jurat. Moreover, as the district court correctly noted, the author of the letter does not "claim to be a medical expert of any kind" nor does the letter even remotely support the allegations of the complaint. (R. at 228-229). Accordingly, , the letter on its face fails to satisfy NRS 41A.071, and the district court did not err in reaching the same conclusion.

IV. THE DISTRICT COURT'S DECISION CAN ALSO BE AFFIRMED ON THE ALTERNATIVE GROUND THAT DEFENDANTS DID NOT OWE PLAINTIFF ANY DUTY.

While the district court did not err in dismissing Plaintiff's Complaint, dismissal was proper for another separate reason: Defendants did not owe the non-patient plaintiff a duty of care to protect him against the destruction of the interior of his home by his son Sean[5].

It is well-established that to prevail on a negligence claim, a plaintiff must establish four elements: (1) the existence of a duty of care, (2) breach of that duty, (3) legal causation, and (4) damages. *Turner v. Mandalay Sports Entm't, LLC,* 124 Nev. 213, 217, 180 P.3d 1172, 1175 (2008). With respect to the duty element,

[5] This Court will affirm the order of the district court so long as it reached the correct result, albeit for different reasons. *Rosentein v. Steele,* 103 Nev. 571, 575, 747 P.2d 230, 233 (1987).

under common law principles, no duty is owed to control the dangerous conduct of another or to warn others of the dangerous conduct, except when (1) there is a special relationship between the parties or between the defendant and the identifiable victim, *and* (2) the harm created by the defendant's conduct is reasonably foreseeable. *Lee v. GNLV Corp.,* 117 Nev. 291, 295, 22 P.3d 209, 212 (2001); *Mangeris v. Gordon,* 94 Nev. 400, 402-03, 580 P.2d 481, 483 (1978).

In *Mangeris v. Gordon,* 94 Nev. 400 (1978), the widow of a murder victim, a taxicab driver, brought a wrongful death action against various defendants, including operators of a massage parlor, alleging that they had negligently failed to report to her husband or the local police department that certain known individuals who frequented their establishment had committed violent criminal acts, and as a result of their negligence, her husband was murdered. *Id.* at 400. The district court dismissed plaintiff's complaint on the ground that it did not allege facts sufficient to establish a duty to warn. *Id.* at 400-01. On appeal, this Court affirmed finding that defendants did not owe the decedent any duty because even assuming a special relationship existed between the defendants and the decedent "a reasonable person would not, from the facts alleged, foresee a risk that [the assailant] would murder [the decedent] at a remote time and distant location. Absent foreseeability of such a risk, respondents had no duty to warn [decedent] of [the assailant's] criminal conduct." *Id.* at 403 (citations omitted).

Likewise here, even assuming *arguendo* that non-patient Plaintiff was an identifiable third party, Defendants had no duty to warn Plaintiff of potential harm or otherwise prevent Sean from causing damage to Plaintiff's home. Neither Plaintiff's Complaint nor the attached letter detailing the Department's investigation contain any allegations or information that Sean had a history of violent conduct, that he had made threats directed to anyone, much less Plaintiff, or that he had intentions of causing any damage to Plaintiff's home, or any other information to make it reasonably foreseeable to Spring Mountain or Mr. Dubroca that Sean would enter Plaintiff's home and cause $20,000 in damages.

Respondents were unable to locate any Nevada case involving this reasonable foreseeability – duty concept in a medical malpractice case. However, several other states' courts analyzing whether a defendant healthcare provider owed a duty to an identifiable third party non-patient damaged or injured by a patient have declined to impose such a duty, particularly where, as here, the harm or damage to the non-patient was not reasonably foreseeable. *See e.g., Abraham v. Wayside Cross Rescue Mission,* 289 Ill. App. 3d 1048, 1055, 682 N.E.2d 1240, 1244-45 (2d Dist. 1997) (defendant in-patient rehabilitation treatment center owed no duty to identifiable victim (wife of patient) because it was not reasonably foreseeable that patient (husband) would leave the facility and attack plaintiff, despite evidence that patient had violent propensities); *Leonard v. Latrobe Area*

Hospital, 425 Pa.Super. 540, 547-48, 625 A.2d 1228, 1232 (Pa.Sup.Ct. 1993) (no duty to warn or otherwise protect nonpatient, even when nonpatient is known to come into contact with patient, absent direct threat of harm to specific person); *Sherer v. Sarma,* 2014 IL App (5th) 130207, ¶35, 18 N.E.3d 181, 192-93 (psychiatrist who treated husband and wife did not have duty to protect or warn wife of husband who had history of violence, despite wife's physician-patient relationship with psychiatrist, where husband did not make any specific threats of violence towards wife prior to killing her).

These cases reflect the same duty – reasonable foreseeability analysis set forth by this Court in *Mangeris.* Accordingly, Spring Mountain and Mr. Dubroca owed no duty to the non-patient Plaintiff in this case, and the dismissal order may and should be affirmed on this additional ground.

CONCLUSION

For the foregoing reasons, Defendants Spring Mountain Treatment Center and Darryl Dubroca respectfully requests that this Court affirm the district court's order granting their motion to dismiss and dismissing Plaintiff's Complaint with prejudice pursuant to NRS 41A.071 and 41A.097.

Dated this 5th day of November, 2015.

HALL PRANGLE & SCHOONVELD, LLC

/s/: Tyson J. Dobbs

MICHAEL E. PRANGLE, ESQ.
Nevada Bar No. 8619
TYSON DOBBS, ESQ.
Nevada Bar No. 11953
HALL PRANGLE & SCHOONVELD, LLC
1160 N. Town Center Dr., Ste. 200
Las Vegas, NV 89144
(702) 889-6400 – Office
(702) 384-6025 – Facsimile
efile@hpslaw.com
Attorneys for Respondents
Spring Mountain Treatment Center
and Darryl Dubroca

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the typeface and style requirements of NRAP 32(a)(4)-(6). This brief has been prepared in a proportionately spaced typeface using Microsoft Office Word 2010 with 14-point, double-spaced Times New Roman font. I further certify that this brief complies with the page limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it does not exceed 30 pages. I hereby certify that I have read this Answering Brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable rules, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be support by reference to the page of the transcript of appendix where the matter relied on is to be found.

DATED this 5th day of November, 2015.

HALL PRANGLE & SCHOONVELD, LLC

/s/: Tyson J. Dobbs

MICHAEL E. PRANGLE, ESQ.
Nevada Bar No. 8619
TYSON DOBBS, ESQ.
Nevada Bar No. 11953
1160 N. Town Center Dr., Ste. 200
Las Vegas, NV 89144
Attorneys for Respondents
Spring Mountain Treatment Center
and Darryl Dubroca

CERTIFICATE OF SERVICE

The undersigned, an employee of Hall Prangle & Schoonveld, LLC hereby certifies that on the 5th day of November, 2015, she served a copy of **Respondents' Spring Mountain Treatment Center and Darryl Dubroca's Answering Brief** through the Nevada Supreme Court electronic filing system to:

Eric R. Olsen
Nevada Bar No, 3127
GARMAN TURNER GORDON LLP
650 White Drive, Suite 100
Las Vegas, Nevada 89119

/s/: Jackie Olivo
An employee of Hall Prangle & Schoonveld

4852-0043-0890, v. 1