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EIGHTH JUDICIAL DISTRICT COURT
CIVIL/CRIMINAL DIVISION
CLARK COUNTY, NEVADA

ESTATE OF JANE DOE, Plaintiff, vs. VALLEY HEALTH SYSTEM, LLC, et al, Defendants.	CASE NO. A-09-595780 DEPT. NO. II

BEFORE THE HONORABLE VALORIE J. VEGA, DISTRICT COURT JUDGE

WEDNESDAY, DECEMBER 17, 2014

TRANSCRIPT RE:
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT RE: LIABILITY

STATUS CHECK: TRIAL SETTING

APPEARANCES:

For the Plaintiff:	ROBERT E. MURDOCK, ESQ. ECKLEY M. KEACH, ESQ.
For Defendant Valley Health System, LLC:	MICHAEL E. PRANGLE, ESQ.
For Defendant American Nursing Services, Inc.:	JAMES P.C. SILVESTRI, ESQ. AMANDA J. BROOKHYSER, ESQ.
For Defendant Steven D. Farmer:	HEATHER S. HALL, ESQ.

RECORDED BY: Lisa Lizotte, Court Recorder

CLARK COUNTY, NEVADA WEDNESDAY, DECEMBER 17, 2014

PROCEEDINGS

(PROCEEDINGS BEGAN AT 9:38 A.M.)

THE COURT: On page 6, Estate of Jane Doe versus Valley Health System, LLC.

MR. KEACH: Good morning, Your Honor. Marty Keach and Rob Murdoch on behalf of plaintiffs.

THE COURT: Good morning.

MR. MURDOCH: Good morning, Your Honor.

MR. PRANGLE: Mike Prangle for Centennial Hills.

MS. HALL: Good morning, Your Honor. Heather Hall on behalf of Steven Farmer.

MS. BROOKHYSER: Good morning, Your Honor. Amanda Brookhyser on behalf of American Nursing Services.

MR. SILVESTRI: And Jim Silvestri here on behalf of American Nursing Services, Your Honor. Thank you.

THE COURT: Okay. Thank you, everyone.

(Colloquy between the Court and the clerk)

MR. KEACH: Oh. Eckley M. Keach.

THE COURT: That's how it is on the calendar. Yeah.

This is the continued time for a hearing on plaintiff's motion for partial summary judgment as to liability. The sur-reply was filed and reviewed. Did counsel wish to make additional argument based on that?

MR. KEACH: Who goes first, Your Honor?

THE COURT: The party that filed the sur-reply.

MR. PRANGLE: I guess, yes, Judge. Mike Prangle for Centennial Hills. Basically the essential point that we tried to focus on in our sur-reply is the multitude of questions of fact that exist; not the question of whether Steven Farmer committed the act, but rather as a matter of law whether Centennial Hills or A.N.S. are liable for Mr. Farmer's conduct. And quite simply for four essential reasons there are questions of fact on each and every element of plaintiff's burden of proof against Centennial Hills.

First, we have denied that Steven Farmer was an agent or an employee of Centennial Hills at the time in question. Plaintiff in their pleadings basically conclude that Mr. Farmer was an employee of Centennial Hills. The facts that they rely on for that conclusion are two. One, that Mr. Farmer was wearing a badge that said Centennial Hills on it, and secondly that based on testimony in deposition Mr. Farmer was assigned to the sixth floor where the assault occurred. That's it.

Well, we have had additional depositions where there's been testimony about what the badge says, and the badge does not say employee of Centennial Hills, it just says contract worker, which the deponent explained means someone who is not one of us. So the question of whether or not Mr. Farmer was actually an employee of Centennial Hills requires evidentiary proof of it. The evidence is that Mr. Farmer filled out an application for A.N.S. He was paid by A.N.S. He was not paid by Centennial Hills. So there are questions of fact as to whether Mr. Farmer was even an employee of Centennial Hills.

If we move past that, and let's assume for the sake of discussion that

he was an employee of Centennial Hills, it is not then *ipso facto* that Centennial Hills is responsible for his intentional conduct. The analysis that the Court or the jury needs to go through is whether the criteria of NRS 41.745 are met. And the three elements within NRS 41.745 relate to whether Mr. Farmer's now conclusively proved conduct was an independent venture, whether it was committed in the course of the very task assigned to him, and whether it was foreseeable. And there are questions of fact as to each of those three elements, and for that reason the motion needs to be denied.

So on the first question, was this an independent venture, it really comes down to the question of was Mr. Farmer doing what he was supposed to do at the time that he committed this act? And there are questions of fact on that. I mean, the only evidence that we have about the circumstances of the assault comes from Mrs. Petersen and the testimony she gave in the criminal matter where she said that he didn't need to be in my room. You know, there's a suggestion that he was trying to clean her up because she had soiled herself. Mrs. Petersen said, I didn't soil myself; he had no business being down there. There's some talk about him adjusting a catheter that was in her bladder but that she said she didn't have. And then the leads that were attached to her chest that Mr. Farmer was supposedly adjusting she said didn't need to be adjusted. So there are questions of fact as to whether he had any business at all being in that room at that time. If he wasn't or if he wasn't supposed to be there, then this was truly an independent venture. The point being is that these are questions of fact the jury needs to decide.

As to the second prong, is this the -- was it committed in the course of the very task that he was assigned? Again, there's not a shred of evidence that

he was assigned to do these things for Mrs. Petersen. So all that we have is that he was assigned to the sixth floor. That's the only evidence we have on that point thus far, certainly not enough for the Court to take this determination away from a jury as to whether this was the very task that Mr. Farmer was assigned to do. And I will tell you that I can guarantee you he was not assigned the task of sexually assaulting Mrs. Petersen. He was not -- there's no evidence to suggest that he was specifically assigned to clean her up or to adjust her EKG leads, which are the purported reasons that he said he was there. So again, there are questions of fact.

And on the issue of foreseeability, which I believe is where we kind of bogged down last time, although I wasn't here, and the standard -- I'll call it the *Wood* standard that plaintiff articulated, was quite simply just the wrong standard. They articulate in one of the footnotes that this is the risk allocation standard. But in the *Wood* case, which I agree is the right case, it specifically disavows the standard that plaintiff articulated in their briefs. And what *Wood* goes on to say -- and *Wood* concludes that the person was not acting in the scope or it wasn't foreseeable -- is that it's a very fact intensive discussion about was it foreseeable based on the circumstances of this case, not general foreseeability, which is what plaintiff talks about. You know, they suggest that the mere fact that this is insurable is *ipso facto* proof that it was foreseeable. That's not what *Wood* tells us. That's not what *Prell* tells us. That's not what any of the cases tell us. But rather, it's a very fact intensive analysis on the facts of this case. And those are things that the juries do, it's not what the Court does.

So on the question of whether Mr. Farmer was even an employee, there's a question of fact. Assuming that he was, whether this was an independent

venture, there are questions of fact. Whether it was done in the course of the very task assigned to him, questions of fact. Whether it was foreseeable under the circumstances of this case, questions of fact. There is nothing in anything that plaintiff has come forward to that suggests -- and bear in mind, the facts needs to be interpreted in our favor for this hearing -- that the facts are so crystal clear when accepted as true warrant summary judgment. This is not a summary judgment issue. This is something that the jury needs to decide. So, respectfully, we would ask that the motion be denied.

MR. KEACH: I think Mr. Silvestri wants to respond as well, Your Honor.

THE COURT: All right.

MR. SILVESTRI: Is that all right, Your Honor?

THE COURT: Surely.

MR. SILVESTRI: Thank you. I'll keep it brief. Mr. Prangle covered certainly many of the high points, Your Honor. But on behalf of A.N.S., and I'm going to try and respond -- I'm hoping to respond primarily if not solely to those issues that were raised in plaintiff's reply brief that we didn't see in the original motion for summary judgment. And I think that's why the Court graciously granted us this opportunity to file sur-replies.

Despite plaintiff's insistence to rely on NRS 41.130, which is sort of what I'll call the generalized *respondeat superior* statute, we all I think agree now that NRS 41.745 is the proper statute upon which one must rely in order to prove a case of *respondeat superior* in cases where allegations are made against employees who have committed intentional acts. And 41.130 specifically carves out the exception of 41.745. So we know that 41.745 is the appropriate standard to look at.

We also know that despite arguments that were made the last time we were here that were not in the briefs, plaintiff has the burden to prove all three elements of 41.745. There's nothing in the statute that shifts the burden of proof to another party. Plaintiffs generally have the burden of proof. And this is clearly seen when we look at the *Wood* case and I'm going to talk about that for a second. Plaintiff focused a lot at our last hearing on the *Prell* decision, and it's true that *Wood* talks about *Prell* and that *Prell* is the standard -- partially the standard upon which NRS 41.745 relies. In fact, the court in *Wood* says that 41.745 partially enacts by legislation the holding of *Prell*. What *Prell* didn't discuss, and as Mr. Prangle just pointed out, *Prell* does not discuss the issue of foreseeability, which is the added item to 41.745 and it's certainly the item that plaintiff cannot overcome. At a minimum there's an issue of fact. More than likely, though, the issue is in favor at least of A.N.S. and probably Centennial Hills Hospital as well on this issue.

And the reason we know that plaintiff has the burden is that in *Wood* the court goes through the first two elements of 41.745, the truly independent venture element and whether the act was committed in the course of the very task assigned to the employee, and does that pursuant to -- talks about *Prell* and talks about those two elements that have to be -- plaintiff has to prove. And the court then says but a plaintiff must also prove -- the plaintiff must also prove the element of foreseeability. And so we know that that burden of 41.745 clearly rests with the plaintiff. There's nothing that shifts the burden to the defendant at all.

On this issue which was discussed at the last hearing of the first two elements, plaintiff wants to say that Mr. Farmer acted for the employer. In other words, that his act was not truly independent, and that the acts that he committed

were within the very task assigned to him. But the only factual basis that they have to make those statements is that Mr. Farmer told -- allegedly told Ms. Doe that that's what he was there to do. He was there to adjust her electrical leads which had become unattached. He was there to clean her up. He was there to adjust the catheter. There's nowhere in the record that any of those tasks were assigned to Mr. Farmer. Even if you want to talk about in a general sense, because that's what they want to say, well, he's a nurse or a nursing assistant and that's some of the things that they do, but the statute talks about the very task assigned to the employee.

And just as Mr. Prangle pointed out, what we do know through Ms. Doe's own words, and we provided those quotations, her testimony, sworn testimony in our opposition, on the first occasion her electrical leads were not unattached, so why would a nurse have a task to re-attach them. We know that the leads did not need adjusting. We know that the leads were never attached to her breast or nipples. No reason for Mr. Farmer to be performing such a task, despite his own words that he would like to provide his own self-assignments, which there's no testimony that he was allowed to do anyway.

On the second incident we know from Ms. Doe's own words, no need to be cleaned up from a bowel movement that she allegedly had. She said that she had not soiled herself. In fact, Mr. Farmer didn't even change the bed pad, so we know that that was not a task assigned to him.

And third, the third incident, Ms. Doe testified that her catheter did not need adjusting and it certainly didn't need adjusting in her vagina. That's not where it was placed. And that's what she says, so no reason for Mr. Farmer to be digitally

penetrating her in that area of her body.

The issue of foreseeability did get bogged down last time and it really does stem from a quote that plaintiffs put in their reply brief, and the quote comes from footnote 53 in the *Wood* decision. And the quotation made in the reply brief is incomplete because the supreme court prefaced the quote used by plaintiff and it also concluded the quote used by plaintiff. And in the preface to the quote and in the conclusion to the quote the court specifically says this is not the standard of foreseeability in the state of Nevada. In fact, they relegated it to a footnote to simply point out that other states perhaps look at this issue of foreseeability differently.

And Mr. Prangle is correct, the quote that the supreme court makes in footnote 53 talks about foreseeability as a risk shifting analysis, which at one time was used in the state of Nevada, and that was in the *Jimenez* case. And within months after the *Jimenez* decision came down from our Nevada Supreme Court, the Nevada Legislature overruled *Jimenez* by enacting 41.745. And we have attached the legislative history regarding the enactment of 41.745. And we also know that the *Jimenez* decision was withdrawn. And that risk shifting analysis simply was a way for courts to put forth what at least I believe at that time was the public policy argument that it was if an act was not so unusual or startling so as to make it unfair to shift the loss to just one of the many costs that an employer has to pay to conduct business. That became the test of foreseeability that the Nevada Legislature specifically rejected and that by stipulation the parties in *Jimenez* withdrew the *Jimenez* decision. *Jimenez* is no longer the law. Foreseeability is under our traditional notions of reasonable foreseeability as defined by NRS 41.745.

It's interesting, though, to point out because in footnote 53 the court

cites to a case in California that uses this risk shifting analysis of foreseeability. And even with that very liberal definition of foreseeability, California courts that have addressed the same type of factual issues that we have here, namely the *Lisa M.* case which we cited to in our opposition, have found that such abhorrent acts committed by a nurse or a medical assistant are not foreseeable and certainly do not rise to the level of the task assigned to them, certainly do not promote the business of the employer, and therefore *respondeat superior* does not attach and the employer is not responsible for those intentional acts.

Your Honor, we would ask that the plaintiff's motion for partial summary judgment be denied.

THE COURT: Mr. Keach.

MR. KEACH: Thank you, Your Honor.

They're asking you to deny our motion, Your Honor. I kind of got a feeling you might be doing that, and if you do, deny it without prejudice, please, so that as we address additional facts we can have an opportunity to come back in here and argue that the additional facts we have are sufficient to establish summary judgment. As to my argument, Your Honor --

THE COURT: Hasn't discovery closed?

MR. KEACH: No.

THE COURT: No? When does discovery close?

MR. MURDOCK: Actually, I don't even think we have --

MR. PRANGLE: I'm not sure.

MR. SILVESTRI: I think part of it is to come back and get --

MR. MURDOCK: Right.

MR. SILVESTRI: -- our scheduling because we had a stay.

MR. MURDOCK: Right.

THE COURT: Oh, that's right.

MR. SILVESTRI: That was one of the things that needed to be addressed today.

MR. MURDOCK: Yeah.

THE COURT: Okay.

MR. KEACH: So we've got plenty of time for discovery, Your Honor, so.

THE COURT: Okay.

MR. KEACH: But, Your Honor, last time we were here they were complaining that we submitted these additional affidavits from two experts and they needed an opportunity to respond to that because these expert affidavits came out of the blue. And what those two experts' affidavits said was that this was foreseeable conduct. So we've got experts saying it was foreseeable. It then shifts the burden to them to present an expert or some testimony, somebody that says it's not. And what our expert said, Your Honor, in summary was this happens all the time, hospitals know it and hospitals have to take reasonable precautions because it's foreseeable. In essence that's what he said.

Well, Your Honor, I come in here today having read their lengthy and well-researched briefs, and guess what's missing? Not one -- not one -- not one affidavit or other admissible evidence under Rule 56 to rebut those two affidavits. They can say, well, we didn't have enough time to get an expert. That's when you ask for Rule 56(f) relief, Your Honor, which they haven't asked for, and they can't get it now because they're getting ready to lose. They don't even need an expert,

however, Your Honor, to create an issue of fact. They've got their own people. Centennial could have put their CEO in an affidavit that says, you know what, we didn't know this stuff happens. We didn't know that staff employees, that nursing assistants could rape a patient, that's completely unknown to us -- because that's what our experts say. Well, they didn't rebut that, Your Honor. In fact, Your Honor, they don't have any affidavits to rebut anything. And that's the real problem for them, Your Honor. They argue but they don't argue Rule 56, which says specifically how they have -- what they have to present in order to rebut our case.

And I briefly want to talk about foreseeability, Your Honor, just in regards to those two expert affidavits, because here's the long and short of it. They argue that we've misstated the foreseeability standard, okay. Well, they argue instead that the foreseeability standard is the same foreseeability in a negligence standard. That's what they argue. And there's probably a lot of truth to that. And the reason I say that, Your Honor, is because that's what the statute does say, okay. It talks about a negligence standard, in essence. It says: "For the purposes of this subsection, conduct of an employee is reasonably foreseeable if a person of ordinary intelligence and prudence could have reasonably anticipated the conduct and the probability of injury." Well, that's what negligence is. Reasonable man standard. I get that. So when they talk about foreseeability as a reasonable man standard, they're right.

So what are we talking about? Well, we know -- we know in a negligence case, Your Honor, that if a risk of harm is foreseeable -- in a negligence case if a risk of harm is foreseeable the law imposes a duty to take reasonable precautions to prevent that risk of harm. That's black letter law. We know that.

So let me give you an example. Is it foreseeable, would a reasonable man believe that it is possible that a Metro officer could shoot an unarmed man? Is that foreseeable? Would a reasonable man think it's foreseeable that a Metro officer could shoot an unarmed man? The answer is absolutely, unequivocally yes. And that's as a matter of law, Your Honor, because under *Lee v. Golden Nugget* that foreseeability is a legal standard, it's not factual. That's law. And so the law imposes upon Metro a duty to take reasonable precautions. That's what the law is. That's the negligence standard.

The law doesn't say that Metro has to look at each of its three thousand employees and say is this officer -- is it likely that this officer might shoot a particular unarmed man. Is it likely that this one? They don't have to go through that with all three thousand officers, Your Honor. The question is, is it foreseeable that a Metro officer could shoot an unarmed man? And if it is, the law imposes a duty to take reasonable risk (sic). And that's what Metro does. They train them. They train them how not to do it. It doesn't mean they prevent it, but it establishes the foreseeability. And then you to the next -- you go to the next standard and the next standard and the next standard, breach, proximate cause, damages. But as to the foreseeability, that's not a difficult concept.

Well, it's no different here. Is it reasonably foreseeable, would a reasonable man think it's foreseeable that a staff nurse could sexually assault a patient? No different than a Metro officer shooting an unarmed man. The answer is yes. It's yes because, A) we've got two experts that say it that's gone unrebutted. That's a definite yes. B) a reasonable man would understand that. C) the fact that it's an insurable risk, Your Honor, by definition someone has already foreseen this

risk, sexual assaults on patients. And some people actually bought insurance to prevent that. They not only knew about the risk, they bought insurance to prevent the risk. The risk they bought insurance for, Your Honor, is not an unforeseeable risk. It's not a risk -- it's not a risk that is a question of fact. It's a foreseeable risk. That's what's being insured, a foreseeable risk.

And that's why, Your Honor, in *Lee v. Golden Nugget*, the court made it so clear that when we're just talking about foreseeability that is a question of law. Now, it is fact intensive. You need to look at facts and those facts are things like we have in our expert affidavits, but the court makes that legal determination. And just like in any negligence case where a police officer was to shoot an unarmed man, the question of is it foreseeable that a police officer might do it such that a duty arose, that's a given. That's a given. And it's a given in this case. And it's really a given because they didn't rebut it.

Now, we've asked for partial summary judgment. If you read our reply brief and our conclusion, we've asked for partial summary judgment on a number of separate and distinct issues. Each one of them, partial summary judgment on a separate issue. Several of those points aren't in dispute. For instance, there are no facts in dispute that Farmer was convicted of sexually assaulting plaintiff and committing open and gross lewdness and indecent exposure. We're entitled to summary judgment on that. That's not at issue. Summary judgment on the issue of liability as to Farmer -- as to Farmer must be granted and all affirmative defenses related to liability must be dismissed because we've got liability as to Farmer, and affirmative defenses related to liability, those must be dismissed.

Now, that's not just as to Farmer, Your Honor. Affirmative defenses

as to liability goes to everyone. At least -- at least, Your Honor, any affirmative defenses relating to these specific acts, as opposed to the affirmative defenses of 41.745. I will concede, Your Honor, that the affirmative defenses of 41.745 survive. The defendants are entitled to argue those. Today we should be done with them, but even if we aren't and the Court determines that there are questions of fact, then they need to -- and they're entitled to a fact finder on that, those are the only affirmative defenses that remain for them. Any affirmative defenses as to liability are gone as to Farmer and as to all defendants.

Plaintiff is entitled to summary judgment that Farmer was employed by A.N.S. That's not in dispute. They don't come in here and deny that. We're also entitled to summary judgment that Farmer was employed by Centennial, Your Honor. Now, I just have to disagree with counsel on this point. You know, he says there are questions of fact as to whether Farmer was their employee. Okay. Here's what we presented, Your Honor, by proper evidence under Rule 56, okay, that he worked there, that they controlled his work duties, that they told him to go to the E.R. that night, that they told him to leave the E.R. and go to the sixth floor, that they gave him a badge that said he was Centennial contract staff. Those are the facts we have, Your Honor, that he was working at Centennial Hills.

They didn't -- Your Honor, when they want to say there's a question of fact that he was an employee, it's just not right. It's just not right. They don't get to say it, they have to present evidence to rebut it. Where is one -- one -- one affidavit from any person at Centennial Hills that says Farmer was not our employee? That creates a question of fact, Your Honor. It doesn't exist. Counsel's argument doesn't count. And they don't get to come back another day, Your Honor. You've been

gracious enough to give them a sur-reply. Please, enough's enough. They need to rebut it. They did not.

Rule 56(e) says: "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule" -- and the otherwise provided in this rule, Your Honor, are depositions, interrogatories, requests for admissions and other admissible evidence; we know that -- "must set forth specific facts showing that there is a genuine issue for trial." What fact did they present? What fact did they present that there is a question of fact as to his employee status?

The real truth, Your Honor, okay, getting away -- and, you know, the real truth, Your Honor, is the issue about his employee status with Centennial Hills, it's not a question of fact, it's a question of law. And the question of law is this: Is a contract staff a staff employee? When a hospital goes out and hires contract staff employees to do their work, is that person an employee? That's a legal question, it's not a factual question. They say it's a question of fact. What fact? It's a legal issue. And the issue has been decided, Your Honor. We already know the answer. The cases we're talking about tells us.

In *Rockwell* we had a situation where a management company hired a security guard. The apartment complex was held liable for the security guard's miscon-- or would have been held liable. It went back to trial court for trial, but the apartment complex was deemed to be the employer for the purposes of the *respondeat superior* liability. And there's no difference here, Your Honor. And

I made the analysis last time and went through it in terms if we hire a Manpower employee to come work for us, it's no different. They're hiring their employees through an outside agency, A.N.S. That's a legal question, does that make him an employee?

And so, Your Honor, they of course have to have this issue because as I'm going to explain in a moment, Your Honor, regardless of everything they've said and regardless of what this Court might think, if he's an employee we're going to win. That's right. I know that what you're looking at probably says otherwise, but I'm telling you we're going to win and I'm going to explain why in a moment. So if you look at it as what it really is, a question of law, because they haven't raised any factual issues, Your Honor, there's really not a dispute that he was an employee of Centennial. And so I think we're entitled to summary judgment on that as well, Your Honor.

And then we go to are we entitled to summary judgment on the issue of whether these -- whether Farmer's conduct was in the course of the very task assigned to Farmer and not truly an independent venture. And here's why I'm getting ready to explain to Your Honor why everything they said is wrong about this point and what we say is right, and here's why. One thing we know, all agree *Wood* is the case. Everybody in this room admits *Wood v. Safeway* is the case and that's the law. And we just heard it again from counsel. So please don't have someone stand up and tell me, well, I don't care what *Wood* says, because *Wood* is getting ready to explain why we are right and they're wrong. Counsel made a big production a moment ago as to why we can't win because we have the burden of proof. They're wrong. They are wrong. At least, Your Honor, at the very least --

at the very least as to the first two elements they are dead wrong, and *Wood* tells them they are dead wrong. They can scramble all they want because I'm getting ready to tell them where it is.

The issue is this, Your Honor, okay. NRS 41.130 says an employer must pay for all damages imposed against the employee. That's it. It's that simple, okay. The employer must pay for the damages awarded against the employee. The only issue is, was he in course and scope? They can challenge that. Or truly independent venture. But those, Your Honor, those are an exception. The law is they're liable for the damages. The exception is unless they can prove. Now, that's the part -- that's the part they don't like. They want to shift that to me, that I've got to prove these three things exist and that I have to prove all three, because everybody knows this, the statute is clear, it's conjunctive, whoever has the burden, us or them, has to prove all three. So if we have the burden, we have to prove independent venture, course of task assigned, forseeability. If they have the burden, they have to prove it was truly an independent venture, he was not acting in the task assigned and it was not foreseeable.

And of course when you read the statute it does say that. I mean, before I get to *Wood*, it does say an employer is not liable for harm or injury caused by the intentional conduct of an employee if the conduct of the employee was a truly independent venture, was not committed in the course of the very task, was not reasonably foreseeable. Okay. Just when you read the statute it's pretty clear that's defendant's burden because why am I ever going to want to prove something was not reasonably foreseeable? When on earth would I want to prove that? Or when on earth would I want to prove that it's not in the course of the task assigned?

I wouldn't. They would, if they want to get the benefit of their affirmative defenses.

Your Honor, they submitted the -- I want to kind of leave that because I've got the home run. I want to leave that to the end to build a little climax here. They submitted all the legislative history, which of course, Your Honor, is not proper before this Court unless there is an ambiguity in the statute, because if the statute is clear on its face, they don't get to go to legislative history. But even when they did, they didn't find anything in the legislative history where a legislator said that the burden was the plaintiff's. Now, there are people testifying on behalf of the bill, both sides. One in particular is Brooke Nielsen from the A.G.'s Office, who is trying to get as strong as she can get so that the State doesn't have liability, and she says the burden is on the plaintiff and that doesn't change. But no legislator says that, Your Honor. Nothing in the statute says that, Your Honor. It's not written that way. And *Wood* tells us they didn't go that way.

Their whole case in opposition to our summary judgment motion, Your Honor, falls apart if we're right that 41.130 is the rule, is the law, and that's what's going to happen unless they prove the exceptions exist. Now, you have two different parties here, so the Court could rule differently as to A.N.S. and Centennial Hills. A.N.S. is the employer, so we know 41.130 applies to them. That's not a question. Centennial Hills argues that they are not the employer. They don't provide any facts. And the legal issue, which really is is a contract staff employee an employee, is a question of law. But you could find -- I wouldn't agree with it, but you could find that Centennial Hills was -- there's a question of fact as to whether they're an employer, but you can't find that as to A.N.S.

So here's what you've got. You can decide this motion one of two

ways. You can decide that plaintiff has the burden to prove the three elements of NRS 41.745 because they argue it and because Brooke Nielsen said it. Or you can decide based upon the unambiguous case law that clearly requires defendants to prove all three elements in order to escape the mandates of 41.130. If *Wood* says the defendants have the burden to prove the first two elements of 41.745 or they're liable, would that be a sufficient basis for us to get summary judgment, Your Honor?

Well, that's exactly what *Wood* says in 121 Nev. at page 739, Your Honor. In discussing who needed to prove the statutory elements of 41.745 -- this is what Wood says talking about the statutory elements in 41.745 -- the court said Doe -- that was the rape victim -- "Doe argues that Action Cleaning failed to produce any evidence to meet the first two statutory elements, that the sexual assault was a truly independent venture and was not committed in the course of a task assigned to Ronquillo-Nino. Our view of the record, however, reveals that Doe is wrong. Action Cleaning produced an affidavit. Therefore, we conclude that Doe's argument must fail and Action Cleaning has met the first two requirements under 41.745." Okay, look what the court said. Doe argues that Action Cleaning failed to produce any evidence to meet the first two statutory elements, and Doe's argument must fail because they've met that burden, the first two requirements.

The court in *Safeway*, the case that everybody knows is the law, said it's Action Cleaning's burden, okay. The reason they couldn't go with the plaintiff on those first two elements is because Action Cleaning met its burden as to those two elements. That's what *Wood v. Safeway* says. So whose burden is it? Action Cleaning is in the same position as A.N.S. They've got the burden. There's no doubt about that. That means they have to prove it was truly -- they have to prove,

not us -- not us. That's the problem here, Your Honor. They have to prove it by affidavit.

We, Your Honor, presented proper evidence. We presented the nurse, Karen Goodheart, that said this is what a CNS is supposed to do -- CNA is supposed to do. They're supposed to change the bed pans, they're supposed to clean up the feces, they're supposed to do all these things. That's what CNAs -- We produced the voluntary statement of Christine Murray that says changing leads is something that CNAs do. We produced that. They didn't rebut that. They didn't. What affidavit do they have to rebut it? They don't. 56(f) requires that. What answer to interrogatory do they have to rebut it, or request for admissions, or any admissible evidence do they have to rebut that? They don't. 56(f) says you can't rely on arguments and pleadings. We need an affidavit. They don't rebut those things.

What they try to twist it, Your Honor, is that he wasn't supposed -- nobody said he was supposed to be in the room doing this to her at this point in time because she says, well, I didn't know my leads needed changing, I didn't know my catheter needed adjusting and I didn't know I had any feces. That's not the question, Your Honor. It never was the question. The question was never what she thought. There's nothing in the statute or in the case law that says we look to what the victim thought, okay. When the Metro officer shoots the unarmed man, we're not looking at whether the victim thought it was okay to do it or not. The victim is going to say I didn't do anything wrong. It's not what the victim thought, it's what was his job.

Quit playing games. What was the man's job? The man's job was

what these two nurses said his job was, to go in there and take care of the patient. As to A.N.S., they don't even get that. They don't even get that, Your Honor. A.N.S. -- Do you know what task A.N.S. assigned to Farmer? They don't -- A.N.S. doesn't tell Farmer change leads, clean bed pans, go to sixth floor. A.N.S. tells Farmer one -- they assign Farmer one task; one. Go work at Centennial Hills. That's the task they assigned. They can't get around that, Your Honor. They don't -- You know, that's why I say again, Centennial Hills and A.N.S. are in two different seats here. Centennial Hills is the one that tells him change bed pans, change leads, do these things. A.N.S., they assign him to Centennial Hills. That's the task they assign him to. They can't get anything else.

When the court in *Safeway* said that the only way Action Cleaning -- the only way that Action Cleaning was able to defeat Doe was by meeting its burden by producing an affidavit, that's what they have to do. They have the burden, not me. Even if, Your Honor, even if, which I don't agree, but even if the burden of foreseeability is mine, they never get there because he was in the course of -- he was doing the task he was assigned to do. Because if he's doing that, they haven't met their burden. So even if I can't prove foreseeability, they're dead in the water because they have to meet all three elements. They have to meet all three. They do not meet. And so when they don't meet those three elements, even the first two elements, Your Honor, as they did in Action Cleaning, even if I have the burden on foreseeability, they didn't meet their burden on those first two elements and therefore they have to lose. They have to lose.

Your Honor, it may not be what they've been arguing. And I will say one thing, Centennial Hills wrote a heck of a brief that says stuff that's not right, but

it sure as heck looks good. I mean, I read that brief and I'm thinking, dang, I need to go back to law school because they're telling me all kinds of things that I'm reading the law differently. The truth is, they just make statements; they don't back it up. Like when we go back to foreseeability, Your Honor, like the prior incidents, okay. Now, let me tell you what you don't have again on foreseeability. What we presented was that Farmer had a problem at Rawson-Neal, that they knew about it. They put him on do not return. They say he was ultimately cleared. That's not exactly right. Nobody says he didn't kiss the woman. Nobody says he didn't engage in inappropriate conduct. There's no affidavit that says that. What they say is they conducted an investigation and they took the do not return off. And that was Rawson-Neal's investigation, it wasn't the State's.

THE COURT: We don't need to go back and argue the whole motion.

MR. KEACH: We don't, Your Honor. We don't. But I do want to make one point that they argued that's just wrong. As to Centennial Hills, Your Honor, they don't even argue -- they don't even argue the foreseeability to the specific instance that they have with Ms. Murray. They don't. What they say is, it's admissible hearsay. Look at their brief. Their term is Ms. Murray's testimony is admissible hearsay.

Okay, it's admissible hearsay. What does she say? She says that -- she says she heard an elderly female patient screaming, I don't want you by me, get out of here. That's not hearsay. That's not being offered to prove anything. It's just being offered to show what she heard. The door to the room was closed. Murray said that's not normal. The lights in the room were off. She said that's not normal. Farmer was in there with the woman when she was screaming get out. That's not

normal. And she also says, Your Honor, Farmer was always volunteering to put leads on female patients that required him to touch their breasts and that was a little odd. Now, this isn't hearsay, this is her direct testimony. They don't rebut that.

You know, it just baffles me that Rule 56 says they have to rebut it by affidavit or other admissible evidence. They argue in one paragraph on page 18 of their brief, one paragraph that it was admissible hearsay and therefore somehow we lose that argument and that's it. That's it. That's the only thing they submit to this Court to rebut Christine Murray, that it was admissible hearsay; page 18 of their brief, Your Honor.

A.N.S. and Centennial put all their eggs in the wrong basket. Their case hinges on us having to prove -- having the burden to prove the three elements of 41.745. It's their burden to create the issues, not us. All three elements have to be shown, not one. They've failed to submit admissible evidence to create an issue of material fact on these elements. Summary judgment must be granted against them, Your Honor.

THE COURT: The Court finds that defendant Farmer is a convicted felon on criminal acts that form the underlying basis of this lawsuit. The Court further finds that defendant Farmer at the time of those criminal acts was the employee of the three defendants, American Nursing Services, Inc., Universal Health Services, Inc., and Valley Health System, LLC. The Court finds that there is no genuine issue of material fact as to liability of the defendant, Steven Dale Farmer.

The Court grants the plaintiff's motion in part as to defendant Steven Dale Farmer's liability pursuant to NRCP 56, *Wood v. Safeway*, 121 Nev. 724 from 2005, NRS 41.130 and NRS 41.133. The judgment of conviction on the felony

crimes is conclusive evidence to impose civil liability for the injuries to the plaintiff. However, the issue of damages as to Farmer remain an issue for the time of trial.

The Court further finds that the plaintiff must prove general foreseeability for a claim of negligence and that to rebut liability and to defend against it the defendants must prove the various sections and provisions of NRS 41.745. The Court neglected to say that with the granting in part of the motion as to defendant Farmer's liability, the affirmative defenses that relate to the specific criminal acts committed by him are dismissed as to all of the defendants.

The Court is going to deny the balance of the motion without prejudice at this time as to the liability of defendants American Nursing Services, Inc., Universal Health Services, Inc., and Valley Health System, LLC, as there is a genuine issue of material fact as to liability, the principal one being whether it was reasonably foreseeable slash foreseeability. The Court notes that credibility and weight of expert opinions are for the jury to determine at the time of trial. The denial of the balance is pursuant to NRCP 56, *Wood v. Safeway*, 121 Nev. 724 from 2005, *Prell Hotel Corporation v. Antonacci*, 86 Nev. 390 from 1970, and NRS 47.745.

The Court will ask that plaintiff's counsel prepare the order and pass it by the counsel for the four defendants for review prior to submission to the Court.

MR. KEACH: Thank you, Your Honor.

MR. SILVESTRI: Your Honor, can we ask for a point of clarification on the fifth -- what I marked down as the fifth point? You said, if I'm quoting correctly, "plaintiff must prove general foreseeability." That was a term that was used by plaintiffs in their brief and in argument. Is that the type of foreseeability that the

Court is saying must be proven?

THE COURT: Right.

MR. SILVESTRI: Okay.

MR. KEACH: Thank you, Your Honor.

THE COURT: You're welcome. Hopefully that will narrow some of the issues that you'll have to address at the time of trial and as discovery is on-going. And the case will be transferring to Judge Scotti. If there's further motions, those will be brought before him.

MR. KEACH: Well, I know I speak on behalf of Mr. Murdock and I'm sure I speak on behalf of defense counsel, we're really sorry to see you leave the bench. We wish you the best, and this will be our last time.

THE COURT: Thank you. Happy Holidays to all of you.

MR. PRANGLE: Thanks, Judge.

MS. BROOKHYSER: Thank you, Your Honor.

MR. SILVESTRI: Judge, do you want to leave to Judge Scotti about -- I thought we were supposed to discuss scheduling.

THE COURT: Oh, you know what, thank you for reminding me. On the very top of page 7 there is hiding a status check, trial setting that we do need to address. When do you folks feel the case will be trial ready, based on what you have left to do?

MR. SILVESTRI: There's quite a bit left to do because of the stay that was in place while we tended Mr. Farmer's criminal trial. So, nine to twelve months?

MR. MURDOCK: I think we probably have about six more months of discovery. That's probably about right.

MR. SILVESTRI: I think that's right and there might be -- there will be more motion practice following that.

MR. MURDOCK: When is the -- Bemis isn't here. When is the five year rule?

MR. PRANGLE: Oh, I don't know.

MS. BROOKHYSER: I don't recall, but it was -- (indiscernible).

MR. SILVESTRI: We rely on John for that.

MR. MURDOCK: We rely on John for the five year rule.

MR. PRANGLE: We'll let you know when our motion is filed.

THE COURT: You know what, I've got it on my desk --

MR. MURDOCK: Yeah, that's the only -- that's the only issue.

THE COURT: -- in chambers. I'm going to step down and grab that. Hold on a minute.

(Pause in the proceedings)

THE COURT: Okay. The order lifting stay that was electronically filed on July 7th of 2014 indicates that the new five year deadline is February 3rd, 2016.

MR. MURDOCK: Okay. Thank you, Your Honor.

THE COURT: So I'm looking at trial stacks in 2015. The way my department has been set up is as a split calendar with civil/criminal alternating five weeks. Judge Scotti is going to be a hundred percent civil, and so his trial stacks are probably doing to start at the same time but they're all going to be civil. So there is a stack that goes from the middle of May to the middle of June, which might be too soon.

MR. MURDOCK: I think that's too soon, Your Honor.

THE COURT: And there is one that goes from the end of July through August and then one that goes from the beginning of October into November. So I think the August one would be a good place to put you if you're going to have six months of discovery and then some motion work.

MR. SILVESTRI: How about the October one?

MR. MURDOCK: How about the October?

THE COURT: And then if there is some kind of a problem with a witness or whatever, you can bump to October and you still will be within your five year rule.

MR. MURDOCK: That sounds reasonable to me.

MR. PRANGLE: I guess I would request the October setting now.

THE COURT: If you get the October setting and you can't meet it for some reason and you need to continue it if you have a witness become hospitalized or something, then you'd have to go into the January stack and you'd be like right bumping up to it, so --

MR. PRANGLE: I'm fairly confident that if it's certainly due to any issue with me, I'd be willing to do a waiver of the five year rule, if it's because of me.

THE COURT: And then Judge Scotti may have -- he may have a civil stack that starts right after Labor Day, but I don't know if he's going to do that or not. So I would either like to put you in the August stack or set you another status check before Judge Scotti.

MR. SILVESTRI: When does he take the bench?

THE COURT: January 5th.

MR. SILVESTRI: Oh. So maybe that would be the best thing to do. Does that sound reasonable?

THE COURT: Give him a couple of weeks to --

MR. SILVESTRI: Yeah.

THE COURT: -- figure out how he's going to set up his stacks.

MR. KEACH: That sounds fine with us, Your Honor.

THE COURT: Maybe put you in the beginning -- the middle of January.

MR. MURDOCK: That's fine. It doesn't matter.

THE COURT: Okay, let me look at the calendar. How about January 26th at 9:30?

MR. MURDOCK: I'm sorry, what was that, Your Honor?

THE COURT: January 26th, 2015 at 9:30 a.m.

MS. HALL: Do you want us, Your Honor, at that time to just address any remaining discovery issues, address those with Judge Scotti at that time?

THE COURT: Any remaining discovery issues should be addressed with Commissioner Bulla.

MS. HALL: Right. But as far as like the scheduling or the length --

THE COURT: Just the time line, the length of the trial and where you believe you'll be trial ready, those you can bring to Judge Scotti's attention on that status check.

MR. MURDOCK: Yeah, once we get the trial order, then we're going to have to go back down to the commissioner to actually set a scheduling order and all the dates.

THE COURT: Okay. Thank you, everyone.

MR. PRANGLE: Thanks, Judge.

MR. KEACH: Thank you, Your Honor.

MS. HALL: Thank you very much, Your Honor.

MS. BROOKHYSER: Thank you.

(PROCEEDINGS CONCLUDED AT 10:44:10 A.M.)

* * * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.

Liz Garcia

Liz Garcia, Transcriber
LGM Transcription Service

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02/27/2015 04:58:17 PM

ORDR

CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

ESTATE OF JANE DOE, by and through its Special Administrator, Misty Petersen,

Plaintiff,

vs.

VALLEY HEALTH SYSTEM, LLC, a Nevada limited liability company, d/b/a CENTENNIAL HILLS HOSPITAL MEDICAL CETER; UNIVERSAL HEALTH SERVICES, INC., a Delaware corporation; AMERICAN NURSING SERVICE, INC., a Louisiana corporation; STEVEN DALE FARMER, an individual; DOES I through X, inclusive; and ROE CORPORATIONS I through X, inclusive,

Defendants.

Case No.: 09-A-595780-C
Dept. No.: II

Date: December 17, 2014

ORDER ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT RE: LIABILITY

This matter came before the Court on December 17, 2014 on Plaintiff's Motion for Summary Judgment Re: Liability.

Appearing on behalf of Plaintiff, Estate of Jane Doe, by and through its Special Administrator, Misty Petersen, were its attorneys Robert E. Murdock, Esq. and Eckley M. Keach, Esq.

Appearing on behalf of Defendants, Valley Health System LLC d/b/a Centennial Hills Hospital Medical Center and Universal Health Services, Inc. (hereinafter, "Centennial/UHS"), was their attorney Michael E. Prangle, Esq.

Appearing on behalf of Defendant American Nursing Services, Inc. (hereinafter, "ANS"), was its attorney James P.C. Silvestri, Esq.

Appearing on behalf of Defendant Steven Dale Farmer (hereinafter, "Farmer") was his attorney Heather S. Hall, Esq.

Richard F. Scotti
District Judge

Department Two
Las Vegas, NV 89155

Having read and reviewed all of the pleadings and papers on file herein regarding relevant issues, having read the transcript of the proceedings in this matter, and good cause appearing therefor, the Court adopts and makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. In May of 2008, Jane Doe was a patient at Centennial Hills Hospital Medical Center.

2. In May of 2008, Centennial/UHS had a contractual agreement whereby ANS would provide certain hospital staff, which included Certified Nursing Assistants (hereinafter, "CNA").

3. In May of 2008, Farmer was an agency CNA working at Centennial/UHS through ANS.

4. On May 14, 2008, ANS sent Farmer to Centennial/UHS to work there as a CNA.

5. On May 14, 2008 Farmer originally was told to work in the Emergency Room by Centennial/UHS.

6. In May of 2008, Farmer wore an employee badge that had his name, ANS, Centennial/UHS, and contract staff written on it.

7. At around 21:30 hours on May 14, 2008, while Farmer was working at Centennial Hills Hospital Medical Center, Farmer was moved from the Emergency Room to the Sixth Floor by Centennial/UHS to work.

8. On May 14, 2008, Jane Doe was on the Sixth Floor in Room 614 at Centennial/UHS.

9. On May 14, 2008, in the course and scope of his employment with ANS and Centennial/UHS as a CNA, and in the course and scope of working at Centennial/UHS, it was expected that Farmer would enter patients' rooms on the Sixth Floor of Centennial/UHS as part of his tasks.

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10. In addition, Farmer was expected to give bed baths, cleanup stool, cleanup urine, and check monitor leads.

11. On May 14, 2008, Farmer entered Jane Doe's room, Room 614 at Centennial/UHS.

12. On May 14, 2008, having contact with a patient in the patient's room on the Sixth Floor of Centennial/UHS was in the course and scope of Farmer's employment with ANS and Centennial/UHS as a CNA.

13. Farmer had contact with Jane Doe in her room on the Sixth Floor of Centennial/UHS.

14. On May 14, 2008, Jane Doe awoke to find Steven Farmer pinching and rubbing her nipples telling her that he was fixing her EKG leads.

15. Farmer lifted up Jane Doe's hospital gown.

16. Farmer sexually assaulted her by digitally penetrating her anus.

17. Farmer digitally penetrated Jane Doe's anus, vagina, and pinched and rubbed her nipples against the will of Jane Doe.

18. Farmer was convicted in the Eighth Judicial District Court, Clark County, Nevada, in Case Number 08C245739, in Count 10 of Sexual Assault (Felony – Category A) in violation of NRS 200.364 & 200.366 for the digital penetration, by inserting his finger(s) into the anal opening of Jane Doe, against her will or under conditions in which Farmer knew, or should have known, that Jane Doe was mentally or physically incapable of resisting or understanding the nature of Farmer's conduct.

19. Farmer was convicted in the Eighth Judicial District Court, Clark County, Nevada, in Case Number 08C245739, in Count 12 of Sexual Assault (Felony – Category A) in violation of NRS 200.364 & 200.366 for the digital penetration, by inserting his finger(s) into the genital opening of Jane Doe, against her will or under conditions in which Farmer knew, or should have known, that Jane Doe was mentally or physically incapable of resisting or understanding the nature of Farmer's conduct.

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20. Farmer was convicted in the Eighth Judicial District Court, Clark County, Nevada, in Case Number 08C245739, in Count 11 of Open or Gross Lewdness (Gross Misdemeanor) in violation of NRS 201.210 for touching and/or rubbing the genital opening of Jane Doe with his hand(s) and/or finger(s).

21. Farmer was convicted in the Eighth Judicial District Court, Clark County, Nevada, in Case Number 08C245739, in Count 13 of Open or Gross Lewdness (Gross Misdemeanor) in violation of NRS 201.210 for touching and/or rubbing and/or pinching the breast(s) and/or nipple(s) of Jane Doe with his hand(s) and/or finger(s).

22. Farmer was convicted in the Eighth Judicial District Court, Clark County, Nevada, in Case Number 08C245739, in Count 14 of Open or Gross Lewdness (Gross Misdemeanor) in violation of NRS 201.210 for touching and/or rubbing and/or pinching the breast(s) and/or nipple(s) of Jane Doe with his hand(s) and/or finger(s).

23. Farmer was convicted in the Eighth Judicial District Court, Clark County, Nevada, in Case Number 08C245739, in Count 15 of Indecent Exposure (Gross Misdemeanor) in violation of NRS 201.220 for deliberately lifting the hospital gown of Jane Doe to look at her genital opening and/or anal opening and/or breast(s).

CONCLUSIONS OF LAW

1. NRS 41.133 states: "If an offender has been convicted of the crime which resulted in the injury to the victim, the judgment of conviction is conclusive evidence of all facts necessary to impose civil liability for the injury."

2. The Nevada Supreme Court has explained: "We conclude that the language of NRS 41.133 establishes a conclusive presumption of liability when an offender has been convicted of the crime that resulted in the injury to the victim." *Cromer v. Wilson*, 225 P.3d 788, 790 (Nev. 2010). "NRS 41.133 mandates that conviction of a crime resulting in injury to the victim is **conclusive evidence of civil liability for the injury**." *Langon v. Matamoros*, 121 Nev. 142, 143, 111 P.3d 1077, 1077 (2005) (emphasis added).

3. Farmer was convicted of the crime which resulted in injuries to the victim.

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4. As to all Defendants, the judgment of conviction is conclusive evidence of the fact of the anal sexual assault of Jane Doe.

5. As to all Defendants, the judgment of conviction is conclusive evidence of the fact of the vaginal sexual assault of Jane Doe.

6. As to all Defendants, the judgment of conviction is conclusive evidence of the fact of the unlawful touching and/or rubbing the genital opening of Jane Doe with his hand(s) and/or finger(s).

7. As to all Defendants, the judgment of conviction is conclusive evidence of the fact of the unlawful touching and/or rubbing and/or pinching the breast(s) and/or nipple(s) of Jane Doe with his hand(s) and/or finger(s).

8. As to all Defendants, the judgment of conviction is conclusive evidence of the facts regarding his deliberately lifting of the hospital gown of Jane Doe to look at her genital opening and/or anal opening and/or breast(s).

9. As to Farmer, the judgment of conviction results in summary judgment as to liability and dismissal of any affirmative defenses related to liability. Though comparative fault was alleged by Farmer, at this date, no facts have been presented as to same. However, Plaintiff's Motion solely dealt with the issue of liability. Plaintiff will have to file a separate motion on the issue of comparative fault should she believe that summary judgment would be proper on that issue.

10. All affirmative defenses that relate to the criminal acts committed by Farmer are dismissed as to all of the defendants.

11. The Court finds that Farmer is a convicted felon on criminal acts that form the underlying basis for this lawsuit.

12. The Court finds that there is no genuine issue of material fact as to liability of Farmer.

13. The Court GRANTS the plaintiff's Motion as to Farmer's liability pursuant to NRCP 56; *Wood v. Safeway*, 121 Nev. 724 (2005); NRS 41.130; and NRS 41.133.

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Richard F. Scotti
District Judge

Department Two
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14. Judgment and conviction on the felony crimes is conclusive evidence to impose civil liability for the injuries to the plaintiff, however, the issue of damages as to Farmer remains an issue for the time of trial.

15. Plaintiff also moved for summary judgment against ANS and Centennial/UHS based upon NRS 41.130, the respondeat superior statute.

16. The first issue is who were Farmer's employers. The Court finds that Farmer, at the time the criminal acts were committed, was the employee of American Nursing Services, Inc., Universal Health Services, Inc., and Valley Health System, LLC.

17. With regard to negligence, the Court further finds that the plaintiff must prove general foreseeability.

18. To refute respondeat superior liability per NRS 41.130, the defendants must prove the various sections and provisions of NRS 41.745 in order to rebut a claim made under NRS 41.130

19. NRS 41.130 states:

> Except as otherwise provided in NRS 41.745, whenever any person shall suffer personal injury by wrongful act, neglect or default of another, the person causing the injury is liable to the person injured for damages; and where the person causing the injury is employed by another person or corporation responsible for the conduct of the person causing the injury, that other person or corporation so responsible is liable to the person injured for damages.

20. NRS 41.745 states:

> 1. An employer is not liable for harm or injury caused by the intentional conduct of an employee if the conduct of the employee:
>
> (a) Was a truly independent venture of the employee;
>
> (b) Was not committed in the course of the very task assigned to the employee; and
>
> (c) Was not reasonably foreseeable under the facts and circumstances of the case considering the nature and scope of his or her employment.

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Richard F. Scotti
District Judge

Department Two
Las Vegas, NV 89155

For the purposes of this subsection, conduct of an employee is reasonably foreseeable if a person of ordinary intelligence and prudence could have reasonably anticipated the conduct and the probability of injury.

21. At this time, the Court finds there is a genuine issue of material fact with regard to liability, the principal one being whether the misconduct of Farmer was reasonably foreseeable.

22. Hence, the Court denies Plaintiff's Motion for Partial Summary Judgment without prejudice, pursuant to NRCP 56, *Wood v. Safeway*, 121 Nev. 724 (2005); *Prell Hotel Corporation v. Antonacci*, 86 Nev. 390 (1970); and NRS 41.745.

Accordingly,

IT IS HEREBY ORDERED that, as explained above, Plaintiffs' Motion for Summary Judgment Re: Liability is GRANTED IN PART as to Farmer's liability pursuant to NRCP 56; *Wood v. Safeway*, 121 Nev. 724 (2005); NRS 41.130; and NRS 41.133.

IT IS FURTHER ORDERED that, as explained above, Plaintiffs' Motion for Summary Judgment Re: Liability is DENIED in part WITHOUT PREJUDICE as to the liability of ANS and Centennial/UHS as there is a genuine issue of material fact as to liability pursuant to NRCP 56, *Wood v. Safeway*, 121 Nev. 724 (2005); *Prell Hotel Corporation v. Antonacci*, 86 Nev. 390 (1970); and NRS 41.745.

IT IS SO ORDERED.

DATED this 17th day of February, 2015.

RICHARD F. SCOTTI
DISTRICT COURT JUDGE

Richard F. Scotti
District Judge

Department Two
Las Vegas, NV 89155

CERTIFICATE OF SERVICE

I hereby certify that on or about the date filed, a copy of this Order was electronically served, mailed or placed in the attorney's folder on the first floor of the Regional Justice Center as follows:

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PYATT SILVESTRI
Attorneys for Defendant American Nursing Services, Inc.

Melody Howard
Judicial Executive Assistant

Richard F. Scotti
District Judge

Department Two
Las Vegas, NV 89155

+ ☐ STAT

SNP 1925

PHYSICIAN ORDERS

PROMOTE PATIENT SAFETY!
1) Indicate REASONS FOR USE for all PRN medication orders 2) Do NOT use these dangerous abbreviations:

ADMIT STATUS (CHECK ONLY ONE): ☐ INPATIENT ☐ PLACE INTO OBSERVATION HEIGHT: WEIGHT:

ALLERGIES: 1. 2. 3. ☐ None

DIAGNOSIS:

Date \ Time		PRINT NAME OR LICENSE # FOR EACH SIGNATURE
	Box 19	
5-13-8	Adm to Tele 23°: Dr Bazemore	
~~2929~~	Dx: Seizures.	
	Followed Post-Ictal Period	
	Cod: Stable	
	V. Vals: per proto	
	All: see extensive attached list	
	Adv: Reglan	
	Diet: reg # 7	
	I.V.: Heplock	
	Rx: Ativan 2g IVP q 4° prn Sz.	
	~~D.Lantin 100mg po TID~~ Evra	
	~~Labs: BT~~	
	call PMD for Seizures	
	Neuro q 4°	
	Sz precautions	

Erik Evensen, D.O.
NV Lic # 1170

U | IU | QD | QOD | MS | MSO_4 | $MgSO_4$ | LEADING DECIMAL | TRAILING ZEROS

ORDERS:	AUTHORIZATION IS GIVEN TO DISPENSE A THERAPEUTIC EQUIVALENT UNLESS NOTED. NON-FORMULARY DRUGS MAY REQUIRE 48 HOURS TO OBTAIN.

BAR CODE

PO0010 - Physician Orders

Desert Springs Hospital Medical Center · Valley · Summerlin Hospital Medical Center
The Valley Health System
Spring Valley Hospital Medical Center · Centennial Hills Hospital Medical Center

PHYSICIAN ORDERS
(79858908) (R 5/07) (Standard Register)

ORIGINAL - MEDICAL RECORD PINK - NURSING

PATIENT INFORMATION

[redacted]
51 SX: F EMR
ADM/REG DT: 05/13/08

CENTENNIAL HILLS HOSPITAL MEDICAL CENTER
6900 N. DURANGO DRIVE
LAS VEGAS, NV 89149

[redacted] presented to the ER complaining of seizure activity. She had a seizure reportedly and associated with stuttering speech. She reports she has been noncompliant with her Dilantin, however, she is alert and oriented by three and does complain of a headache. She denies any vomiting or nausea at this time. Also denies any vision changes or extremity weakness or numbness.

PAST MEDICAL HISTORY:
Significant for pseudoseizures, anxiety and depression.

MEDICATIONS:
Prozac, Dilantin.

ALLERGIES:
Codeine, Darvocet, Darvon, erythromycin, Floxin, Lortab, Percocet, Percodan, Talwin, Toradol, Tylox, Valium, Vistaril, Demerol.

SOCIAL HISTORY:
Significant for occasional alcohol use, no tobacco use. The patient is single, works here in Las Vegas.

REVIEW OF SYSTEMS:
CONSTITUTIONAL SYSTEMS: The patient denies any fever or chills.
HEENT: The patient denies any vision changes, neck pain, sore throat. However, she does report positive headache.
PULMONARY SYSTEM: The patient denies any coughing or shortness of breath or wheezing.
CARDIOVASCULAR SYSTEM: The patient denies any chest pain or palpitations.
GASTROINTESTINAL SYSTEM: The patient denies any vomiting, diarrhea or abdominal pain.
NEUROLOGICAL SYSTEM: The patient does report and exhibit stuttered speech. Reflexes are 2/4. Sensory intact. Motor strength 4/5. Alert and oriented times three. Cranial nerves II through XII intact.

LABORATORY DATA:
WBC is 10.8, hemoglobin 13, hematocrit 40, sodium 142, potassium 3.4, serum bicarb 18, BUN 10, creatinine 0.5, glucose 99, Dilantin level less than 0.3.

ASSESSMENT:
Pseudoseizure.

PLAN:
Will set up a computed tomography scan of the head, also Ativan 2 mg IV q.4h. p.r.n. seizures. Obtain a neuro consult and follow with neurology.

Signed by BAZEMORE, CURTIS on
16-Jul-2008 07:19:34 -0700

Curtis E. Bazemore, M.D.

CEB/MEDQ DD: 07/06/2008 12:44:45 DT: 07/07/2008 06:07:27
Unique ID#: 332452820 Job #: 158933

PATIENT: [redacted]
ATTENDING:
ADMISSION DATE: 05/14/2008 [redacted] RM #: 519

79514964
16

Centennial Hills Hospital [redacted] MEDICAL CENTER

EMERGENCY NURSING RECORD

Seizure

SIGN IN TIME_____

TRIAGE TIME 1708 I II (III) IV V

NAME: [redacted] DATE 5/13/08

AGE: 51 M / F

PMD_____

DOCTOR_____

ARRIVAL MODE: car EMS police_____

EMERGENCY CONTACT:_____

TREATMENT PTA IV O_2 blood glucose

meds V/S

Height [redacted]

BP 148/70 P 98 RR 21 temp OR (TM) O-R Ax

SaO_2 98 RA / O_2_____ GCS_____

blood glucose_____

PAIN LEVEL current _____/10

CHIEF COMPLAINT seizure x1 x2 x3_____ witnessed

post ictal on arrival seizing on arrival_____

occurred just PTA _____ hrs / days ago_____

lost consciousness / unresponsive

motor activity

- tonic / clonic / focal

visual disturbance_____

headache_____

incontinence_____

injury: none

head chest

neck abdomen

nose back

lip / mouth RUE / LUE

bit tongue RLE / LLE

precipitating factors: none

recent alcohol / drug intake_____

sleep deprivation_____

change in meds or dosage_____

recent illness_____

missed dose of seizure meds_____

ALLERGIES NKDA SEE ATTACHED

drug - PCN / ASA / sulfa / latex / codeine / iodine_____

MEDS none see med list PROZAC, DIAZEPAM

PAST MEDICAL HX negative

seizure disorder / stroke / TIA / cancer DEPRESSION

past surgeries none SEIZURES

SOCIAL HX

smoker _____ppd drugs / alcohol_____

^fall risk screen completed_____

LMP_____ pregnant / postmenop / hyst

RN Signature [signature]

ER0011

Rack Time: 1710 Room: 18

INITIAL ASSESSMENT TIME: 1710

GENERAL APPEARANCE

__no acute distress

__alert

(mild) / moderate / severe distress_____

__anxious / decreased LOC_____

HAD W/ SEIZURE

FUNCTIONAL / NUTRITIONAL ASSESSMENT

(independent ADL)

(appears well)

(nourished / hydrated)

__assisted / total care_____

__obese / malnourished_____

__recent weight loss / gain_____

NEURO / PSYCH

__oriented x 3

__PERRL

__cooperative

__maintains eye contact

__speech appropriate

__moves all extremities

__disoriented to person / place / time_____

__pupils unequal R_____ L_____

__agitated / confused / memory loss_____

__tremors_____

__non verbal / speech slurred_____

__weakness / sensory loss_____

RESPIRATORY

(no resp distress)

(nml breath sounds)

__mild / moderate / severe distress_____

__wheezing / crackles / stridor_____

__decreased breath sounds_____

__tachypnea_____

CVS

__regular rate

__tachycardia / bradycardia_____

EXTREMITY / SKIN

(no evidence of trauma)

(warm, dry)

(intact)

__laceration / abrasion_____

__pale / cyanotic_____

__cool / diaphoretic_____

__open wound / needle marks_____

__skin rash / lesion(s)_____

ABDOMEN

(nml inspection)

(soft, non-tender)

__tenderness_____

__rigid / distended_____

ADDITIONAL FINDINGS

PT SAME MD ED PHARMACY SIGNED

INITIAL ACTIONS

TIME			INIT
1728	ID band applied	ID band verified	
	disrobed / gowned	blanket provided	
	bed low position	side rails up x1 x2	
	call light in reach	head of bed elevated	

Nurse Signature [signature]

[redacted] 51 SX: F EMR
ADM/REG DT: 05/13/08

ACTIONS

TIME		INIT
1710	cardiac monitor	
1710	pulse oximeter O_2 2 L via NC	
	Accu-Chek	
	restraints see documentation	
1710	seizure precautions	

IV STARTS

TIME	#	site	gauge	attempts	complications	INIT
1706	1	RAC	#20			

IV / MEDICATION INFUSION RECORD

Start Time	Solution / Med	Type / Pump	Rate ml / hr	Stop Time	Amount Infused	INIT
	Response: no change improved pain ____/10					
	Response: no change improved pain ____/10					
	Response: no change improved pain ____/10					

MEDICATIONS

TIME	Medication	Dose	Route	Site	INIT
1715	ATIVAN	2 MG	IVP		
1717	Response: no change improved				
	Response: no change improved				
	Response: no change improved				
	Response: no change improved				

PROCEDURES

TIME		INIT
1814	12-lead EKG performed	
	notified	
	LP tray set up	
	consent signed	
	assisted with LP / tolerated well	
	spinal fluid to lab	
	Foley fr. 16 mL return 100 cc	
1746	lab drawn / sent by nurse / lab	
	Recheck	
	to Xray w/ monitor / nurse / O_2 / tech	
	return to room	
	to CT w/ monitor / nurse / O_2 / tech	
	return to room	

VITAL SIGNS

TIME	BP	P	RR	T	SaO_2	GCS	Pain	Pupils	INIT
2010	124/79	91	16		100% RA		0/10		
							/10		
							/10		
							/10		
							/10		

ADDITIONAL NOTES

1830 - Family at ED to talk to pt.
1915 Pt asleep, breathing easy & non-labored. Alert & oriented x3, speech slightly slurred. Answers questions appropriately. 2030 Pt pt's seizure activity noted.

INTAKE _____ OUTPUT _____

_IV / saline lock discontinued: Total Amt Infused _____

_____ Time _____ Initials _____

PROPERTY TO:

patient family security safe see patient belongings list

DISPOSITION

_discharged home police nursing home ME funeral home
_verbal / written instructions / RX given : patient _____
_verbalized understanding
_learning barriers addressed _____
_accompanied by / driver _____
_MSE
admitted / transferred to 6 N doctor Bazemore
report to Ward time 2025
_transfer documentation completed
_notified family / police / ME _____
_left AMA / LWBS / LAT / AWOL signed AMA sheet refused _____

Discharge Vitals
BP _____ HR _____ RR _____ Temp _____ SaO_2 _____
_pain level at discharge ____/10

CONDITION

_unchanged _Improved _stable
guarded _critical _other _____
Depart Time 2030 Mode: walk crutches W/C stretcher ambulance
Acuity: 1 2 3 4 5 6

Discharge Nurse Signature _____
☐Continuation Sheet

SIGNATURE	INITIAL
Brock RN	

ER0011

[redacted]
51 SX: F EMR
ADM/REG DT: 05/13/08

49 Centennial Hills Hospital

EMERGENCY PHYSICIAN RECORD

Seizure (5)

78835816

DATE: 5-13-8. TIME: 1735 ☐ on arrival

ROOM: 13 EMS Arrival

EMS treatments ordered

HISTORIAN: patient spouse paramedics

(HX) EXAM LIMITED BY:

☐ ambulance notes reviewed

limited post-ictal

HPI

chief complaint: seizure first time / hx of seizure disorder

time / duration:
single episode occurred
multiple episodes (# 2) began pta.
most recent episode:

occurred: just prior to arrival

witnessed? no yes by:
details of seizure cannot be obtained / verified

character of seizure(s):
lost consciousness
unresponsive
- completely partially unknown
did not regain between seizures

motor activity
- generalized "shaking all over"
- shaking in one area
- staring

other:

bowel incontinence
urinary incontinence
stopped breathing
lost pulse
unknown

number and duration:
unknown duration / number
single isolated seizure
- duration: 30

repeated seizures
x2 x3 x4 multiple
2 in ED

status epilepticus
continued on arrival in ED

post-ictal symptoms:
none
confusion
lost power / feeling
- arm / leg R / L

speech difficulty
visual disturbance
headache

injury: none head neck nose lip mouth bit tongue chest abdomen back RUE RLE LUE LLE

preceding symptoms / context: none
missed recent doses of seizure meds
changed medication or dosage ?
recent alcohol intake
sleep deprivation
recent illness / see ROS
drug use

Evaluation / treatment PTA: by patient paramedics
treatment-

Recently seen / treated by doctor ?

ROS

NEURO
headache
neck pain
recent head injury

CVS / PULMONARY
chest pain
palpitations
cough
sputum
trouble breathing

CONST
fever

EYES / ENT
trouble with vision
sore throat

GI / GU
abdominal pain
nausea / vomiting
diarrhea
black / bloody stools
painful / frequent urination

SKIN / LYMPH / MS
skin rash / swelling
joint pain

☑ all systems neg. except as marked

Limited

PAST HX negative prior records reviewed

previous seizure / seizure disorder
recent onset / long-standing / since childhood
occasional / frequent / none for years last seizure:
2° to: idiopathic / head injury / prior stroke / ethanol abuse / cancer
craniotomy / cysticercosis / unsure

stroke
craniotomy
shunt
depression
thyroid problem

HIV / AIDS
brain tumor / cancer
known mets
heart disease
HTN
diabetes Type 1 Type 2
diet / oral / insulin
psychiatric disorder

Medications none see nurses note

phenytoin
phenobarbital
carbamazepine
valproic acid

Allergies NKDA

see nurses note ?

SOCIAL HX smoker ? drug use / abuse
recent ETOH lives alone
lives at home lives in nursing home

FAMILY HX negative CNS cancer ?
seizure

ER0012

[redacted]
EMR
: 05/13/08

Circle-positive ✓Check-normal Backslash-negative

1855- family at bedside Hx ē pseudoSZ in past
1900- reviewed old chart 3/8 ⊖EEG, ⊖CT on admsn

[X] Nursing Assessment Reviewed [X] Vitals Reviewed

PHYSICAL EXAM

GENERAL APPEARANCE ? postictal

- __ no acute distress — __ mild / moderate / severe distress
- X alert — __ anxious / lethargic
- __ convulsing / confused (post-ictal)

EENT

- X PERRL — __ post-surgical pupillary defect (R / L)
- X nml ENT inspection — __ tenderness / swelling / ecchymosis
- X no apparent trauma — __ scleral icterus / pale conjunctivae
- X pharynx nml — __ abnormal accommodation
- X no CSF leak — __ pupils unequal, R pupil __ mm L pupil __ mm
- __ EOM palsy
- __ abnml fundi *papilledema / hemorrhages*
- __ tongue abrasion / laceration
- __ hemotympanum / Battle's sign
- __ TM obscured by cerumen
- __ nasal septal hematoma
- __ oral lesions

NECK / BACK

- X neck supple — __ cerv. lymphadenopathy*
- X non-tender — __ meningismus
- __ carotid bruit
- __ Kernig's sign / Brudzinski's sign

__ Nexus criteria neg	__ midline tenderness / distracting injury __ altered mental status __ recent ETOH

RESPIRATORY

- X no resp. distress — __ wheezes / rales / rhonchi
- X breath sounds nml — __ crepitus / rib injury
- X no evidence of rib injury

CVS

- X regular rate, rhythm — __ tachycardia / bradycardia
- X heart sounds nml — __ irregularly irregular rhythm
- __ extrasystoles (occasional / frequent)
- __ murmur grade __ /6 *sys / dias*
- __ decreased pulse(s)

GI (ABDOMEN)

- X non-tender — __ tenderness
- X no organomegaly — __ hepatomegaly / splenomegaly
- X no distention
- __ nml bowel snds*

SKIN

- X color nml, no rash — __ cyanosis / diaphoresis / pallor
- X warm, dry — __ rash / embolic lesions
- __ signs of IVDA

EXTREMITIES

- X non-tender — __ pedal edema
- X normal ROM* — __ tenderness
- X no pedal edema

OBSERVED SEIZURE ACTIVITY IN ED ______ duration ______
focal / generalized awake / unresponsive
head turned R / L eyes deviated R / L

NEURO / PSYCH

higher functions

- __ oriented x3 — (slow) confused / (combative)
- __ mood / affect nml — __ disoriented to *time / place / person*
- __ speech nml — __ aphasic *expressive / receptive*
- __ slurred speech

cranial nerves-

- X normal as tested — __ facial droop
- __ tongue deviation (to R / L)

cerebellar-

- X normal as tested — __ abnml Romberg / gait / finger-nose test
- __ pronator drift

Underline *indicates organ system*
** equivalent or minimum required for organ system exam*

sensorimotor-

- X no motor deficit — __ weakness
- X no sensory deficit — __ sensory deficit
- __ reflexes nml, symmetrical — __ hyperreflexia / hyporeflexia
- __ abnormal reflexes / Babinski

LABS, EKG & XRAYS

CBC (normal) except — WBC __ Hgb __ Hct __ Platelets __ segs __ bands __ lymphs __ monos __ eos __

Chemistries (normal) (except) — Na __ K 3.4 Cl __ CO2 18 Gluc __ BUN __ Creat __ Ca __ Dilantin

Drug Levels dilantin __ phenobarb __ tegretol __

Toxicology *normal except* — acetamin. __ Aspirin __ ETOH __ Triage™ urine __ drug screen ??

EKG MONITOR STRIP X NSR X Rate 99

EKG *NML* [X] interp. by me [ ] Reviewed by me Rate 99
X *NSR* X *nml intervals* X *nml axis* X *nml QRS* X *nml ST/T*
not / changed from:

CXR [ ] interp. by me [ ] Reviewed by me [ ] Discsd w/ radiologist
__ *nml/NAD* __ *no infiltrates* __ *nml heart size* __ *nml mediastinum*
not / changed from:

Head CT normal

Pulse Ox 98 % on (RA) __ L % at *(time)*
Interpretation-oxygenation: (good) / adequate / poor

PROGRESS

Time __ unchanged improved re-examined
1730 pt had SZ ? sternal rub, returned pt "awake" started screaming
X Discussed with Dr Barenose Time
will see patient in: ED / (hospital) office alert. s̄ SZ activity

Counseled (patient) (family) regarding: lab / rad. results (diagnosis) need for follow-up
Additional history from: (family) caretaker paramedics ē pseudoSZ
__ prior records ordered / reviewed __ Rx given
CRIT CARE TIME *(excluding separately billable procedures)*
30-74 min 75-104 min ____ min

CLINICAL IMPRESSION

(Seizure) *New-Onset Epileptic* Status Epilepticus
Generalized Focal Grand Mal Cardiac Dysrhythmia
CNS Infection / Injury Cerebrovascular Accident
Drug Reaction — Prolonged Post-Ictal Period

DISPOSITION- [ ] home [X] admitted ICU / CCU [ ] transferred [ ] expired
Time 1915 [ ] AMA [ ] eloped [ ] obs [ ] LWBS [ ] Other
CONDITION- [X] good [ ] fair [ ] poor [ ] critical [ ] improved [ ] stable [ ] unchanged

______ **RESIDENT / PA / NP SIGNATURE**

ATTENDING NOTE:
__ Resident / PA / NP's history reviewed, patient interviewed and examined.
Briefly, pertinent HPI is:
My personal exam of patient reveals:
Assessment and plan reviewed with resident / midlevel. Lab and ancillary studies show:
I confirm the diagnosis of:
__ Care plan reviewed. Patient will need:
Please see resident / midlevel note for details.

Physician Signature *RT! #* *turned care over at*
Physician Signature *RT! #* *assumed care at*
[X] Template Complete [ ] Dictated Addendum [ ] Additional T-Sheet

ADDRESSOGRAPH

[redacted] SX: F EMR
ADM/REG DT: 05/13/0

ER0012

Seizure - 49

1915- still confused / mellow, Discussed ē Dr Barenose
2220- pt declining Dilantin/Cerebyx

WA. 0860

CHHMC EMERGENCY DEPARTMENT- PHYSICIAN ORDER SHEET

Order Time: _____

Labs
- CBC
- BMP CMP
- CPK Trop
- Mg
- Lipase
- PT/INF PTT
- BNP
- D-Dimer
- CRP ESR RSV
- CSF Protocol
- Retic Count
- CPOU x1 Add On

Urine
- U/A
- Dip
- C & S

Stool C&S
- C-Diff Toxin
- Wound C&S

Pregnancy
- Urine
- Serum
- Quant
- Other:____

Genital Cx
- GC , Chlam
- Trich
- Wet Mount
- KOH

Tox
- Urine Drug Screen
- ETOH
- ASA Tylenol
- Methanol Ethylene Glycol

Levels
- Theo
- Digoxin
- Acetone
- Lactic Acid
- Dilantin
- Phenobarbital
- Depakote (valproic acid)
- Tegretol (carbamazepine)
- Ammonia
- TSH / TFT

Medical Records

Blood
- Blood Culture x1 x2 ARD
- Type & Cross _____ Units
- Type & Screen
- Type & Rh

Cat Scan
- CT Soft Tissue R/O_____
- CT Head R/O_____
- CT Facial / Max. R/O_____
- CT Orbit R/O_____
- CT Abd/Pelvis w / w-o R/O_____
- CT Chest R/O Mass / PE / Aneurysm
- CT Spine C T L R/O_____

VQ Scan
- R/O PE

Sonogram
- Pelvis Abd GB Renal
- Testicular R/O_____
- Extremity RL LL RU LU R/O DVT / Foreign Body

MRI w / w-o
- Head Spine C T L R/O_____
- ☐ PICC Line
- ☐ LP under Flouroscopy
- ☐ Angio ☐ 2D Echo

EKG **PEFV**

Respiratory
- ABG R/A on O_2
- Albuterol 2.5mg x1 x2
- Xopenex 1.25 mg x1 x2
- Atrovent 0.5 mg x1 x2
- Continuous neb ____ ____
- Sputum Culture

XRAY
- PCXR 2V
- R / L Ribs
- Abdominal Series
- Spine C T L
- Soft Tissue Neck
- Face / Nasal
- Shoulder R L
- Humerus R L
- Elbow R L
- Forearm R L
- Wrist R L
- Hand R L
- Pelvis
- Hip R L
- Femur R L
- Knee R L
- Tib/Fib R L
- Ankle R L
- Foot R L
- other_____

Physician Signatures

1. 2.

Physician Nursing Orders – Document on RN T-Sheet

Time Ordered

- ☑ Cardiac Monitor ☐ Start CT PO Prep
- ☑ Pulse Oximeter _____ % R/A _____ L O_2
- ☐ O2 2 L nc / v mask / NRB Maintain O2 Sat >92%
- ☐ Postural Vital Signs ☐ NPO
- ☑ Foley Catheter ☐ 3-Way irrigation / CBI ☐ NG Tube
- ☐ Disrobe/Gown patient ☐ Accucheck _____
- ☐ Ace / Crutches / Splint / Sling
- ☐ Set up for Nasal Packing/Rectal Exam/Suture/Pelvic Exam

IV's
- ☐ Saline Lock ☐ _____ mL/hr
- ☐ NS _____ mL bolus (Hydration)
- ☐ NS _____ ml/hour drip
- ☐

Medications
- ☐ ASA 325 mg by mouth ☐ Tylenol _____mg (15mg/kg)
- ☐ Ibuprofen _____mg (10mg/kg)
- ☐ Phenergan 12.5mg IVP ☐ Zofran 4mg IVP ☐ Inapsine 1.25mg IVP
- ☐ Reglan10 mg IVP ☐ Pepcid 20mg IVP ☐ Protonix 40 mg IVP
- ☐ Morphine _____ mg Slow IVP, may repeat (x1 x2) prn pain q 15 min.
- ☐ Dilaudid _____mg Slow IVP, may repeat (x1 x2) prn pain q 15 min.
- ☐ Lortab 7.5mg/500 mg PO ☐ Percocet 5mg/325 PO x 1
- ☐ Cerebryx PE 1 gm IV ☐ Torodol 30mgIV--------60 mg IM
- ☐ DT 0.5 mL IM ☐ Heparin Protocol

Cardiac:
- ☐ ASA 325mg PO (PTA) ☐ Nitro 0.4mg SL x 3 PRN chest pain
- ☐ Nitropaste _____" Anterior Chest Wall Hold SBP <90
- ☐ Morphine ___ mg SlowIVP, may repeat (x1x2) prn pain q 15 min.
- ☐ Lopressor 5mg. IV every 5 mins. x 3 (Hold Pulse<60 SBP <90)
- ☐ Lopressor 25mg. PO x 1 (Hold Pulse<60 SBP <90)

Pulmonary: *Blood Cultures prior to antibotic treatment*
- ☐ Zithromax 500mg IV and Rocephin 2 gm IV
- OR ☐ Cefepime 2gm IV and Ciprofloxacin 400mg IV
- ☐ 1GM Vancomycin IV (MRSA TX)
- OR ☐ 600mg Zyvox IV
- ☐ O2 _____ L nc / v mask / NRB Maintain O2 Sat >92%

Infection:
- ☐ NS Bolus 500cc SBP>90mm hg then 150cc/hr
- ☐ Vasopressor:_____titrate SBP >90mm hg
- ☐ Foley Catheter Monitor Output ☐ Accucheck_____

Blood Cultures prior to antibotic treatment
- ☐ Zosyn 4.5g IV & Amikacin 500mg & Vancomycin 1g IV
- OR ☐ Levaquin 500mg IV *and* Amikacin 500mg IV *and* Vancomycin 1g IV
- ☐ Dexamethasone 10mg IVP

Document any contraindications on T-sheet

Core Measures

Send labs/EKG/radiology reports with patient Order Time:_____

BAR CODE

ER0012 - ED Physician Order Sheet

Centennial Hills Hospital [redacted] MEDICAL CENTER

E.D. PHYSICIAN ORDER SHEET

(PMM# 78601762) (R 4/08) (IKON COPY CENTER)

PATIENT IDENTIFICATION

[redacted]

MR

/13/08

Found on floor

Emergency Department Fax Report

Date/Time: 5/17/18

Centennial [redacted] Hospital [redacted] MEDICAL CENTER

Patient Information

ER Room 18 to Dept/Room 614

Sending RN Jessica

[redacted]

Admitting Doctors Bazemore

Allergies – extensive list

Diagnosis: Sz

History: HTN, DM, COPD, CAD, Sz, Depression

AccuCheck: Time: Insulin: AC &HS Q4 H

Category Status: I II III

IV Sites/Gauge: g 20 RAC

Diet/Fluid/Restrictions/I/O: Regular

IV Solution & Rate:

Abnormal Labs: Dilantin < 3.0

Pending Labs/Tests: – Neuro q 4' seizure precautions

Mental Status/Neuro: (Alert/oriented) Disoriented; Lethargic; Aphasic; Anxious; Other

ER Stat Lab Cardiac Enzymes

Test	Initial Lab Time/Result	2 hr Time/Result	6 hr Time/Result	12 hr Time/Result
CPKMB				
Trop				
Myoglob				
BNP				

Requisitions for uncompleted cardiac enzymes sent w/patient to floor:

Vital Signs Time: 2010

T 98 P 90 BP 124/77 SPO2 100% 2L Pain 6

Respiratory/Breath Sounds: (Normal) Decreased R__ L__ Crackles R__ L__ Wheezing R L Rales/Rhonchi R L

O2 Therapy:

Cardiac Rhythm: (Sinus Rhythm) A-Fib; Bradycardia; PVCs/PACs; Tachycardia; Other

Rate SR

Tele: 9+

GI: (Non-tender) Guarding; Hypoactive/Hyperactive BS; Distended

LBM:

Urinary: (Voiding w/o problems) Foley; Incontinent

Yellow Amber Red Clear Cloudy Sediment

Other:

Musculoskeletal: (Ambulatory) w/ assistance; w/o assistance

ER0013 - ER Documentation

Integumentary (location)

Decubs:

Wounds:

Edema: 1+ 2+ 3+ Pitting

W/C Nurse notified? Yes No (N/A)

Meds Given in ER

1715 Ativan 2 mg IVP

Other Pertinent Info.

– speech "stuttering"

CHH00322

WA. 0863

5/14/08 Wednesday EMERGENCY DEP. MENT DAILY ASSIGNMENTS

RN'S 7A,11A, AND 1P	ASSIGN.	COMMENTS	RN'S 11A, 1P, AND 7P	ASSIGN.	COMMENTS
[redacted]	charge	[redacted]	[redacted]	chg	
[redacted]	triage / FT [redacted]		[redacted]	18,19,21,22	
[redacted]	7,8,9,23		[redacted]	14-17	
[redacted]	10,11,12,13 ther Hall		[redacted]	20+23 [redacted]	
[redacted]	[redacted]	[redacted]	[redacted]	10-13	
[redacted]	14,15,16,17		[redacted]	[redacted]	called in for 3p shift [redacted]
[redacted]	18,19,21,22	[redacted]	[redacted]	triage	home at 0300
[redacted]	2-6	11A-11P	[redacted]	2-6	11A-11P
[redacted]	10,11,12,13	1P-1A	[redacted]	FT	1P-1A
			Steve Farmer	agency	psych holds
[redacted]	Tech A	11A-11P	[redacted]	UC/Tech	11A-11P (FT)
[redacted]	Tech B	11A-11P	[redacted]	UC/Tech	11A-11P (lobby)
[redacted]	desk		[redacted]	UC/Tech	ER home 0800
[redacted]	~~desk~~ lobby		[redacted]	UC/Tech	desk

Farmer

DAILY ASSIGNMENTS

AM: CRASH CARTS RM RESTRAINT LOG RM SLEEP BOX RM

PM: CRASH CARTS RE RESTRAINT LOG N/A SLEEP BOX RE ACCU CHK RE

STATS

RN HOURS	HOLD HOURS	ADJ RN HOURS	AGENCY		
TRAVELER	ORIENTATION	NON LICENSED	MANAGER		
U.C./TECH	PSYCH. HOURS	OBS HOURS	ED OFFICE		

Daily Patient Assignment

Date: 5/14/08
Shift: 7p-7p
Clinical Supervisor: [redacted]

RN	Room Assignment
[redacted]	607 - 612
	629 - 635
	601 - 606
	613 614 615 616 618 628 636
CNA	**Assignment**
[redacted]	4/C
[redacted] CNA	
[redacted]	
	Orientation [redacted]
[redacted]	Orientation for UC
Float	**Unit**
[redacted]	
Steve Farmer	2130 to 6th floor

7p Census - 24
DC tonight - 615
616

Midnight Census: 27
Observation Patients: _____

CHH00323

WA. 0864

History of AB595 1997

Versions: As Introduced First Reprint Second Reprint As Enrolled

BDR 3-1631
Introduced:06/12/97
Introduced By: Judiciary

Summary: Revises provisions governing civil liability of public and private employers for intentional conduct of employees. (BDR 3-1631)

- 06/12/97 Read first time. Referred to Committee on Judiciary. To printer.
- 06/13/97 From printer. To committee. 6-19
- 06/19/97 From committee: Amend, and do pass as amended.
- 06/20/97 Read second time. Amended. To printer.
- 06/21/97 From printer. To engrossment. Engrossed. First reprint.
- 06/21/97 Placed on General File.
- 06/21/97 Read third time. Passed, as amended. Title approved. To Senate.
- 06/23/97 In Senate. Read first time. Referred to Committee on Judiciary. To committee. 7-4
- 07/05/97 From committee: Amend, and do pass as amended. Placed on Second Reading File.
- 07/05/97 Read second time. Amended. To printer.
- 07/05/97 From printer. To re-engrossment. Re-engrossed. Second reprint. Declared an emergency measure under the Constitution.
- 07/05/97 Read third time. Passed, as amended. Title approved. To Assembly.
- 07/05/97 In Assembly.
- 07/05/97 Senate amendment concurred in.
- 07/05/97 To enrollment.
- 07/08/97 Enrolled and delivered to Governor.
- 07/11/97 Approved by the Governor.
- 07/14/97 Chapter 384.
- 07/21/97 Effective July 11, 1997.

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BILL SUMMARY
69th REGULAR SESSION
OF THE NEVADA STATE LEGISLATURE

PREPARED BY
RESEARCH DIVISION
LEGISLATIVE COUNSEL BUREAU
Nonpartisan Staff of the Nevada State Legislature

ASSEMBLY BILL 595
(Enrolled)

Assembly Bill 595 changes the provisions governing the civil liability of public and private employers for harm or injury caused by the intentional conduct of an employee. This measure provides that an employer is not liable if the employee's conduct is a truly independent venture of the employee; is not committed in the course of the very task assigned to the employee; and is not reasonably foreseeable under the facts and circumstances of the case, considering the nature and scope of employment. The bill establishes that employee conduct is reasonably foreseeable if a person of ordinary intelligence and prudence could have anticipated the conduct and the probability of injury.

Assembly Bill 595 does not impose strict liability on an employer for any unforeseeable intentional act of an employee.

This measure, which is effective on July 11, 1997, does not apply to cases filed prior to its effective date.

Background Information

Representatives of the Office of the Attorney General testified that A.B. 595 was requested in response to the March 27, 1997, decision by Nevada's Supreme Court in *State v. Jimenez*. The *Jimenez* decision, which was recently withdrawn, announced a new test for employer liability and rejected the negligence foreseeability test for intentional torts. Under this new test, an employer would have been considered to be the insurer for an employee's intentional wrongdoing. The ruling placed employers at a great disadvantage in any litigation based upon the intentional acts of employees that result in harm or injury. According to the Attorney General's staff, the new test could also have been interpreted to impose strict liability on employers in such cases.

On June 17, 1997, the Supreme Court withdrew its opinion in the *Jimenez* case. Despite this action, representatives of the Attorney General and of various private and public employers testified that A.B. 595 still needs to be passed to address this issue in statute. With the withdrawal of the opinion, the issue of employer liability is governed by prior Nevada case law, primarily the

1970 Supreme Court opinion in *Prell Hotel Corp. v. Antonacci*, which established workable criteria for employer liability.

Assembly Bill 595 codifies the *Prell* test for employer liability to ensure that this standard would apply in these types of intentional tort cases. This bill does not alter the normal rules of civil procedure in civil actions where the burden of proof is on the plaintiff.

—As Introduced— **A.B. 595**

ASSEMBLY BILL NO. 595–COMMITTEE ON JUDICIARY

JUNE 12, 1997

Referred to Committee on Judiciary

SUMMARY—Revises provisions governing civil liability of public and private employers for intentional conduct of employees. (BDR 3-1631)

FISCAL NOTE: Effect on Local Government: No.
Effect on the State or on Industrial Insurance: No.

EXPLANATION – Matter in italics is new: matter in brackets [ ] is material to be omitted.

AN ACT relating to civil liability; revising the provisions governing civil liability of public and private employers for the intentional conduct of employees; and providing other matters properly relating thereto.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Chapter 41 of NRS is hereby amended by adding thereto a new section to read as follows:

1. An employer is not liable for harm or injury caused by the intentional conduct of an employee if the conduct of the employee:

(a) Was a truly independent venture of the employee;

(b) Was not committed in the course of the very task assigned to the employee; and

(c) Was not reasonably foreseeable under the facts and circumstances of the case considering the nature and scope of his employment.

For the purposes of this subsection, conduct of an employee is reasonably foreseeable if a person of ordinary intelligence and prudence would have reasonably anticipated that the particular harm or injury could occur.

2. Nothing in this section imposes strict liability on an employer for any unforeseeable intentional act of his employee.

3. For the purposes of this section:

(a) "Employee" means any person who is employed by an employer, including, without limitation, any present or former officer or employee, immune contractor or member of a board or commission or legislator in this state.

(b) "Employer" means any public or private employer in this state, including, without limitation, the State of Nevada, any agency of this state and any political subdivision of the state.

(c) "Immune contractor" has the meaning ascribed to it in subsection 3 of NRS 41.0307.

(d) "Officer" has the meaning ascribed to it in subsection 4 of NRS 41.0307.

Sec. 2. NRS 41.03475 is hereby amended to read as follows:

41.03475 [No] *Except as otherwise provided in section 1 of this act, no* judgment may be entered against the State of Nevada or any agency of the state or against any political subdivision of the state for any act or omission of any present or former officer, employee, immune contractor, member of a board or commission, or legislator which was outside the course and scope of his public duties or employment.

Sec. 3. NRS 41.130 is hereby amended to read as follows:

41.130 [Whenever] *Except as otherwise provided in section 1 of this act, whenever* any person shall suffer personal injury by wrongful act, neglect or default of another, the person causing the injury [shall be] *is* liable to the person injured for damages; and where the person causing [such] *the* injury is employed by another person or corporation responsible for his conduct, [such] *that* person or corporation so responsible [shall be] *is* liable to the person injured for damages.

Sec. 4. This act becomes effective upon passage and approval.

MINUTES OF THE
ASSEMBLY COMMITTEE ON JUDICIARY

Sixty-ninth Session
June 19, 1997

The Committee on Judiciary was called to order at 8:15 a.m., on Thursday, June 19, 1997. Chairman Bernie Anderson presided in Room 3138 of the Legislative Building, Carson City, Nevada. Exhibit A is the Agenda. Exhibit B is the Guest List.

COMMITTEE MEMBERS PRESENT:

Mr. Bernie Anderson, Chairman
Ms. Barbara Buckley, Vice Chairman
Mr. Clarence (Tom) Collins
Ms. Merle Berman
Mr. John Carpenter
Mr. Don Gustavson
Mr. Dario Herrera
Mrs. Ellen Koivisto
Mr. Mark Manendo
Mr. Dennis Nolan
Ms. Genie Ohrenschall
Mr. Richard Perkins
Mr. Brian Sandoval
Mrs. Gene Segerblom

GUEST LEGISLATORS PRESENT:

Chris Giunchigliani, Representative, Clark County Assembly District 9
Douglas Bache, Representative, Clark County Assembly District 11

STAFF MEMBERS PRESENT:

Donald O. Williams, Chief Principal Research Analyst
Risa L. Berger, Committee Counsel
Matthew Baker, Committee Secretary

OTHERS PRESENT:

Alice Molasky, Commissioner, Insurance Division, Department of Business and Industry

ASSEMBLY BILL 595 - Revises provisions governing civil liability of public and private employers for intentional conduct of employees.

Chairman Anderson noted the importance of the bill. It provided that under certain circumstances employers were immune from liability to harm or injury caused by the intentional conduct of an employee. An employer was not liable if such conduct was a truly independent venture of the employee, was not committed in the very task assigned to the employee and was not reasonably foreseeable under the facts and circumstances of the case, considering the nature and scope of his employment. Amended language further provided that the conduct of an employee was reasonably foreseeable if a person of ordinary intelligence and prudence would have reasonably anticipated that the particular harm or injury would have occurred. Section 1 did not impose strict liability of an employer of an unforeseeable, intentional act of an employee.

Section 2 of the bill excepted the provisions of section 1 from the provisions of the statutes which prohibited a judgment against the state of Nevada or any political subdivision thereof for any act of omission of an employee or an officer who was outside the course and scope of his public duties or employment.

Section 3 of the bill excepted the provisions of section 1 from the provisions of NRS which set forth the liability of the person and his employer for a wrongful act, negligence or a default which caused personal injury.

Brooke Neilsen, Assistant Attorney General, addressed the committee. With her was Tom Ray, the Solicitor General, who was in charge of the Litigation Division of the Attorney General's Office. Ms. Neilsen, reading from her prepared testimony (Exhibit F), stated A.B. 595 was proposed in response to the Nevada Supreme Court decision in *State vs. Jimenez.* The *Jimenez* decision affected a fundamental change in the law governing public employer liability for the intentional torts of employees. However, the Supreme Court withdrew its opinion on *Jimenez.*

The *Jimenez* decision announced a new test for employer liability, based upon a rationale that the employer's liability should extend beyond his actual or possible control over the employees to include risks inherent in or created by the enterprise because the employer, rather than the innocent injured party, was best able to spread the risk through prices, rates or liability insurance. Ms. Neilsen noted the *Jimenez* decision also rejected the negligence foreseeability test for intentional torts. The decision held that employee intentional torts were foreseeable if in the context of the particular enterprise an employee's conduct

was not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business.

Under the new test, an employer would have been considered to be the insurer for an employee's intentional wrongdoing. The ruling placed public employers at a great disadvantage in any litigation based upon the intentional torts of employees. The new test articulated *Jimenez* could also had been interpreted to impost strict liability on the State in such cases. In at least one recent case against a state agency, the court relied on *Jimenez,* holding the employer strictly liable for the intentional tort of an employee and directed a verdict in favor of the plaintiff. The State was not given the chance to argue against liability on this claim before the jury.

In light of the withdrawal of the Supreme Court's opinion, the issue of employer liability was governed by prior Nevada case precedent. Prior to the *Jimenez* decision the liability of employers for intentional torts of employees was governed primarily by the case of *Prell Hotel Corp. vs. Antonacci.* Under *Prell* an employer could be held liable for intentional torts unless, "the employee's tort is truly an independent venture of his own and not committed in the course of the very task assigned him . . ." The Prell case, followed in Nevada for almost 30 years, established workable criteria for employer liability. Ms. Neilsen stated it struck a fair balance between the rights of plaintiffs and employers. As the defense counsel for the State, Ms. Neilsen stated the Attorney General's Office was satisfied *Prell* gave an employer a fair opportunity to defend against claims based upon intentional misconduct of employees.

Ms. Neilsen commented the provisions set forth in A.B. 595 would codify the *Prell* test for employer liability and would ensure that the *Prell* standard would remain applicable in the types of intentional tort cases mentioned. The language in section 1, subsections 1(a) and 1(b) was taken directly from *Prell.* The language in section 1, subsection 1(c), which required the conduct of an employee to be reasonably foreseeable for the employer to be held liable, was included in the bill to address the foreseeability test mentioned in the *Jimenez* opinion.

Ms. Neilsen stressed A.B. 595 was not intended to give the State a legal or procedural advantage in litigation. The sole purpose of the measure was to re-establish the *Prell* test for employer liability for intentional torts committed by employees. She brought attention to the fact that A.B. 595, in keeping with the normal rules of civil procedure applied to civil actions, the plaintiff retained the burden of proof with respect to the provisions of section 1, subsection 1. The plaintiff must prove his or her case. The bill did not alter this burden.

Mr. Ray stated the legislation was a policy issue. The Supreme Court's new test decision was a policy question which should have been decided by the legislature and not the court. The bill simply codified case law prior to the *Jimenez* case. The problem with the Jimenez case was the jury would never have heard the issue. Whether or not an act was within or without the scope could be very fact intensive. Rather than have the court instruct the jury that it's within the scope, it should be argued before the jury and left to them to decide.

David Howard, Representative, Reno/Sparks Chamber of Commerce, addressed the committee. He noted he represented 2300 private employers and their concern with the *Jimenez* case was extreme. He explained his understanding of the case was just because an employer had the ability to pay, that was just cause to rule against them. Mr. Howard stated he took exception to that and found it reprehensible. He was glad the Supreme Court had withdrawn their opinion on the matter. Mr. Howard supported the statements by the Attorney General's Office, but was concerned with some of the other language in the bill. Overall, he supported the legislation.

Assemblyman Sandoval questioned where the issue of negligent hiring and doing background checks on employees figured into the bill. He was concerned the bill was an incentive to not do a background check. This way an employer would not know of a danger or some type of propensity of an employee. Ms. Neilsen stated it was good policy for all employers to check into the background of who they were hiring. In this way, they would feel comfortable they had hired a trustworthy person. She opined the existence of the foreseeability test was not going to deter employers from doing those types of tests and background checks needed. These had to be done in any business.

Assemblyman Sandoval stated he agreed with the policy but did not want to create a situation where "ignorance is bliss." Mr. Ray did not see the foreseeability element of the bill as affecting the issues which were being raised. Plaintiff's lawyers were quite creative and the foreseeability issue would relate to the act which was committed. The attorney could file a separate cause of action within his complaint for negligent hiring or one for negligent supervision. These could be independent bases for liability on the part of the employer as opposed to whether or not the employer was liable for the act of an employee. The foreseeability issue would not eliminate the employer's obligation to take appropriate action in terms of hiring decisions and supervision decision.

Assemblyman Sandoval questioned the significance of the word "particular" on page 1, line 12. Mr. Ray stated the term identified what the harm or act itself

was, as it related to the particular incident. He stated some of the language in the bill was directly from the *Prell* case itself.

Ms. Neilsen added that the language contained modifiers intended to try and get the court and jury to focus on what happened in a particular case.

Assemblyman Nolan asked what happened if there was reasonable suspicion that an individual may have been an endangerment or possibly been harmful to children, but a particular harm could not be anticipated. Did the individual then have protection under the statute? In other words, what was the policy if the person might have been a danger because of his previous background, but the particular harm could not be foreseen? Ms. Neilsen stated the statute would give an employer opportunity to argue, whatever they believed their defense was. The statute would not give them an absolute defense. The employer would not win a case just because they could say there was no way they could have anticipated particular acts. The jury would have to decide, with defense counsel making what argument they thought was best on behalf of their client.

Jim Nelson, Representative, Nevada Association of Employers, addressed the committee. He supported the bill.

Brent Kolvet, Representative, Nevada Association of Counties, League of Cities, Nevada Public Agency Insurance Pool, addressed the committee. He stated the *Jimenez* case disturbed his clients very greatly and he was glad it had been withdrawn. However, another case already decided by the Supreme Court caused concern, which was why A.B. 595 was important, despite the *Jimenez* case.

This particular case, called *Sunbelt,* involved a private employer, not a public employer. Under the facts of the case, a person employed as a security guard at an apartment complex, while off duty, shot and killed his girlfriend when she tried to move out of his apartment, which happened to be within the apartment complex. The Supreme Court overturned the motion for a grant of summary judgment by the district court. It stated it was conceivable that the guard, in committing murder while off duty, could be within the course and scope of his employment.

Under these facts, if this case could be given to a jury, there was concern among private and public employers where the Supreme Court would go next. The bill did not go far enough in its protections. Mr. Kolvet stated the *Jimenez* case made the assertion that the *Prell* case had done away with the traditional motivational test in determining whether an employee was acting within the act and scope of their employment. Course and scope of employment, for many

years, had been determined by whether or not the employee did something in furtherance of the employer's purposes. The *Prell* decision was wrongly interpreted by the *Jimenez* case to have done away with that. In the *Prell* case, the court had said that unless the act was outside the course and scope, the employer could be held liable. Then the court approved a jury instruction, issued in that case, which very clearly said that a person acted outside the course and scope of his employment if he pursued purposes which were not those of his employer.

Mr. Kolvet noted the language contained in section 1, subsection 1(a) referred to the *Prell* case. There was a motivation issue which needed to be looked at. What motivated the employee to act? In *Sunbelt*, the employee acted because he was angry his girlfriend was leaving him and that is why he shot her. It had nothing to do with providing security for the apartment complex. The motivational test in the *Sunbelt* case would not pass muster under the *Prell* standard. Mr. Kolvet stated he supported the bill.

Assemblywoman Buckley pointed out the court's decision in the *Sunbelt* case had rested on the fact that the security guard in question had a history of aggressive behavior, which resulted in him being terminated from many security jobs. He was fired for insubordination from many casinos. He falsified his employment application, stating he had performed military service. He was also a convicted sex offender. The Supreme Court decision stated his actions did not hold to course and scope, but stated summary judgment was not appropriate because the person carried a radio off duty and was available for emergency situations. She asked Mr. Kolvet if these factors entered into the court's decision.

Mr. Kolvet stated there were some bad facts in the case, and they lead to other issues, such as negligent hiring, negligent retention and negligent training, which were directed solely against the employer. The bill did nothing to obviate those causes of action. All the factors mentioned by Assemblywoman Buckley supported a negligent hiring and negligent retention cause of action. If the employer messed up and hired someone that should not be in a certain position, the employer should be responsible.

Madelyn Shipman, Representative, Washoe County, addressed the committee. She supported A.B. 595, stating her concerns had been voiced by Mr. Kolvet and the Attorney General's Office. The bill did adopt or attempt to adopt the *Prell* test, which she opined was the appropriate test for determining employer liability, based upon respondeat superior liability.

Ms. Shipman pointed out district attorneys and the Attorney General's Office were required, under state statute, to make a determination when a public employee committed an act or when an agency was sued based upon an act of an employee. They had to determine, based on criteria the legislature had set forth, as to whether a person was acting within the course and scope of their employment and whether their acts were otherwise willful or malicious. What was lost in the context of the *Jimenez* case was any kind of criteria to make that determination. A section of NRS 41 prohibited the state or any political subdivision from indemnifying or paying a judgment on behalf of an employee whose actions were outside the course and scope of public duties or employment.

Lt. Stan Olsen, Legislative Liaison, Las Vegas Metropolitan Police Department, addressed the committee. He supported the bill and offered an amendment (Exhibit G). It would change section 1, subsection 1(a) to "was an independent venture of the employee or an act which was not designed, calculated and intended to further the interests of or serve the employer." This statement went further than *Prell* but was a recommendation put forth by attorneys representing the Las Vegas Metropolitan Police Department.

Chairman Anderson questioned what effect the amendment would have. Ms. Berger noted section 1 of the bill applied to both public and private employers but the amended language would go further than what *Prell* stated. Policy issues would have to be decided by the committee.

Carole Vilardo, Representative, Nevada Taxpayer's Association, addressed the committee. She supported the bill and noted there had been a major concern on the part of employers. Private sector employers had a comfort level in knowing there was a specific standard.

Bill Bradley, Representative, NTLA, addressed the committee. He stated he supported the concept of going back to the *Prell* standard but stated he language contained in A.B. 595 went beyond it.

Section 1, subsection 1(a) and 1(b) were verbatim from *Prell*. However, subsection 1(c), which dealt with the definition of "reasonably foreseeable," was never defined by *Prell*. There was never a definition which included the words "particular harm." He noted "particular" would absolve some employers from liability because it would be argued that even though a person was violent and dangerous, there was no way of knowing they would commit a particular act. This was the particular harm provision.

In a case called *Eldorado vs. Brown*, a black Oakland, California school principal was accused of cheating at the Eldorado Hotel and Casino in Reno, Nevada. The Eldorado Hotel and Casino notified Gaming Control, who arrested Mr. Brown. A jury determined he had been wrongfully arrested and awarded him damages. In that case, the definition of foreseeable was predictability. Was an employer able to predict an act and a harm as a result of an employee's conduct? In the *Eldorado* case, which was existing law, the proprietor had a duty to take affirmative action, to control the wrongful acts of third persons where he had reasonable cause to anticipate the act and the probability of injury. There was no instance of the word "particular" in this definition.

To be consistent with existing Nevada law, page 1, line 11 and 12 of the bill should adopt the *Eldorado vs. Brown* language. The language "foreseeable if a person of ordinary intelligence and prudence could have reasonably anticipated the act and the probability of injury." Mr. Bradley noted most victims in intentional tort cases were usually vulnerable people such as children, hospital patients, seniors and women. Several cases arose out of the conduct of highway patrolmen and police assaulting women during their tenure as an officer. The interests of these vulnerable people need to be balanced with the rights of the employers.

Chairman Anderson asked Ms. Berger if the *Eldorado vs. Brown* language, if added, would change the standard in a different manner than was intended with *Prell*, making it more difficult for the employer to defend himself in such kinds of litigation. Ms. Berger stated some of the proposed amended language was more of a policy issue. She pointed out the provision in section 1, subsection 1(c) was not the standard used in *Prell.* It was added into the bill because of statements made by the Nevada Supreme Court in their decision on *Jimenez*. The intent of the provision was to bring it back to an ordinary negligent standard.

Assemblywoman Buckley noted the biggest difficulty with *Jimenez* was its intent of ratifying and affirming *Prell* and then its further aim to also clarify that an employer was liable whenever an act was foreseeable. Foreseeability was then defined for purposes of this area as any content that was not so unusual or startling that it would seem unfair to include the loss resulting from it among the other costs of the employer's business. This is what greatly concerned the public and private sector. Adopting another definition of "reasonably foreseeable" rejected the *Jimenez* standard, returning it to a more reasonable test of foreseeability. The particular harm or injury was anticipated. Assemblywoman Buckley stated the language could be debated but it was important to specifically back away from the "spreading the risk" theory and talk

about foreseeability so the policy was clear when the Supreme Court considered the issue again.

The suggestion of adding "anticipated the act and the probability of injury" dealt more with the negligence standard than the false arrest portion of the *Eldorado vs. Brown* case. It was not exactly a respondeat superior standard.

Mr. Bradley noted those who had previously testified on the bill wished to codify existing law and did not want to go beyond *Prell*, which incorporated 30 years of case law. He stated the amended language he proposed did not go beyond existing law. There needed to be a fair balance between the rights of injured victims and the rights of employers, as defined by the Supreme Court. Defining "reasonably foreseeable" in the context of existing case law, seemed to be consistent with the intent of the committee. Mr. Bradley commented he was worried the bill took the standard beyond existing law, by requiring anticipation of the particular harm. He opined this went too far and would otherwise absolve liability.

Chairman Anderson commented attorneys from both sides of the issue surrounding the bill needed to compromise and arrive at an agreed upon standard of language.

Assemblywoman Buckley asked Ms. Neilsen if the suggestion of defining "reasonably foreseeable" as "a person of ordinary intelligence and prudence would have reasonably anticipated the act and the probability of injury," helped employers or hurt them, or just clarified intent. Ms. Neilsen stated the language offered by Mr. Bradley did not give an advantage either way. The first two provisions in the bill, namely section 1, subsection 1(a) and 1(b) were directly from *Prell*. The reasonably foreseeable language was included to address the Supreme Court language which discussed "spreading the risk." Anything would be considered foreseeable if it was fair to spread the risk to the employer. This needed to be addressed in the bill because it was entirely new. To get back to the standard before *Jimenez,* it had to be addressed.

Assemblywoman Buckley stated she would be in favor of whatever language was the clearest, to prevent litigation. However, section 1, subsection 1(c) needed to be included, so that the definition of foreseeability as spreading the risk to private employers was overruled. Otherwise, there was no point in the legislation being passed.

Mr. Bradley noted he only wanted the provisions in the bill based on existing law, so there was some precedent.

With no further testimony, Chairman Anderson asked for action to be taken on A.B. 595.

ASSEMBLYWOMAN OHRENSCHALL MOVED TO AMEND AND DO PASS A.B. 595.

ASSEMBLYWOMAN BUCKLEY SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY BY THOSE PRESENT. (ASSEMBLYMAN COLLINS WAS ABSENT FOR THE VOTE.)

The floor assignment was given to Assemblywoman Buckley.

Testimony commenced on S.B. 280.

SENATE BILL 280 - Revises provisions governing fee charged to disseminator of information concern racing.

John Sullivan, General Counsel, Las Vegas Disseminator Service, addressed the committee. With him was Todd Roberts, Executive Vice President, Nevada Disseminator Services and Richard Scott, President, Sports Media Network.

Mr. Sullivan stated he and his colleagues, along with the Gaming Control Board, had worked on trying to amend the law which addressed concerns with the dissemination tax. The tax was currently based on a per-customer, daily basis and the amendment was to address taxation based on an income level and receipts from the properties to recognize the changing nature of the racing industry.

Mr. Sullivan commented sections 1 and 2 of the bill were administrative in nature. The most significant changes were in section 3, which took the $10 per day for each customer charge and changed it to a 4.25 percent of total fees collected. The pay date would be changed, in recognition of the fact that disseminators needed to be paid by the casinos in order to have the tally, so they could send their taxes in.

He pointed out the financial concerns which prompted the bill, supplying information (Exhibit H) to the committee which gave a history of the last 6 years, documenting the declining nature of live broadcast handling fees and the stagnant nature of the tax, which was growing to larger portions of the actual fees received. In 1990, live broadcast fees were approximately $14 million, of which $600,000 was taken out in tax. On the estimates for 1997, the live broadcast fees would be approximately $2 million, with over $500,000 in taxes.

AB 595
Office of the Attorney General
Before the Assembly Committee on Judiciary
Thursday, June 19, 1997

We greatly appreciate the courtesy shown to our office by Chairman Anderson and members of the Committee with regard to the issue addressed in AB 595, and are pleased to have the opportunity to discuss this very significant public policy matter.

AB 595 was proposed in response to the Nevada Supreme Court decision in *State v. Jimenez*, Nev. (Adv. Op. 37, March 27, 1997). We believe the *Jimenez* decision has effected a fundamental change in the law governing public employer liability for the intentional torts of employees. On Tuesday, June 17, 1997, the Nevada Supreme Court withdrew its opinion in *Jimenez*.

I will briefly explain the *Jimenez* decision for the benefit of the Committee. In *Jimenez* the Court announced a "new test" for employer liability, which was based upon:

> [A] 'rationale that the employer's liability should extend beyond his actual or possible control over the employees to include risks inherent in or created by the enterprise because [the employer], rather than the innocent injured party, is best able to spread the risk through prices, rates or liability insurance.' (citations omitted).
>
> 1997 Nev. Adv. Op. 37, at p.10.

The *Jimenez* case also rejected the negligence foreseeability test for intentional torts. The decision held that employee intentional torts are foreseeable if:

> [I]n the context of the particular enterprise an employee's conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business.
> *Id.*

Under this new test, an employer would have been considered to be the insurer for an employee's intentional wrongdoing. The ruling placed public employers at a great disadvantage in any litigation based upon the intentional torts of employees. The new test articulated in *Jimenez* could also have been interpreted to impose strict liability on the State in such cases. In at least one recent case against a state agency, the court relying on *Jimenez,* held the employer strictly liable for the intentional tort of an employee and directed a verdict in favor of the plaintiff. The State was not given the chance to argue against liability on this claim before the jury.

In light of the withdrawal of the opinion, the issue of employer liability is governed by prior Nevada case precedent. Prior to the *Jimenez* decision the liability of employers for intentional torts of employees was governed primarily by the case of *Prell Hotel Corp. v.*

Submitted to the Committee on Judiciary on 6-19-97
by Brooke Nielsen, Assistant
Attorney General

EXHIBIT F

Antonacci, 86 Nev. 390, 469 P.2d 399 (Nev. 1970). Under *Prell* an employer could be held liable for intentional torts unless, "the employee's tort is truly an independent venture of his own and not committed in the course of the very task assigned to him. . .." *Prell*, 86 Nev. at 391. The *Prell* case, followed in Nevada for almost 30 years, established workable criteria for employer liability, and we believe struck a fair balance between the rights of plaintiffs and employers. As the defense counsel for the State, we are satisfied that under *Prell* the employer is given a fair opportunity to defend against claims based upon intentional misconduct of employees.

If it is the wish of the Legislature to address this issue in statute, we believe the provisions of AB 595 would codify the *Prell* test for employer liability and would ensure that this standard would remain applicable in these types of intentional tort cases. The language in Section 1, subsections 1(a) and (b) is taken directly from *Prell.* The language in Section 1, subsection 1(c), which would require the conduct of the employee to be "reasonably foreseeable" for the employer to be held liable, was originally included to address the new *Jimenez* foreseeability test quoted above.

AB 595 is not intended give the State a legal or procedural advantage in litigation. The sole purpose of AB 595 was to re-establish the *Prell* test for employer liability for intentional torts committed by employees.

We have one matter which should be made a part of the record on this bill. It should be clarified that under AB 595, in keeping with the normal rules of civil procedure applied to civil actions, the plaintiff retains the burden of proof with respect to the provisions of Section 1, subsection 1 of AB 595. In other words, as it is in all civil tort cases, the plaintiff must prove his or her case and AB 595 does not alter this burden.

Change section 1, subsection a to "was an independent venture of the employee or an act which was not designed, calculated and intended to further the interests of or serve the employer."

Submitted to the Committee on Judiciary on 6-19-97
by Stan Olsen, Legislative Liaison, Las Vegas Metro Police Dept.
EXHIBIT G

Assembly Bill No. 595.

Bill read second time.

The following amendment was proposed by the Committee on Judiciary:

Amendment No. 741.

Amend section 1, page 1, by deleting lines 11 and 12 and inserting: "*foreseeable if a person of ordinary intelligence and prudence could have reasonably anticipated the conduct and the probability of injury.*".

Assemblyman Anderson moved the adoption of the amendment.

Remarks by Assemblyman Anderson.

Amendment adopted.

Bill ordered reprinted, engrossed and to third reading.

Assembly Bill No. 600.

Bill read second time and ordered to third reading.

Senate Bill No. 192.

Bill read second time and ordered to third reading.

Senate Bill No. 244.

Bill read second time and ordered to third reading.

Senate Bill No. 280.

Bill read second time.

Assemblyman Anderson moved that Senate Bill No. 280 be re-referred to the Committee on Ways and Means.

Motion carried.

Senate Bill No. 351.

Bill read second time and ordered to third reading.

Senate Bill No. 103.

Bill read second time.

The following amendment was proposed by Assemblyman Nolan:

Amendment No. 687.

Amend sec. 4, page 2, line 23, by deleting "*and* ".

Amend sec. 4, page 2, line 29, by deleting the italicized period and inserting "*; and*".

Amend sec. 4, page 2, between lines 29 and 30, by inserting:

"*(c) Maintain records of sexual offenses committed against a child. Such records must be kept separate from any other records concerning abuse of a child as defined in NRS 200.508, and may include, without limitation:*

(1) The age of the child;

(2) The gender of the child;

(3) A description of the type of sexual offense committed;

(4) The relationship of the offender to the child;

(5) The physical location where the sexual offense was committed;

(6) The length of time, if any, that the offender had lived in the geographic area in which he committed the sexual offense; and

(7) The number of children against whom the offender has admitted to or has been convicted of committing a sexual offense.".

ASSEMBLY BILL NO. 595–COMMITTEE ON JUDICIARY

JUNE 12, 1997

Referred to Committee on Judiciary

SUMMARY—Revises provisions governing civil liability of public and private employers for intentional conduct of employees. (BDR 3-1631)

FISCAL NOTE: Effect on Local Government: No.
Effect on the State or on Industrial Insurance: No.

EXPLANATION – Matter in italics is new; matter in brackets [ ] is material to be omitted.

AN ACT relating to civil liability; revising the provisions governing civil liability of public and private employers for the intentional conduct of employees; and providing other matters properly relating thereto.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Chapter 41 of NRS is hereby amended by adding thereto a new section to read as follows:

1. An employer is not liable for harm or injury caused by the intentional conduct of an employee if the conduct of the employee:

(a) Was a truly independent venture of the employee;

(b) Was not committed in the course of the very task assigned to the employee; and

(c) Was not reasonably foreseeable under the facts and circumstances of the case considering the nature and scope of his employment.

For the purposes of this subsection, conduct of an employee is reasonably foreseeable if a person of ordinary intelligence and prudence could have reasonably anticipated the conduct and the probability of injury.

2. Nothing in this section imposes strict liability on an employer for any unforeseeable intentional act of his employee.

3. For the purposes of this section:

(a) "Employee" means any person who is employed by an employer, including, without limitation, any present or former officer or employee, immune contractor or member of a board or commission or legislator in this state.

(b) "Employer" means any public or private employer in this state, including, without limitation, the State of Nevada, any agency of this state and any political subdivision of the state.

(c) "Immune contractor" has the meaning ascribed to it in subsection 3 of NRS 41.0307.

(d) "Officer" has the meaning ascribed to it in subsection 4 of NRS 41.0307.

Sec. 2. NRS 41.03475 is hereby amended to read as follows:

41.03475 [No] *Except as otherwise provided in section 1 of this act, no* judgment may be entered against the State of Nevada or any agency of the state or against any political subdivision of the state for any act or omission of any present or former officer, employee, immune contractor, member of a board or commission, or legislator which was outside the course and scope of his public duties or employment.

Sec. 3. NRS 41.130 is hereby amended to read as follows:

41.130 [Whenever] *Except as otherwise provided in section 1 of this act, whenever* any person shall suffer personal injury by wrongful act, neglect or default of another, the person causing the injury [shall be] *is* liable to the person injured for damages; and where the person causing [such] *the* injury is employed by another person or corporation responsible for his conduct, [such] *that* person or corporation so responsible [shall be] *is* liable to the person injured for damages.

Sec. 4. This act becomes effective upon passage and approval.

Remarks by Assemblywoman Ohrenschall.
Roll call on Assembly Bill No. 170:
YEAS—41.
NAYS—None.
Excused—Krenzer.

Assembly Bill No. 170 having received a constitutional majority, Mr. Speaker declared it passed, as amended.
Bill ordered transmitted to the Senate.

Assembly Bill No. 220.
Bill read third time.
Remarks by Assemblywoman Giunchigliani.
Roll call on Assembly Bill No. 220:
YEAS—41.
NAYS—None.
Excused—Krenzer.

Assembly Bill No. 220 having received a constitutional majority, Mr. Speaker declared it passed, as amended.
Bill ordered transmitted to the Senate.

Assembly Bill No. 375.
Bill read third time.
Remarks by Assemblywoman Giunchigliani.
Roll call on Assembly Bill No. 375:
YEAS—41.
NAYS—None.
Excused—Krenzer.

Assembly Bill No. 375 having received a constitutional majority, Mr. Speaker declared it passed, as amended.
Bill ordered transmitted to the Senate.

Assembly Bill No. 595.
Bill read third time.
Remarks by Assemblywoman Buckley.
Roll call on Assembly Bill No. 595:
YEAS—41.
NAYS—None.
Excused—Krenzer.

Assembly Bill No. 595 having received a constitutional majority, Mr. Speaker declared it passed, as amended.
Bill ordered transmitted to the Senate.

Assembly Bill No. 497.
Bill read third time.
The following amendment was proposed by Assemblyman Carpenter:
Amendment No. 740.
Amend the bill as a whole by deleting section 1, renumbering sections 2 and 3 as sections 5 and 6 and adding new sections designated sections 1 through 4, following the enacting clause to read as follows:

MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY

Sixty-ninth Session
July 4, 1997

The Senate Committee on Judiciary was called to order by Chairman Mark A. James, at 12:55 p.m., on Friday, July 4, 1997, on the Senate Floor of the Legislative Building, Carson City, Nevada. There was no Agenda. There was no Attendance Roster.

COMMITTEE MEMBERS PRESENT:

Senator Mark A. James, Chairman
Senator Jon C. Porter, Vice Chairman
Senator Mike McGinness
Senator Maurice Washington
Senator Ernest E. Adler
Senator Dina Titus
Senator Valerie Wiener

STAFF MEMBERS PRESENT:

Barbara Moss, Committee Secretary

Chairman James discussed Assembly Bill (A.B.) 595 and asked for a committee motion.

ASSEMBLY BILL 595: Revises provisions governing civil liability of public and private employers for intentional conduct of employees. (BDR 3-1631)

SENATOR MCGINNESS MOVED TO AMEND AND DO PASS A.B. 595.

SENATOR WIENER SECONDED THE MOTION.

THE MOTION CARRIED. (SENATORS ADLER AND JAMES ABSTAINED FROM THE VOTE.)

*****

By the Committee on Finance:

Senate Bill No. 496—An Act relating to state employees; establishing a maximum allowed salary for certain employees in the unclassified service of the state; and providing other matters properly relating thereto.

Senator Raggio moved that the bill be referred to the Committee on Finance.

Motion carried.

Assembly Bill No. 353.

Senator Rawson moved that the bill be referred to the Committee on Finance.

Motion carried.

Assembly Bill No. 482.

Senator Rawson moved that the bill be referred to the Committee on Taxation.

Motion carried.

SECOND READING AND AMENDMENT

Assembly Bill No. 595.

Bill read second time.

The following amendment was proposed by the Committee on Judiciary:

Amendment No. 1216.

Amend the bill as a whole by renumbering sec. 4 as sec. 5 and adding a new section designated sec. 4, following sec. 3, to read as follows:

"Sec. 4. The amendatory provisions of this act apply to a civil action that is filed on or after the effective date of this act.".

Senator James moved the adoption of the amendment.

Remarks by Senator James.

Amendment adopted.

Bill ordered reprinted, re-engrossed and to third reading.

GENERAL FILE AND THIRD READING

Assembly Bill No. 3.

Bill read third time.

Roll call on Assembly Bill No. 3:

YEAS—21.

NAYS—None.

Assembly Bill No. 3 having received a constitutional majority, Mr. President declared it passed.

Bill ordered transmitted to the Assembly.

Assembly Bill No. 5.

Bill read third time.

Roll call on Assembly Bill No. 5:

YEAS—21.

NAYS—None.

ASSEMBLY BILL NO. 595–COMMITTEE ON JUDICIARY

JUNE 12, 1997

Referred to Committee on Judiciary

SUMMARY—Revises provisions governing civil liability of public and private employers for intentional conduct of employees. (BDR 3-1631)

FISCAL NOTE: Effect on Local Government: No.
Effect on the State or on Industrial Insurance: No.

EXPLANATION – Matter in italics is new; matter in brackets [ ] is material to be omitted.

AN ACT relating to civil liability; revising the provisions governing civil liability of public and private employers for the intentional conduct of employees; and providing other matters properly relating thereto.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Chapter 41 of NRS is hereby amended by adding thereto a new section to read as follows:

1. An employer is not liable for harm or injury caused by the intentional conduct of an employee if the conduct of the employee:

(a) Was a truly independent venture of the employee;

(b) Was not committed in the course of the very task assigned to the employee; and

(c) Was not reasonably foreseeable under the facts and circumstances of the case considering the nature and scope of his employment.

For the purposes of this subsection, conduct of an employee is reasonably foreseeable if a person of ordinary intelligence and prudence could have reasonably anticipated the conduct and the probability of injury.

2. Nothing in this section imposes strict liability on an employer for any unforeseeable intentional act of his employee.

3. For the purposes of this section:

(a) "Employee" means any person who is employed by an employer, including, without limitation, any present or former officer or employee, immune contractor or member of a board or commission or legislator in this state.

(b) "Employer" means any public or private employer in this state, including, without limitation, the State of Nevada, any agency of this state and any political subdivision of the state.

(c) "Immune contractor" has the meaning ascribed to it in subsection 3 of NRS 41.0307.

(d) "Officer" has the meaning ascribed to it in subsection 4 of NRS 41.0307.

Sec. 2. NRS 41.03475 is hereby amended to read as follows:

41.03475 [No] *Except as otherwise provided in section 1 of this act, no* judgment may be entered against the State of Nevada or any agency of the state or against any political subdivision of the state for any act or omission of any present or former officer, employee, immune contractor, member of a board or commission, or legislator which was outside the course and scope of his public duties or employment.

Sec. 3. NRS 41.130 is hereby amended to read as follows:

41.130 [Whenever] *Except as otherwise provided in section 1 of this act, whenever* any person shall suffer personal injury by wrongful act, neglect or default of another, the person causing the injury [shall be] *is* liable to the person injured for damages; and where the person causing [such] *the* injury is employed by another person or corporation responsible for his conduct, [such] *that* person or corporation so responsible [shall be] *is* liable to the person injured for damages.

Sec. 4. The amendatory provisions of this act apply to a civil action that is filed on or after the effective date of this act.

Sec. 5. This act becomes effective upon passage and approval.

(30)

Roll call on Assembly Bill No. 545:

YEAS—21.

NAYS—None.

Assembly Bill No. 545 having received a constitutional majority, Mr. President declared it passed.

Bill ordered transmitted to the Assembly.

Assembly Bill No. 552.

Bill read third time.

Roll call on Assembly Bill No. 552:

YEAS—19.

NAYS—Adler, Coffin—2.

Assembly Bill No. 552 having received a constitutional majority, Mr. President declared it passed.

Bill ordered transmitted to the Assembly.

Assembly Bill No. 595.

Bill read third time.

Remarks by Senators Adler, Neal, James and Coffin.

Conflict of interest declared by Senator Adler.

Roll call on Assembly Bill No. 595:

YEAS—20.

NAYS—None.

Not voting—Adler.

Assembly Bill No. 595 having received a constitutional majority, Mr. President declared it passed, as amended.

Bill ordered transmitted to the Assembly.

Assembly Bill No. 641.

Bill read third time.

Roll call on Assembly Bill No. 641:

YEAS—21.

NAYS—None.

Assembly Bill No. 641 having received a constitutional majority, Mr. President declared it passed.

Bill ordered transmitted to the Assembly.

Assembly Bill No. 211.

Bill read third time.

The following amendment was proposed by the Committee on Commerce and Labor:

Amendment No. 1244.

Amend sec. 8.5, page 2, by deleting lines 17 and 18 and inserting:

"Sec. 8.5. 1. The commissioner may establish by regulation:

(a) The fees that may be imposed by a check-cashing or deferred deposit service for cashing checks or entering into a deferred deposit transaction; and

(b) The penalties that may be imposed by the commissioner for a violation of the provisions of this chapter or the regulations adopted pursuant thereto.

Assembly Bill No. 595–Committee on Judiciary

CHAPTER 384

AN ACT relating to civil liability; revising the provisions governing civil liability of public and private employers for the intentional conduct of employees; and providing other matters properly relating thereto.

[Approved July 11, 1997]

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Chapter 41 of NRS is hereby amended by adding thereto a new section to read as follows:

1. An employer is not liable for harm or injury caused by the intentional conduct of an employee if the conduct of the employee:

(a) Was a truly independent venture of the employee;

(b) Was not committed in the course of the very task assigned to the employee; and

(c) Was not reasonably foreseeable under the facts and circumstances of the case considering the nature and scope of his employment.

For the purposes of this subsection, conduct of an employee is reasonably foreseeable if a person of ordinary intelligence and prudence could have reasonably anticipated the conduct and the probability of injury.

2. Nothing in this section imposes strict liability on an employer for any unforeseeable intentional act of his employee.

3. For the purposes of this section:

(a) "Employee" means any person who is employed by an employer, including, without limitation, any present or former officer or employee, immune contractor or member of a board or commission or legislator in this state.

(b) "Employer" means any public or private employer in this state, including, without limitation, the State of Nevada, any agency of this state and any political subdivision of the state.

(c) "Immune contractor" has the meaning ascribed to it in subsection 3 of NRS 41.0307.

(d) "Officer" has the meaning ascribed to it in subsection 4 of NRS 41.0307.

Sec. 2. NRS 41.03475 is hereby amended to read as follows:

41.03475 [No] *Except as otherwise provided in section 1 of this act, no* judgment may be entered against the State of Nevada or any agency of the state or against any political subdivision of the state for any act or omission of any present or former officer, employee, immune contractor, member of a board or commission, or legislator which was outside the course and scope of his public duties or employment.

Sec. 3. NRS 41.130 is hereby amended to read as follows:

41.130 [Whenever] *Except as otherwise provided in section 1 of this act, whenever* any person shall suffer personal injury by wrongful act, neglect or default of another, the person causing the injury [shall be] *is* liable to the person injured for damages; and where the person causing

STATUTES OF NEVADA 1997

[such] *the* injury is employed by another person or corporation responsible for his conduct, [such] *that* person or corporation so responsible [shall be] *is* liable to the person injured for damages.

Sec. 4. The amendatory provisions of this act apply to a civil action that is filed on or after the effective date of this act.

Sec. 5. This act becomes effective upon passage and approval.

Assembly Bill No. 589–Committee on Transportation

CHAPTER 385

AN ACT relating to motor vehicles; providing for the issuance of special license plates indicating employment as a professional firefighter; imposing a fee for the issuance or renewal of such license plates; and providing other matters properly relating thereto.

[Approved July 11, 1997]

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Chapter 482 of NRS is hereby amended by adding thereto a new section to read as follows:

1. Except as otherwise provided in this section, the department, in cooperation with professional firefighters in the State of Nevada, shall design, prepare and issue license plates that recognize employment as a professional firefighter using any colors and designs which the department deems appropriate. The department shall not design, prepare or issue the license plates unless it receives at least 250 applications for the issuance of those plates.

2. The department shall issue license plates that recognize employment as a professional firefighter for a passenger car or a light commercial vehicle upon application by a qualified person who is entitled to license plates pursuant to NRS 482.265 and who otherwise complies with the requirements for registration and licensing pursuant to this chapter. A person may request that personalized prestige license plates issued pursuant to NRS 482.3667 be combined with license plates that recognize employment as a professional firefighter if that person pays the fees for the personalized prestige license plates in addition to the fees for the license plates that recognize employment as a professional firefighter.

3. An application for the issuance or renewal of license plates that recognize employment as a professional firefighter is void unless it is accompanied by documentation which, in the determination of the department, provides reasonable proof of the identity of the applicant and proof of his current employment as a professional firefighter or his status as a retired professional firefighter. Such documentation may include, but is not limited to:

(a) An identification card which indicates that the applicant is currently employed as a professional firefighter or is currently a member of a firefighters' union; or

(b) Evidence of his former employment as a professional firefighter.

IN THE SUPREME COURT OF THE STATE OF NEVADA

VALLEY HEALTH SYSTEM, LLC, a Delaware limited liability company, d/b/a CENTENNIAL HILLS HOSPITAL MEDICAL CENTER and UNIVERSAL HEALTH SERVICES, INC., a Delaware corporation,

Petitioners,

vs.

EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, and THE HONORABLE RICHARD F. SCOTTI,

Respondents,

and

AMERICAN NURSING SERVICES, INC., a Louisiana corporation; ESTATE OF JANE DOE, by and through its Special Administrator, Misty Peterson; STEVEN DALE FARMER, an individual; DOES I through X, inclusive; and ROE CORPORATIONS I through X, inclusive,

Real Parties in Interest.

Supreme Court Case No. _____

District Court No. 09-A-595780-C

Dept. II

PETITIONERS' APPENDIX TO THE PETITION FOR WRIT OF MANDAMUS AND/OR WRIT OF PROHIBITION

VOLUME 4 of 4

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ALPHABETICAL INDEX TO PETITIONERS' APPENDIX TO THE PETITION FOR WRIT OF MANDAMUS AND/OR WRIT OF PROHIBITION

Defendants Centennial Hills Hospital and Universal Health Services, Inc.'s Supplemental Briefing in Opposition to Plaintiff's Motion for Partial Summary Judgment (December 10, 2014)	IV	WA0762 - WA0816
Defendant Universal Health Services, Inc's Motion to Dismiss for Lack of Personal Jurisdiction (September 10, 2009)	I	WA0023 - WA0035
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Attorneys for Defendants
AMERICAN NURSING SERVICES, INC.

DISTRICT COURT

CLARK COUNTY, NEVADA

JANE DOE, Plaintiff, vs. CENTENNIAL HILLS HOSPITAL MEDICAL CENTER AUXILIARY, a Nevada corporation; VALLEY HEALTH SYSTEM LLC, a Nevada limited liability company; UNIVERSAL HEALTH SERVICES FOUNDATION, a Pennsylvania corporation; AMERICAN NURSING SERVICES, INC., a Louisiana corporation; STEVEN DALE FARMER, an individual; DOES I through X, inclusive; and ROE CORPORATIONS I through X, inclusive, Defendants.	CASE NO.: A-09-595780-C DEPT NO.: II

AMERICAN NURSING SERVICES, INC.'S SUR-REPLY BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

COMES NOW, Defendant AMERICAN NURSING SERVICES ("ANS"), by and through its attorneys of record James P. C. Silvestri, Esq., of the Law Firm PYATT SILVESTRI, S. Brent Vogel, Esq., and Amanda J. Brookhyser, Esq. of the law firm of LEWIS BRISBOIS BISGAARD & SMITH LLP and hereby submits its Sur-Reply Brief in Opposition to Plaintiff's Motion for Partial Summary Judgment.

DATED this 10 day of December, 2014.

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Attorneys for Defendants
AMERICAN NURSING SERVICES, INC.

I.

SUMMARY OF ARGUMENT

Plaintiff filed her Motion for Partial Summary Judgment on or about September 29, 2014. The points and authorities were comprised of 12 pages. Although the length of a brief is not the determiner of substance, it is evidence in this particular matter of what essentially was the sole issue presented by Plaintiff to the Court. Specifically, Plaintiff contended that ANS was liable under a theory of *respondeat superior* pursuant to NRS 41.130. In fact, even in Plaintiff's Reply Brief, she continues to contend that the sole issue before the Court is whether ANS is liable

under a theory of *respondeat superior* under NRS 41.130.[1]

Plaintiff's initial brief was completely void of any discussion of NRS 41.745. Yet, it has become evident to all parties that as to Plaintiff's claims against ANS, application of NRS 41.745 is **the** primary issue.

In light of the fact that that Plaintiff did not address NRS 41.745 in her Opening Brief, she was left to address such in her Reply Brief, thereby making arguments and attaching evidence to which ANS was unable to respond in its Opposition. Therefore, the Court has granted ANS this opportunity to file a Sur-Reply to Plaintiff's Reply Brief.

Specifically, ANS now responds to the following issues:

1. NRS 41.745 is the primary basis upon which a Plaintiff can seek to impose liability against an employer under a theory of *respondeat superior* when an employee commits an intentional act.
2. Plaintiff has the burden of proof to impose liability against ANS, including but not limited to proving the elements of NRS 41.745.
3. NRS 41.745 includes an element of "reasonable foreseeability." As clearly stated by the Nevada Supreme Court, such "reasonable foreseeability" is not, as Plaintiff contends, "general foreseeability," but instead the analysis focuses on the individual intentional actor. In this case, that focus is upon Stephen Farmer.
4. Plaintiff misstates the legal analysis of "foreseeability" under NRS 41.745 as stated in *Wood v. Safeway*, Inc., 121 P.3d 1026 (Nev. 2005).
5. Plaintiff improperly included affidavits, and references thereto, of two witnesses, purportedly "experts," Paul Hofmann and Dwayne Tatalovich. These witnesses were never identified before the filing of Plaintiff's Reply Brief.

Based upon the points and authorities contained herein, those in ANS's Opposition and those made in argument made to this honorable court, ANS respectfully asks that the Court deny

[1] Plaintiff's Reply brief states in pertinent part: "But the instant Motion only has to do with NRS 41.130 liability." Reply Brief, p. 3, fn. 2. Emphasis in original.

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Plaintiff's Motion for Partial Summary Judgment.

II.

PLAINTIFF MISSTATES THE REQUIREMENTS OF NRS 41.745

NRS 41.745 requires that a Plaintiff prove three requirements before being able to impose liability upon an employer under the theory of *respondeat superior* for the intentional conduct of an employee.[2] Plaintiff must prove that the conduct of the employee:

- Was not a truly independent venture of the employee;
- Was committed in the course of the very task assigned to the employee; and
- Was reasonably foreseeable under the facts and circumstances of the case considering the nature and scope of his or her employment.

A. Plaintiff Cannot Meet Requirements (a) and (b) of NRS 41.745

Plaintiff improperly tries to satisfy the first two elements by relying upon statements attributed to Stephen Farmer, himself, namely:

- Farmer told Jane Doe that he was in her room to adjust electrical leads
- Farmer told Jane Doe that he was in her room to clean her and her bed due to a bowel movement that she had had
- Farmer told Jane Doe that he was in her room in order to adjust a catheter

Plaintiff fails to, and cannot, provide evidence that any of these very tasks were assigned to Farmer since none of these tasks were even required or needed with respect to the care of Jane Doe. Further, in the alternative, it is undisputed that Farmer ***was never*** assigned the task of touching, in any manner, Jane Doe's genital areas.

In Jane Doe's own words:

---

[2] Plaintiff's creative attempt at realigning the burden of proof standard at oral argument on December 3, 2014 by arguing that NRS 41,745 is in the "conjunctive," makes no sense. Plaintiff has the burden of proof and must prove all three elements, (a), (b) and (c). *See Wood*, "NRS 41.745 ***also*** requires an element of foreseeability, in effect raising the standard and ***making employers liable only when an employee's intentional conduct is reasonably foreseeable under the circumstances.***" *Wood* at 1036. Emphasis added.

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- Her electrical leads were not unattached, did not need adjusting and were not even attached to her breasts and nipples when Farmer assaulted her by fondling her breasts and nipples.
- Jane Doe did not need cleaning from a bowel movement, Farmer did not clean her, she had not soiled her bed and Farmer had not replaced her bed pad when Famer assaulted her by digitally penetrating her anus.
- Jane Doe did not have a catheter in her vagina and her catheter did not need adjusting when Farmer digitally penetrated her vagina.

Simply because Farmer "says so," does not create the "very task assigned" to him. Further, just because Farmer stated a false reason for his presence at Doe's bedside does not make his conduct any less of a "truly independent" act, especially since he performed none of the very tasks that he allegedly described for Jane Doe. Instead, he performed something completely different, namely the abhorrent sexual assaults for which he was accused and convicted.

B. Plaintiff Misstates The "Reasonable Foreseeability" Requirement Under NRS 41.745(c)

In her Reply Brief, Plaintiff goes to great lengths in arguing that the "reasonable foreseeability" requirement under NRS 41.745 simply requires some form of "general foreseeability." Plaintiff makes this improper argument primarily due to the fact that Plaintiff misstates the law from *Wood v. Safeway, supra*. Quoting from *Wood*, fn. 53, Plaintiff writes in her brief:

> One way to determine whether a risk is inherent in, or created by, an enterprise is to ask whether the actual occurrence was generally foreseeable consequence of the activity. However, "foreseeability" in this context must be distinguished from the "foreseeability" as a test for negligence. In the latter sense, "foreseeable" means a level of probability which would lead a prudent person to take effective precautions **whereas "foreseeability" as a test for respondeat superior merely means that in the context of the particular enterprise an employee's conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business**. In other words, where the question is one of vicarious liability, **the inquiry should be whether the risk was one "that may fairly be regarded as typical of or broadly incidental to the enterprise undertaken by the employer.**

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> Under the modern rationale of respondeat superior, the test for determining whether an employer is vicariously liable for the tortious conduct of his employee is closely related to the test applied in workers' compensation cases for determining whether an injury arose out of or in the course of employment.

See Reply Brief, p. 17. Emphasis in Reply Brief, only.

However, when one reads the ***FULL*** quote from fn. 53 in *Wood*, it is crystal clear that the Nevada Supreme Court is making the distinction of how "foreseeability" in situations involving *respondeat superior* is applied in California, as compared to Nevada under NRS 41.745. The Nevada Supreme Court ***prefaced*** the above referenced quote with:

> "The California Court of Appeal has explained "foreseeability" in the context of respondeat superior as follows:

The same quote is ***concluded*** by the Nevada Supreme Court stating:

> This court quoted a portion of the above language with approval *in State, Department of Human Resources v. Jimenez*, 113 Nev. 356, 365, 935 P.2d 274, 279-80 (1997). However that opinion was later withdrawn based upon the voluntary stipulation to dismiss the case. *State, Dep't Hum. Res. V. Jimenez*, 113 Nev. 735, 941 P.2d 969 (1997).

So, in essence, Plaintiff was asking this Court to consider the foreseeability test in *Jimenez* which the Nevada legislature specifically overturned by immediately enacting NRS 41.745. *See* Legislative History for Assembly Bill 595, Exhibit "12.".[3]

The Nevada Supreme Court has given parties specific guidance about how to analyze "reasonable foreseeability." The Court in *Wood* looked specifically at the subject employee's background, including the fact that (1) Ronquillo-Nino had no prior criminal history, (2) his employer required proper proof of identification, checked employment references and (3) completed proper Immigration and Naturalization forms of its employees. *See Wood, supra,* at 1036-1037.

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[3] Interestingly, Plaintiff admits on p. 27 of her Reply Brief that "California Law Differs From Nevada law and is Not Persuasive." Yet Plaintiff wants to rely upon the totally distinguishable California law as it pertains to the definition of foreseeability as used in a respondeat superior situation. Of further interest, however, is that in situations involving sexual abuse by a health care professional, such as in *Lisa M. v. Henry May Newhall Memorial Hospital*, 12 Cal. 4th 291, 907 P.2d 358 (1995), courts have held that such abhorrent acts are not foreseeable even under the "general foreseeability" test upon which Plaintiff would like to rely. *See Lisa M.*, 12 Cal. 4th 302-306.

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Instead of focusing on such particulars, Plaintiff instead makes generalized arguments that since violent and/or sexual attacks have occurred in workplace environments before, it should be foreseeable that such could have occurred to Jane Doe. Plaintiff tries to support this argument by relying upon the affidavits of two witnesses never before disclosed and who clearly do not understand Nevada law on this issue.[4] Plaintiff also points to the fact that ANS has insurance coverage as potential evidence that the acts of Farmer were foreseeable. If that were the case, the foreseeability requirement of any tort would be met as long as the defendant who is being sued has an insurance policy. Not only is Plaintiff's position unsupported by any actual legal authority, but it violates the basic public policy behind actors maintaining comprehensive insurance policies to protect themselves as well as the public.

Thus, Plaintiff fails to meet the proper requirement of NRS 41.745(c). Plaintiff's argument can only withstand judicial analysis where "general foreseeability" is the standard, which it clearly is not.

III.

CONCLUSION

Plaintiff's reliance upon previously undisclosed argument and evidence does not support Plaintiff's request for partial summary judgment. The thrust of these new arguments is based upon erroneous interpretations of facts and law.

The undisputed, material evidence supports one consistent set of conclusions:

- Farmer committed several truly independent acts involving the criminal sexual assaults against Jane Doe
- Farmer's deviant behavior was not committed in the course of the very tasks assigned to him, i.e. to provide medical care to Jane Doe. His repugnant behavior was not done on behalf of ANS, nor done out of any sense of duty owed to ANS.

[4] Plaintiff's use of these affidavits is a clear violation of NRCP 37(c). *See also Francis v. Wynn Las Vegas, LLC*, 127 Nev. Adv. Op. 60, 262 P.3d 705, 715 n.7 (2011); *Weaver v. State, Dep't of Motor Vehicles*, 121 Nev. 494, 502, 117 P.3d 193, 198–99 (2005).

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- Farmer's sexual assaults committed against Jane Doe were not reasonably foreseeable under the circumstance of this case considering the nature and scope of his employment.

As a result, Plaintiff cannot meet her burden of proving respondeat superior liability against ANS under NRS 41.745. Plaintiff's Motion for Partial Summary Judgment should be denied.

DATED this 10 day of December, 2014.

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Attorneys for Defendants
AMERICAN NURSING SERVICES, INC.

1.

CERTIFICATE OF SERVICE

I hereby certify that on the 10 day of December, 2014, service of the foregoing **AMERICAN NURSING SERVICES, INC.'S SUR-REPLY BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT** on the following person(s) by the following method(s) pursuant to NRCP 5(b):

Via E:Filed/Served:
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EXHIBIT "12"

History of AB595

Versions: As Introduced First Reprint Second Reprint As Enrolled

BDR 3-1631
Introduced: 06/12/97
Introduced By: Judiciary

Summary: Revises provisions governing civil liability of public and private employers for intentional conduct of employees. (BDR 3-1631)

Heard in the the following Committees:

Assembly:	JUDICIARY 6-19
Senate:	JUDICIARY 7-4

- 06/12/97 Read first time. Referred to Committee on Judiciary. To printer.
- 06/13/97 From printer. To committee.
- 06/19/97 From committee: Amend, and do pass as amended.
- 06/20/97 Read second time. Amended. To printer.
- 06/21/97 From printer. To engrossment. Engrossed. First reprint.
- 06/21/97 Placed on General File.
- 06/21/97 Read third time. Passed, as amended. Title approved. To Senate.
- 06/23/97 In Senate. Read first time. Referred to Committee on Judiciary. To committee.
- 07/05/97 From committee: Amend, and do pass as amended. Placed on Second Reading File.
- 07/05/97 Read second time. Amended. To printer.
- 07/05/97 From printer. To re-engrossment. Re-engrossed. Second reprint. Declared an emergency measure under the Constitution.
- 07/05/97 Read third time. Passed, as amended. Title approved. To Assembly.
- 07/05/97 In Assembly.
- 07/05/97 Senate amendment concurred in.
- 07/05/97 To enrollment.
- 07/08/97 Enrolled and delivered to Governor.
- 07/11/97 Approved by the Governor.
- 07/14/97 Chapter 384.
- 07/21/97 Effective July 11, 1997.

Go back **Home Page**

Assembly Bill No. 595-Committee on Judiciary

June 12, 1997

Referred to Committee on Judiciary

SUMMARY--Revises provisions governing civil liability of public and private employers for intentional conduct of employees. (BDR 3-1631)

FISCAL NOTE: Effect on Local Government: No.
Effect on the State or on Industrial Insurance: No.

EXPLANATION - Matter in italics is new; matter in brackets [ ] is material to be omitted.

AN ACT relating to civil liability; revising the provisions governing civil liability of public and private employers for the intentional conduct of employees; and providing other matters properly relating thereto.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1 Chapter 41 of NRS is hereby amended by adding thereto a new section to read as follows:
1. An employer is not liable for harm or injury caused by the intentional conduct of an employee if the conduct of the employee:
(a) Was a truly independent venture of the employee;
(b) Was not committed in the course of the very task assigned to the employee; and
(c) Was not reasonably foreseeable under the facts and circumstances of the case considering the nature and scope of his employment.
For the purposes of this subsection, conduct of an employee is reasonably foreseeable if a person of ordinary intelligence and prudence would have reasonably anticipated that the particular harm or injury could occur.
2. Nothing in this section imposes strict liability on an employer for any unforeseeable intentional act of his employee.
3. For the purposes of this section:
(a) "Employee" means any person who is employed by an employer, including, without limitation, any present or former officer or employee, immune contractor or member of a board or commission or legislator in this state.
(b) "Employer" means any public or private employer in this state, including, without limitation, the State of Nevada, any agency of this state and any political subdivision of the state.
(c) "Immune contractor" has the meaning ascribed to it in subsection 3 of NRS 41.0307.
(d) "Officer" has the meaning ascribed to it in subsection 4 of NRS 41.0307.
Sec. 2 NRS 41.03475 is hereby amended to read as follows:
41.03475[No] *Except as otherwise provided in section 1 of this act, no* judgment may be entered against the State of Nevada or any agency of the state or against any political subdivision of the state for any act or omission of any present or former officer, employee, immune contractor, member of a board or commission, or legislator which was outside the course and scope of his public duties or employment.
Sec. 3 NRS 41.130 is hereby amended to read as follows:
41.130[Whenever] *Except as otherwise provided in section 1 of this act, whenever* any person shall suffer personal injury by wrongful act, neglect or default of another, the person causing the injury [shall be] *is* liable to the person injured for damages; and where the person causing [such] *the* injury is employed by another person or corporation responsible for his conduct, [such] *that* person or corporation so responsible [shall be] *is* liable to the person injured for damages.
Sec. 4 This act becomes effective upon passage and approval.

(REPRINTED WITH ADOPTED AMENDMENTS)
FIRST REPRINT

Assembly Bill No. 595-Committee on Judiciary

June 12, 1997

Referred to Committee on Judiciary

SUMMARY--Revises provisions governing civil liability of public and private employers for intentional conduct of employees. (BDR 3-1631)

FISCAL NOTE: Effect on Local Government: No.
Effect on the State or on Industrial Insurance: No.

EXPLANATION - Matter in italics is new; matter in brackets [ ] is material to be omitted.

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(c) Was not reasonably foreseeable under the facts and circumstances of the case considering the nature and scope of his employment.
For the purposes of this subsection, conduct of an employee is reasonably foreseeable if a person of ordinary intelligence and prudence could have reasonably anticipated the conduct and the probability of injury.
2. Nothing in this section imposes strict liability on an employer for any unforeseeable intentional act of his employee.
3. For the purposes of this section:
(a) "Employee" means any person who is employed by an employer, including, without limitation, any present or former officer or employee, immune contractor or member of a board or commission or legislator in this state.
(b) "Employer" means any public or private employer in this state, including, without limitation, the State of Nevada, any agency of this state and any political subdivision of the state.
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Sec. 3 NRS 41.130 is hereby amended to read as follows:
41.130[Whenever] *Except as otherwise provided in section 1 of this act, whenever* any person shall suffer personal injury by wrongful act, neglect or default of another, the person causing the injury [shall be] *is* liable to the person injured for damages; and where the person causing [such] *the* injury is employed by another person or corporation responsible for his conduct, [such] *that* person or corporation so responsible [shall be] *is* liable to the person injured for damages.
Sec. 4 This act becomes effective upon passage and approval.

(REPRINTED WITH ADOPTED AMENDMENTS)
SECOND REPRINT

Assembly Bill No. 595-Committee on Judiciary

June 12, 1997

Referred to Committee on Judiciary

SUMMARY--Revises provisions governing civil liability of public and private employers for intentional conduct of employees. (BDR 3-1631)

FISCAL NOTE: Effect on Local Government: No.
Effect on the State or on Industrial Insurance: No.

EXPLANATION - Matter in italics is new; matter in brackets [ ] is material to be omitted.

AN ACT relating to civil liability; revising the provisions governing civil liability of public and private employers for the intentional conduct of employees; and providing other matters properly relating thereto.

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For the purposes of this subsection, conduct of an employee is reasonably foreseeable if a person of ordinary intelligence and prudence could have reasonably anticipated the conduct and the probability of injury.
2. Nothing in this section imposes strict liability on an employer for any unforeseeable intentional act of his employee.
3. For the purposes of this section:
(a) "Employee" means any person who is employed by an employer, including, without limitation, any present or former officer or employee, immune contractor or member of a board or commission or legislator in this state.
(b) "Employer" means any public or private employer in this state, including, without limitation, the State of Nevada, any agency of this state and any political subdivision of the state.
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Sec. 3 NRS 41.130 is hereby amended to read as follows:
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Sec. 4 The amendatory provisions of this act apply to a civil action that is filed on or after the effective date of this act.

Sec. 5 This act becomes effective upon passage and approval.

Assembly Bill No. 595-Committee on Judiciary

CHAPTER

384

AN ACT relating to civil liability; revising the provisions governing civil liability of public and private employers for the intentional conduct of employees; and providing other matters properly relating thereto.

[Approved July 11, 1997]

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Chapter 41 of NRS is hereby amended by adding thereto a new section to read as follows:

1. An employer is not liable for harm or injury caused by the intentional conduct of an employee if the conduct of the employee:

(a) Was a truly independent venture of the employee;

(b) Was not committed in the course of the very task assigned to the employee; and

(c) Was not reasonably foreseeable under the facts and circumstances of the case considering the nature and scope of his employment.

For the purposes of this subsection, conduct of an employee is reasonably foreseeable if a person of ordinary intelligence and prudence could have reasonably anticipated the conduct and the probability of injury.

2. Nothing in this section imposes strict liability on an employer for any unforeseeable intentional act of his employee.

3. For the purposes of this section:

(a) "Employee" means any person who is employed by an employer, including, without limitation, any present or former officer or employee, immune contractor or member of a board or commission or legislator in this state.

(b) "Employer" means any public or private employer in this state, including, without limitation, the State of Nevada, any agency of this state and any political subdivision of the state.

(c) "Immune contractor" has the meaning ascribed to it in subsection 3 of NRS 41.0307.

(d) "Officer" has the meaning ascribed to it in subsection 4 of NRS 41.0307.

Sec. 2. NRS 41.03475 is hereby amended to read as follows:

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Sec. 3. NRS 41.130 is hereby amended to read as follows:

41.130[Whenever] *Except as otherwise provided in section 1 of this act, whenever* any person shall suffer personal injury by wrongful act, neglect or default of another, the person causing the injury [shall be] *is* liable to the person injured for damages; and where the person causing [such] *the* injury is employed by another person or corporation responsible for his conduct, [such] *that* person or corporation so responsible [shall be] *is* liable to the person injured for damages.

Sec. 4. The amendatory provisions of this act apply to a civil action that is filed on or after the effective date of this act.

Sec. 5. This act becomes effective upon passage and approval.

MINUTES OF THE

ASSEMBLY COMMITTEE ON JUDICIARY

Sixty-ninth Session

June 19, 1997

The Committee on Judiciary was called to order at 8:15 a.m., on Thursday, June 19, 1997. Chairman Bernie Anderson presided in Room 3138 of the Legislative Building, Carson City, Nevada. Exhibit A is the Agenda. Exhibit B is the Guest List.

COMMITTEE MEMBERS PRESENT:

Mr. Bernie Anderson, Chairman

Ms. Barbara Buckley, Vice Chairman

Mr. Clarence (Tom) Collins

Ms. Merle Berman

Mr. John Carpenter

Mr. Don Gustavson

Mr. Dario Herrera

Mrs. Ellen Koivisto

Mr. Mark Manendo

Mr. Dennis Nolan

Ms. Genie Ohrenschall

Mr. Richard Perkins

Mr. Brian Sandoval

Mrs. Gene Segerblom

GUEST LEGISLATORS PRESENT:

Chris Giunchigliani, Representative, Clark County Assembly District 9

Douglas Bache, Representative, Clark County Assembly District 11

STAFF MEMBERS PRESENT:

Donald O. Williams, Chief Principal Research Analyst

Risa L. Berger, Committee Counsel

Matthew Baker, Committee Secretary

OTHERS PRESENT:

Alice Molasky, Commissioner, Insurance Division, Department of Business and Industry

Ann Fleck, Insurance Counsel and Hearing Officer, Insurance Division.

Rich Myers, Representative, Nevada Trial Lawyer's Association (NTLA)

Larry Matheis, Representative, Nevada State Medical Association

Tom Stephens, Director, Nevada Department of Transportation (NDOT)

Madelyn Shipman, Representative, Washoe County

Robert Maddux, Representative, NTLA

John Crawford, Chief, Right-of-Way-Agent, NDOT

Pam Wilcox, Administrator, Division of State Lands

Brooke Neilsen, Assistant Attorney General, Attorney General's Office

Tom Ray, Solicitor General, Litigation Division, Attorney General's Office

David Howard, Representative, Reno/Sparks Chamber of Commerce

Jim Nelson, Representative, Nevada Association of Employers

Lt. Stan Olsen, Legislative Liaison, Las Vegas Metropolitan Police Department

Carole Vilardo, Representative, Nevada Taxpayer's Association

Bill Bradley, Representative, NTLA

John Sullivan, General Counsel, Las Vegas Disseminator Service

Todd Roberts, Executive Vice President, Nevada Disseminator Services Richard Scott, President, Sports Media Network.

Dennis Neilander, Chief, Corporate Securities, Gaming Control Board

David Harrison Kramer, Private Citizen

Following roll call, the Chairman asked committee members to take action to introduce the following Bill Draft Request:

- BDR 41-1236 revises provisions governing revocation of gaming licenses.

(A.B. 621)

ASSEMBLYWOMAN BUCKLEY MOVED COMMITTEE INTRODUCTION OF BDR 41-1236. (A.B. 621)

ASSEMBLYMAN NOLAN SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY BY THOSE PRESENT. (ASSEMBLYMAN PERKINS AND HERRERA AND ASSEMBLYWOMAN SEGERBLOM WERE ABSENT FOR THE VOTE.)

Testimony commenced on A.B. 577.

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ASSEMBLY BILL 577 - Revises provisions governing actions for malpractice and screening panels for medical or dental malpractice claims.

Alice Molasky, Commissioner, Insurance Division, Department of Business and Industry, addressed the committee. With her was Ann Fleck, Insurance Counsel and Hearing Officer, Insurance Division.

The office of the commissioner was responsible for conducting the process for the medical, dental legal screening panel. The bill represented a proposal by the Division of Insurance to attempt to streamline the process of the screening panel. The bill removed the authority of the commissioner to extend extensions of time for the filing of answers and replies to complaints before the screening panel. At the present time, the statutes allowed for a 60 day extension for the filing of an answer and a 20 day for a filing of a response. In most cases, if not all, there was a request for an extension of time. Rather than going through the process of granting extensions, the division wanted to allow a flat 90 day period for the filing of an answer and a 30 day period of filing a response. This would greatly reduce the amount of paper work for the Division of Insurance and for the parties in each case.

There was an amendment which would allow service of the complaint by personal service. At the present time, the statutes only allowed service by certified mail. A respondent named in a complaint could effectively avoid service by simply refusing to acknowledge the service by mail. Personal service was the highest form of process and should be allowed. In cases before the panel where it had been difficult to serve a respondent because of refusal to accept mail, the division had allowed personal service. It should be allowed in the statutes. Ms. Molasky noted the division needed the statutory authority to fulfill its duties.

One provision in the bill would allow the Attorney General to collect the $350 filing fees, if they were not paid. This rarely occurred because the division would not accept a pleading unless it was accompanied by the filing fee.

Assemblyman Nolan asked if the complaints received by the Insurance Division were of a nature where the complainant was waiting for some type of continuance or corrected treatment of some sort; they were waiting for a response or decision on the behalf of the division. Ms. Molasky stated the complainant had to appear before the screening panel before they were taken to the civil system or judicial court on grounds of medical malpractice.

Rich Myers, Representative, Nevada Trial Lawyer's Association (NTLA) addressed the committee. He noted the NTLA were regular participants in the medical, legal and dental screening panel and had a keen interestin it. Mr. Myers stated A.B. 577 had been reviewed and the proposed changes in statute were reasonable, desirable

and would serve to streamline the process.

Larry Matheis, Representative, Nevada State Medical Association, addressed the committee. He stated his support the bill.

Chairman Anderson asked for action to be taken on A.B. 577.

ASSEMBLYWOMAN BUCKLEY MOVED TO DO PASS A.B. 577.

ASSEMBLYMAN GUSTAVSON SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY BY THOSE PRESENT. (ASSEMBLYMAN PERKINS, HERRERA, SANDOVAL AND ASSEMBLYWOMAN SEGERBLOM, BERMAN AND OHRENSCHALL WERE ABSENT FOR THE VOTE.)

The floor assignment was given to Assemblyman Collins.

Testimony commenced on A.B. 580.

ASSEMBLY BILL 580 - Makes various changes relating to property rights.

Chris Giunchigliani, Representative, Clark County Assembly District 9, addressed the committee. She submitted to the committee information (Exhibit C) which illustrated some of the problems associated with homeowner's associations. With her was Douglas Bache, Representative, Clark County Assembly District 11.

The intent of A.B. 580 was to review homeowner's associations which were not affected by legislative changes made in 1993. The provisions in section 1, 2 and 3 addressed this problem and brought those associations into conformance with the changes made in 1993. According to the law, if a homeowner's association existed prior to January of 1992, they were not affected by the common interest law changes. They did not have to release their minutes or have their records available for review by their constituency. This had created a gap which was corrected by the bill.

Assemblywoman Giunchigliani explained that another aim of the bill was to overturn the Supreme Court case whereby a homeowner's association was allowed to use eminent domain to take property. This was a far too broad reaching statute. The right of eminent domain and the seizing of person's properties needed to be more narrowly construed, which was the intent of the bill.

Assemblyman Gustavson stated he was a member of a common interest community and was also a former Chairman of the Board. He noted he had no conflict with the bill.

Assemblyman Bache stated he wished section 8 and 9 removed from the bill. These referenced NRS 37. He noted he had interest with homeowner's rights. His comments and concerns mirrored those of Assemblywoman Giunchigliani.

Assemblyman Sandoval questioned the secret ballot provisions in the bill, contained in section 1. Assemblywoman Giunchigliani stated there had been concerns from homeowners that at their meetings they had to vote for or against something with their neighbors and arguments ensued. The proper process was a written ballot so people were more free to cast their ballots based on the issue, rather than doing a show of hands. This way, there was not increased animosity among those living in the community.

Assemblyman Sandoval questioned if the provisions regarding secret ballots had to be included in statute, in order for homeowner's associations to do so. Assemblywoman Giunchigliani stated such was her understanding.

Assemblywoman Buckley questioned if Assemblywoman Giunchigliani had reviewed a bill by Sen. Schneider which dealt with homeowner's associations. Were any of the provisions of A.B. 580 included in that bill?

Assemblywoman Giunchigliani stated she had reviewed parts of the Sen. Schneider's bill and had spoken with him. It was her understanding the provisions in A.B. 580 were not in his bill.

Tom Stephens, Director, Nevada Department of Transportation (NDOT), addressed the committee. He submitted to the committee information (Exhibit D) which detailed his department's opposition to sections 8 and 9 of the bill. He stated the bill would have a disastrous effect on NDOT's ability to build roads and would kill projects, such as the US 95 widening project in Las Vegas. Sections 8 and 9 needed to be deleted.

Madelyn Shipman, Representative, Washoe County, addressed the committee. She stated she opposed sections 8 and 9 of the bill. They would have affect on counties as it related to their ability to build public projects.

Robert Maddux, Representative, Nevada Trial Lawyer's Association, addressed the committee. He stated the bill involved unnecessary over regulation. Section 1, which dealt with secret ballots, was unnecessary. Homeowner association meetings were conducted very informally and it was not necessary to make all voting by secret ballot.

Mr. Maddux proposed to delete section 1. However, as an alternative, he proposed amended language. After "meeting," insert "upon the request of a member present at the meeting." In other words, if at a meeting a single member stated he wanted the voting done by secret ballot, it would be done by secret ballot, otherwise, everything would be conducted as normal without requiring such a stringent requirement.

Mr. Maddux stated if the bill was enacted as it was, most homeowner's associations would not be aware of the secret ballot requirement. They would continue to conduct their business the way they had. The requirement of the secret ballot should be triggered by some action at the meeting rather than because of a blanket requirement.

In section 3, subsection 2, the bill required all associations, who had been established in the past and had provisions governing documents, to amend their documents. This was unnecessary. Homeowner associations required a vote of 75 percent of the members to be able to effect an amendment. It was extremely difficult to get super majorities. Mr. Maddux proposed an amendment (Exhibit E) which allowed existing declarations for homeowner's associations to be deemed amended to conform. This would circumvent the process of actually hiring a lawyer, preparing amendments to documents, and then trying to get the requisite super majority vote, which was sometimes impossible to get.

Mr. Maddux stated it was a good idea to try and make all homeowner's associations in the state abide by the same rules. There needed to be some consistency. To require everyone to amend their documents was not necessary.

He noted section 3, subsection 2 required any association which existed now to be reorganized to comply with the provisions of NRS 116.3101, which stated an association had to be a profit or non-profit corporation or a partnership. Some associations were unincorporated. It was not necessary to require these associations to reorganize, just so the nature of the organization was changed from an unincorporated association to a corporation. Mr. Maddux wished this provision to be deleted. He also wished for section 10, subsection 2 to be deleted.

Assemblyman Collins questioned if associations followed a certain set of procedures which covered votes. Mr. Maddux noted some did and some did not.

Assemblyman Nolan noted if there was any change to the protocol and procedures directing the association, the members needed to be notified through the mail or by other means. Most homeowner's associations were run by some type of professional agency or had an agency involved who did regular mailings. Would there be opposition to having notification by mail about changes? Mr. Maddux stated such a process made sense. It was important everyone was notified of what changes were being made.

Mr. Maddux noted the provisions in the bill would require each homeowner's association in the state to hire an

attorney to analyze their declaration, compare it to NRS 116, find every provision in their declaration which was not consistent, prepare amendments and then have the association as a whole pass those amendments. This was much too burdensome to do.

Risa Berger, Committee Counsel, pointed out if the provisions in the section 10 were removed, the provisions in section 1 regarding destruction of secret ballots would also have to be removed, for consistency.

John Crawford, Chief, Right-of-Way-Agent, NDOT, addressed the committee. He stated sections 8 and 9 would have a devastating financial affect on NDOT, as well as other public entities. He asked for their removal from the bill.

Pam Wilcox, Administrator, Division of State Lands, addressed the committee. She stated sections 8 and 9 would have serious impacts on the state's ability to acquire land for public projects.

Mr. Maddux once again addressed the committee. He noted his proposed amendments did not apply to board meetings, only to annual member's meetings.

With no further testimony, the hearing was closed on A.B. 580, with no action taken.

Testimony commenced on A.B. 595.

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ASSEMBLY BILL 595 - Revises provisions governing civil liability of public and private employers for intentional conduct of employees.

Chairman Anderson noted the importance of the bill. It provided that under certain circumstances employers were immune from liability to harm or injury caused by the intentional conduct of an employee. An employer was not liable if such conduct was a truly independent venture of the employee, was not committed in the very task assigned to the employee and was not reasonably foreseeable under the facts and circumstances of the case, considering the nature and scope of his employment. Amended language further provided that the conduct of an employee was reasonably foreseeable if a person of ordinary intelligence and prudence would have reasonably anticipated that the particular harm or injury would have occurred. Section 1 did not impose strict liability of an employer of an unforeseeable, intentional act of an employee.

Section 2 of the bill excepted the provisions of section 1 from the provisions of the statutes which prohibited a judgment against the state of Nevada or any political subdivision thereof for any act of omission of an employee or an officer who was outside the course and scope of his public duties or employment.

Section 3 of the bill excepted the provisions of section 1 from the provisions of NRS which set forth the liability of the person and his employer for a wrongful act, negligence or a default which caused personal injury.

Brooke Neilsen, Assistant Attorney General, addressed the committee. With her was Tom Ray, the Solicitor General, who was in charge of the Litigation Division of the Attorney General's Office. Ms. Neilsen, reading from her prepared testimony (Exhibit F), stated A.B. 595 was proposed in response to the Nevada Supreme Court decision in *State vs. Jimenez*. The *Jimenez* decision affected a fundamental change in the law governing public employer liability for the intentional torts of employees. However, the Supreme Court withdrew its opinion on *Jimenez*.

The *Jimenez* decision announced a new test for employer liability, based upon a rationale that the employer's liability should extend beyond his actual or possible control over the employees to include risks inherent in or created by the enterprise because the employer, rather than the innocent injured party, was best able to spread the risk through prices, rates or liability insurance. Ms. Neilsen noted the *Jimenez* decision also rejected the negligence foreseeability test for intentional torts. The decision held that employee intentional torts were foreseeable if in the context of the particular enterprise an employee's conduct was not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business.

Under the new test, an employer would have been considered to be the insurer for an employee's intentional wrongdoing. The ruling placed public employers at a great disadvantage in any litigation based upon the intentional torts of employees. The new test articulated *Jimenez* could also had been interpreted to impost strict liability on the State in such cases. In at least one recent case against a state agency, the court relied on *Jimenez*, holding the employer strictly liable for the intentional tort of an employee and directed a verdict in favor of the plaintiff. The State was not given the chance to argue against liability on this claim before the jury.

In light of the withdrawal of the Supreme Court's opinion, the issue of employer liability was governed by prior Nevada case precedent. Prior to the *Jimenez* decision the liability of employers for intentional torts of employees was governed primarily by the case of *Prell Hotel Corp. vs. Antonacci*. Under *Prell* an employer could be held liable for intentional torts unless, "the employee's tort is truly an independent venture of his own and not committed in the course of the very task assigned him . . ." The Prell case, followed in Nevada for almost 30 years, established workable criteria for employer liability. Ms. Neilsen stated it struck a fair balance between the rights of plaintiffs and employers. As the defense counsel for the State, Ms. Neilsen stated the Attorney General's Office was satisfied *Prell* gave an employer a fair opportunity to defend against claims based upon intentional misconduct of employees.

Ms. Neilsen commented the provisions set forth in A.B. 595 would codify the *Prell* test for employer liability and would ensure that the *Prell* standard would remain applicable in the types of intentional tort cases mentioned. The language in section 1, subsections 1(a) and 1(b) was taken directly from *Prell*. The language in section 1, subsection 1(c), which required the conduct of an employee to be reasonably foreseeable for the employer to be held liable, was included in the bill to address the foreseeability test mentioned in the *Jimenez* opinion.

Ms. Neilsen stressed A.B. 595 was not intended to give the State a legal or procedural advantage in litigation. The sole purpose of the measure was to re-establish the *Prell* test for employer liability for intentional torts committed by employees. She brought attention to the fact that A.B. 595, in keeping with the normal rules of civil procedure applied to civil actions, the plaintiff retained the burden of proof with respect to the provisions of section 1, subsection 1. The plaintiff must prove his or her case. The bill did not alter this burden.

Mr. Ray stated the legislation was a policy issue. The Supreme Court's new test decision was a policy question which should have been decided by the legislature and not the court. The bill simply codified case law prior to the *Jimenez* case. The problem with the Jimenez case was the jury would never have heard the issue. Whether or not an act was within or without the scope could be very fact intensive. Rather than have the court instruct the jury that it's within the scope, it should be argued before the jury and left to them to decide.

David Howard, Representative, Reno/Sparks Chamber of Commerce, addressed the committee. He noted he represented 2300 private employers and their concern with the *Jimenez* case was extreme. He explained his understanding of the case was just because an employer had the ability to pay, that was just cause to rule against them. Mr. Howard stated he took exception to that and found it reprehensible. He was glad the Supreme Court had withdrawn their opinion on the matter. Mr. Howard supported the statements by the Attorney General's Office, but was concerned with some of the other language in the bill. Overall, he supported the legislation.

Assemblyman Sandoval questioned where the issue of negligent hiring and doing background checks on employees figured into the bill. He was concerned the bill was an incentive to not do a background check. This way an employer would not know of a danger or some type of propensity of an employee. Ms. Neilsen stated it

was good policy for all employers to check into the background of who they were hiring. In this way, they would feel comfortable they had hired a trustworthy person. She opined the existence of the foreseeability test was not going to deter employers from doing those types of tests and background checks needed. These had to be done in any business.

Assemblyman Sandoval stated he agreed with the policy but did not want to create a situation where "ignorance is bliss." Mr. Ray did not see the foreseeability element of the bill as affecting the issues which were being raised. Plaintiff's lawyers were quite creative and the foreseeability issue would relate to the act which was committed. The attorney could file a separate cause of action within his complaint for negligent hiring or one for negligent supervision. These could be independent bases for liability on the part of the employer as opposed to whether or not the employer was liable for the act of an employee. The foreseeability issue would not eliminate the employer's obligation to take appropriate action in terms of hiring decisions and supervision decision.

Assemblyman Sandoval questioned the significance of the word "particular" on page 1, line 12. Mr. Ray stated the term identified what the harm or act itself was, as it related to the particular incident. He stated some of the language in the bill was directly from the *Prell* case itself.

Ms. Neilsen added that the language contained modifiers intended to try and get the court and jury to focus on what happened in a particular case.

Assemblyman Nolan asked what happened if there was reasonable suspicion that an individual may have been an endangerment or possibly been harmful to children, but a particular harm could not be anticipated. Did the individual then have protection under the statute? In other words, what was the policy if the person might have been a danger because of his previous background, but the particular harm could not be foreseen? Ms. Neilsen stated the statute would give an employer opportunity to argue, whatever they believed their defense was. The statute would not give them an absolute defense. The employer would not win a case just because they could say there was no way they could have anticipated particular acts. The jury would have to decide, with defense counsel making what argument they thought was best on behalf of their client.

Jim Nelson, Representative, Nevada Association of Employers, addressed the committee. He supported the bill.

Brent Kolvet, Representative, Nevada Association of Counties, League of Cities, Nevada Public Agency Insurance Pool, addressed the committee. He stated the *Jimenez* case disturbed his clients very greatly and he was glad it had been withdrawn. However, another case already decided by the Supreme Court caused concern, which was why A.B. 595 was important, despite the *Jimenez* case.

This particular case, called *Sunbelt*, involved a private employer, not a public employer. Under the facts of the case, a person employed as a security guard at an apartment complex, while off duty, shot and killed his girlfriend when she tried to move out of his apartment, which happened to be within the apartment complex. The Supreme Court overturned the motion for a grant of summary judgment by the district court. It stated it was conceivable that the guard, in committing murder while off duty, could be within the course and scope of his employment.

Under these facts, if this case could be given to a jury, there was concern among private and public employers where the Supreme Court would go next. The bill did not go far enough in its protections. Mr. Kolvet stated the *Jimenez* case made the assertion that the *Prell* case had done away with the traditional motivational test in determining whether an employee was acting within the act and scope of their employment. Course and scope of employment, for many years, had been determined by whether or not the employee did something in furtherance of the employer's purposes. The *Prell* decision was wrongly interpreted by the *Jimenez* case to have done away with that. In the *Prell* case, the court had said that unless the act was outside the course and scope, the employer could be held liable. Then the court approved a jury instruction, issued in that case, which very clearly said that a person acted outside the course and scope of his employment if he pursued purposes which were not those of his employer.

Mr. Kolvet noted the language contained in section 1, subsection 1(a) referred to the *Prell* case. There was a motivation issue which needed to be looked at. What motivated the employee to act? In *Sunbelt*, the employee acted because he was angry his girlfriend was leaving him and that is why he shot her. It had nothing to do with providing security for the apartment complex. The motivational test in the *Sunbelt* case would not pass muster under the *Prell* standard. Mr. Kolvet stated he supported the bill.

Assemblywoman Buckley pointed out the court's decision in the *Sunbelt* case had rested on the fact that the security guard in question had a history of aggressive behavior, which resulted in him being terminated from many security jobs. He was fired for insubordination from many casinos. He falsified his employment application, stating he had performed military service. He was also a convicted sex offender. The Supreme Court decision stated his actions did not hold to course and scope, but stated summary judgment was not appropriate because the person carried a radio off duty and was available for emergency situations. She asked Mr. Kolvet if these factors entered into the court's decision.

Mr. Kolvet stated there were some bad facts in the case, and they lead to other issues, such as negligent hiring, negligent retention and negligent training, which were directed solely against the employer. The bill did nothing to obviate those causes of action. All the factors mentioned by Assemblywoman Buckley supported a negligent hiring and negligent retention cause of action. If the employer messed up and hired someone that should not be in a certain position, the employer should be responsible.

Madelyn Shipman, Representative, Washoe County, addressed the committee. She supported A.B. 595, stating her concerns had been voiced by Mr. Kolvet and the Attorney General's Office. The bill did adopt or attempt to adopt the *Prell* test, which she opined was the appropriate test for determining employer liability, based upon respondeat superior liability.

Ms. Shipman pointed out district attorneys and the Attorney General's Office were required, under state statute, to make a determination when a public employee committed an act or when an agency was sued based upon an act of an employee. They had to determine, based on criteria the legislature had set forth, as to whether a person was acting within the course and scope of their employment and whether their acts were otherwise willful or malicious. What was lost in the context of the *Jimenez* case was any kind of criteria to make that determination. A section of NRS 41 prohibited the state or any political subdivision from indemnifying or paying a judgment on behalf of an employee whose actions were outside the course and scope of public duties or employment.

Lt. Stan Olsen, Legislative Liaison, Las Vegas Metropolitan Police Department, addressed the committee. He supported the bill and offered an amendment (Exhibit G). It would change section 1, subsection 1(a) to "was an independent venture of the employee or an act which was not designed, calculated and intended to further the interests of or serve the employer." This statement went further than *Prell* but was a recommendation put forth by attorneys representing the Las Vegas Metropolitan Police Department.

Chairman Anderson questioned what effect the amendment would have. Ms. Berger noted section 1 of the bill applied to both public and private employers but the amended language would go further than what *Prell* stated. Policy issues would have to be decided by the committee.

Carole Vilardo, Representative, Nevada Taxpayer's Association, addressed the committee. She supported the bill and noted there had been a major concern on the part of employers. Private sector employers had a comfort level in knowing there was a specific standard.

Bill Bradley, Representative, NTLA, addressed the committee. He stated he supported the concept of going back to the *Prell* standard but stated he language contained in A.B. 595 went beyond it.

Section 1, subsection 1(a) and 1(b) were verbatim from *Prell*. However, subsection 1(c), which dealt with the definition of "reasonably foreseeable," was never defined by *Prell*. There was never a definition which included the words "particular harm." He noted "particular" would absolve some employers from liability because it would be argued that even though a person was violent and dangerous, there was no way of knowing they would

commit a particular act. This was the particular harm provision.

In a case called *Eldorado vs. Brown*, a black Oakland, California school principal was accused of cheating at the Eldorado Hotel and Casino in Reno, Nevada. The Eldorado Hotel and Casino notified Gaming Control, who arrested Mr. Brown. A jury determined he had been wrongfully arrested and awarded him damages. In that case, the definition of foreseeable was predictability. Was an employer able to predict an act and a harm as a result of an employee's conduct? In the *Eldorado* case, which was existing law, the proprietor had a duty to take affirmative action, to control the wrongful acts of third persons where he had reasonable cause to anticipate the act and the probability of injury. There was no instance of the word "particular" in this definition.

To be consistent with existing Nevada law, page 1, line 11 and 12 of the bill should adopt the *Eldorado vs. Brown* language. The language "foreseeable if a person of ordinary intelligence and prudence could have reasonably anticipated the act and the probability of injury." Mr. Bradley noted most victims in intentional tort cases were usually vulnerable people such as children, hospital patients, seniors and women. Several cases arose out of the conduct of highway patrolmen and police assaulting women during their tenure as an officer. The interests of these vulnerable people need to be balanced with the rights of the employers.

Chairman Anderson asked Ms. Berger if the *Eldorado vs. Brown* language, if added, would change the standard in a different manner than was intended with *Prell*, making it more difficult for the employer to defend himself in such kinds of litigation. Ms. Berger stated some of the proposed amended language was more of a policy issue. She pointed out the provision in section 1, subsection 1(c) was not the standard used in *Prell*. It was added into the bill because of statements made by the Nevada Supreme Court in their decision on *Jimenez*. The intent of the provision was to bring it back to an ordinary negligent standard.

Assemblywoman Buckley noted the biggest difficulty with *Jimenez* was its intent of ratifying and affirming *Prell* and then its further aim to also clarify that an employer was liable whenever an act was foreseeable. Foreseeability was then defined for purposes of this area as any content that was not so unusual or startling that it would seem unfair to include the loss resulting from it among the other costs of the employer's business. This is what greatly concerned the public and private sector. Adopting another definition of "reasonably foreseeable" rejected the *Jimenez* standard, returning it to a more reasonable test of foreseeability. The particular harm or injury was anticipated. Assemblywoman Buckley stated the language could be debated but it was important to specifically back away from the "spreading the risk" theory and talk about foreseeability so the policy was clear when the Supreme Court considered the issue again.

The suggestion of adding "anticipated the act and the probability of injury" dealt more with the negligence standard than the false arrest portion of the *Eldorado vs. Brown* case. It was not exactly a respondeat superior standard.

Mr. Bradley noted those who had previously testified on the bill wished to codify existing law and did not want to go beyond *Prell*, which incorporated 30 years of case law. He stated the amended language he proposed did not go beyond existing law. There needed to be a fair balance between the rights of injured victims and the rights of employers, as defined by the Supreme Court. Defining "reasonably foreseeable" in the context of existing case law, seemed to be consistent with the intent of the committee. Mr. Bradley commented he was worried the bill took the standard beyond existing law, by requiring anticipation of the particular harm. He opined this went too far and would otherwise absolve liability.

Chairman Anderson commented attorneys from both sides of the issue surrounding the bill needed to compromise and arrive at an agreed upon standard of language.

Assemblywoman Buckley asked Ms. Neilsen if the suggestion of defining "reasonably foreseeable" as "a person of ordinary intelligence and prudence would have reasonably anticipated the act and the probability of injury," helped employers or hurt them, or just clarified intent. Ms. Neilsen stated the language offered by Mr. Bradley did not give an advantage either way. The first two provisions in the bill, namely section 1, subsection 1(a) and 1(b) were directly from *Prell*. The reasonably foreseeable language was included to address the Supreme Court

language which discussed "spreading the risk." Anything would be considered foreseeable if it was fair to spread the risk to the employer. This needed to be addressed in the bill because it was entirely new. To get back to the standard before *Jimenez*, it had to be addressed.

Assemblywoman Buckley stated she would be in favor of whatever language was the clearest, to prevent litigation. However, section 1, subsection 1(c) needed to be included, so that the definition of foreseeability as spreading the risk to private employers was overruled. Otherwise, there was no point in the legislation being passed.

Mr. Bradley noted he only wanted the provisions in the bill based on existing law, so there was some precedent.

With no further testimony, Chairman Anderson asked for action to be taken on A.B. 595.

ASSEMBLYWOMAN OHRENSCHALL MOVED TO AMEND AND DO PASS A.B. 595.

ASSEMBLYWOMAN BUCKLEY SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY BY THOSE PRESENT. (ASSEMBLYMAN COLLINS WAS ABSENT FOR THE VOTE.)

The floor assignment was given to Assemblywoman Buckley.

Testimony commenced on S.B. 280.

SENATE BILL 280 - Revises provisions governing fee charged to disseminator of information concern racing.

John Sullivan, General Counsel, Las Vegas Disseminator Service, addressed the committee. With him was Todd Roberts, Executive Vice President, Nevada Disseminator Services and Richard Scott, President, Sports Media Network.

Mr. Sullivan stated he and his colleagues, along with the Gaming Control Board, had worked on trying to amend the law which addressed concerns with the dissemination tax. The tax was currently based on a per-customer, daily basis and the amendment was to address taxation based on an income level and receipts from the properties to recognize the changing nature of the racing industry.

Mr. Sullivan commented sections 1 and 2 of the bill were administrative in nature. The most significant changes were in section 3, which took the $10 per day for each customer charge and changed it to a 4.25 percent of total fees collected. The pay date would be changed, in recognition of the fact that disseminators needed to be paid by the casinos in order to have the tally, so they could send their taxes in.

He pointed out the financial concerns which prompted the bill, supplying information (Exhibit H) to the committee which gave a history of the last 6 years, documenting the declining nature of live broadcast handling fees and the stagnant nature of the tax, which was growing to larger portions of the actual fees received. In 1990, live broadcast fees were approximately $14 million, of which $600,000 was taken out in tax. On the estimates for 1997, the live broadcast fees would be approximately $2 million, with over $500,000 in taxes. This was based on current language in statute. The racing industry was prospering by moving away from live broadcast and moving to the co-mingling of the tracks, which was beneficial to the properties and to the state and the taxes that the properties paid through the co-mingling wagers.

The initial proposal by the Gaming Control Board had been to entirely eliminate this provision and remove the tax. There was also an interest in making disseminators pay their fair share.

Chairman Anderson commented if the new tax structure proposed by the bill came into play, the new tax would generate significantly less revenue. Mr. Sullivan noted of the Live Broadcast Fees received, the bulk of that

money was paid over to the track for the right's fee to that track. This could range from 25 percent to 75 percent of those fees. Mr. Sullivan stated because of the current tax structure, disseminator services were unable to keep providing services because they were losing a disproportionate amount of money.

Dennis Neilander, Chief, Corporate Securities, Gaming Control Board, addressed the committee. He noted the flat fee disseminators had been paying was established in 1949. Since 1990, with the advent of pari-mutuel wagering, their business had declined significantly. They continued to pay a flat fee, however, even though their revenues had plummeted. Pari-mutuel wagering was more attractive because there was no risk to the property as the money was pooled. The business disseminators provide straight betting from the track. There needed to be an equitable way of adjusting the tax. The figures from 1990, prior to the advent of pari-mutuel wagering, determined the percentage that they paid was 4.25 percent in that year. This percentage was taken and carried over. It was changed from a flat rate to a percentage based rate.

With no further testimony, Chairman Anderson asked for action to be taken on S.B. 280.

ASSEMBLYWOMAN BUCKLEY MOVED TO DO PASS S.B. 280.

ASSEMBLYMAN HERRERA SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY BY THOSE PRESENT. (ASSEMBLYMAN PERKINS AND COLLINS WERE ABSENT FOR THE VOTE.)

The floor assignment was given to Assemblywoman Segerblom.

Testimony commenced on S.B. 13.

SENATE BILL 13 - Provides that person who transmits certain items of electronic mail is liable to recipient for civil damages under certain circumstances.

David Harrison Kramer, Private Citizen, addressed the committee. He stated the bill was a pioneering effort at consumer protection. He noted the problem of junk E-mail was growing into one of epic proportions. Junk E-mail imposed costs not on the sender of an electronic message, but rather on its recipients. In effect, it was akin to a collect call from a telemarketer or a telemarketer's phone call to a cellular phone or direct mail from the post office with postage due. Many millions of Internet users paid for their access to the Internet in increments of time, thus the time spent retrieving, reviewing and deleting unwanted and unsolicited electronic advertisements cost end-users out of pocket dollars.

Mr. Kramer provided information (Exhibit I) to the committee which listed 32 unsolicited E-mail messages Mr. Kramer received on his own personal account in a 3 day span. There were sexually explicit, adults only messages, get rich quick messages and other things. Millions of these messages were sent to consumers at the touch of a button at virtually no cost to the sender of the messages. The bill addressed this problem by ensuring consumers received only the solicitations they chose to receive. S.B. 13 provided consumer choice. It allowed consumers to make a decision to choose to receive certain messages if they wished to, but provided protection for them if they chose not to receive the message. The bill would provide a civil action on behalf of the recipients of unwanted and unsolicited commercial advertisements, allowing them a remedy of $10 per message received, to prevent a flood of unwanted messages. Mr. Kramer noted besides the cost in dollars, unwanted messages also cost time. A person would have to cull through the messages to find the ones they actually wanted to read or were important.

Mr. Kramer stated S.B. 13 was constitutional, as seen in *Rowan vs. United States Post Office*, which dealt with restrictions on direct mail solicitations. He supplied the committee with a copy of legislation pending in California which dealt with unsolicited commercial electronics. (Exhibit J)

With no further testimony, the hearing was closed on S.B. 13.

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The meeting was adjourned at 11 a.m.

RESPECTFULLY SUBMITTED:

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Matthew Baker,

Committee Secretary

APPROVED BY:

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Assemblyman Bernie Anderson, Chairman

DATE:

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MINUTES OF THE

SENATE COMMITTEE ON JUDICIARY

Sixty-ninth Session

July 4, 1997

The Senate Committee on Judiciary was called to order by Chairman Mark A. James, at 12:55 p.m., on Friday, July 4, 1997, on the Senate Floor of the Legislative Building, Carson City, Nevada. There was no Agenda. There was no Attendance Roster.

COMMITTEE MEMBERS PRESENT:

Senator Mark A. James, Chairman

Senator Jon C. Porter, Vice Chairman

Senator Mike McGinness

Senator Maurice Washington

Senator Ernest E. Adler

Senator Dina Titus

Senator Valerie Wiener

STAFF MEMBERS PRESENT:

Barbara Moss, Committee Secretary

Chairman James discussed Assembly Bill (A.B.) 595 and asked for a committee motion.

assembly bill 595: Revises provisions governing civil liability of public and private employers for intentional conduct of employees. (BDR 3-1631)

Senator McGinness moved to amend and do pass a.b. 595.

Senator Wiener seconded the motion.

the motion carried. (senators adler and james abstained from THE votE.)

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Chairman James adjourned the meeting at 1:00 p.m.

RESPECTFULLY SUBMITTED:

Barbara Moss,

Committee Secretary

APPROVED BY:

Senator Mark A. James, Chairman

DATE:

SB
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DISTRICT COURT
CLARK COUNTY, NEVADA

ESTATE OF JANE DOE, by and through its Special Administrator, Misty Petersen, Plaintiff, vs. VALLEY HEALTH SYSTEM LLC, a Nevada limited liability company, d/b/a CENTENNIAL HILLS HOSPITAL MEDICAL CENTER; UNIVERSAL HEALTH SERVICES, INC., a Delaware corporation; AMERICAN NURSING SERVICES, INC., a Louisiana corporation; STEVEN DALE FARMER, an individual; DOES I through X, inclusive; and ROE CORPORATIONS I through X, inclusive, Defendants.	CASE NO. A595780 DEPT NO. II Date of Hearing: Time of Hearing:

DEFENDANTS' CENTENNIAL HILLS HOSPITAL AND UNIVERSAL HEALTH SERVICES, INC.'S SUPPLEMENTAL BRIEFING IN OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

COME NOW Defendants, CENTENNIAL HILLS HOSPITAL ("Centennial") and UNIVERSAL HEALTH SERVICES, INC. ("UHS"), by and through their attorneys of record,

the law firm of HALL, PRANGLE & SCHOONVELD, LLC, and hereby submit their Supplemental Briefing in Opposition to Plaintiff's Motion for Partial Summary Judgment.

This Supplemental Briefing is made and based upon the pleadings on file, the Memorandum of Points and Authorities herein, and any oral argument by counsel that may be heard at the time of the continued hearing on Plaintiff's Motion.

DATED this 10th day of December, 2014.

HALL PRANGLE & SCHOONVELD, LLC

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DFENDANTS, CENTENNIAL AND UHS'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE ISSUE OF VICARIOUS LIABILITY

INTRODUCTION

Plaintiff's Motion for Partial Summary Judgment must be denied, as genuine issues of material fact remain concerning each of the elements of NRS 41.745, such that Centennial and UHS cannot be held vicariously liable for Farmer's sexual assault of Decedent as a matter of law. Rather than focusing on a proper analysis of the relevant law, Plaintiff has bombarded the Court and Defendants with voluminous irrelevant and improperly presented briefing[1] that includes numerous false statements of law and bare conclusions lacking sufficient evidentiary support, in a misguided attempt to convince this Court to ignore the applicable law regarding vicarious liability for intentional torts. Specifically, Plaintiff incorrectly claims that the entry of a judgment of conviction against Farmer not only establishes Farmer's civil liability as a matter of law, but that Farmer's conviction also establishes Centennial an UHS's vicarious liability as a matter of law under NRS 41.133. However, Plaintiff's assertion is fundamentally flawed.

Although Farmer's criminal conviction is conclusive evidence that the sexual assault occurred under NRS 41.133, the proper inquiry for imposing *vicarious* liability on Centennial and UHS is NRS 41.745, which requires Plaintiff to show that (1) Farmer was an employee of Centennial and UHS at the time of the sexual assault; (2) Farmer's sexual assault was not an independent venture, but rather (3) perpetrated in the course of the very task(s) assigned to him; *and* (4) that Farmer's sexual assault was reasonably foreseeable to Centennial and UHS *under the facts and circumstances of this case.* As discussed fully herein, Plaintiff has failed to meet this burden, as genuine issues of material fact remain as to one or more of the above elements.

[1] EDCR 2.20(a) limits papers submitted in support of pretrial brief to 30 pages, absent a court order permitting a longer brief or points and authorities. (Plaintiff's Reply, excluding exhibits was 47 pages).

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Despite Plaintiff's improper attempt to show otherwise, the evidence unequivocally shows that Farmer's sexual assault on Decedent was an independent venture that was completely extraneous to the scope of his very tasks as a CNA, which was not reasonably foreseeable to Defendants Centennial and UHS. Accordingly, Plaintiff's Motion must be denied.

SUMMARY JUDGMENT STANDARD

The moving party has the initial burden of establishing the absence of a genuine issue of fact on each issue material to its case.[2] This means that the moving party must first present sufficient evidence that would entitle her to a directed verdict, ***before the burden shifts*** to the nonmoving party, "who must [then] present significant probative evidence tending to support its claim or defense."[3]

Evidence that would be inadmissible at the trial, such as hearsay, is inadmissible to support a motion for summary judgment.[4] In addition, Plaintiff cannot rest on bare conclusory allegations that she has proven her case as matter of law and that Defendants do not have evidence to prevail at trial, as such allegations fail to meet the moving burden on a Motion for Summary Judgment.[5]

All justifiable inferences are to be drawn in favor of the non-moving party, and the non-moving party's evidence is to be believed.[6] The non-moving party must be permitted to proceed to trial when there is sufficient evidence to support the material factual dispute.[7]

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[2] *C.A.R. Transp. Brokerage Co. v. Darden Restaurants, Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (emphasis added) (internal citation omitted).

[3] *Id.* at 480 (quoting *Intel Corp. v. Hartford Accident & Indem. Co.*, 952 F.2d 1551, 1558 (9th Cir.1991).

[4] *Adamson v. Bowker*, 85 Nev. 115, 119, 450 P.2d 796, 799 (1969) (emphasis added) (internal citation omitted).

[5] *Metro Indus., Inc. v. Sammi Corp.*, 82 F.3d 839, 847 (9th Cir. 1996).

[6] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 2513-14, 91 L. Ed. 2d 202 (1986) (emphasis added) (quoting *Adickes*, 398 U.S., at 158–159, 90 S.Ct., at 1608–1609).

[7] *Liberty Lobby, Inc.*, 477 U.S. at 248-49, 106 S.Ct. at 2510 (emphasis added) (internal citation omitted).

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"Credibility determinations, the weighing of the evidence and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict."[8]

ISSUES PRESENTED

I. **PLAINTIFF IS NOT ENTITLED TO SUMMARY JUDGMENT BECAUSE GENUINE ISSUES OF MATERIAL FACT REMAIN AS TO THE ELEMENTS OF NRS 41.745'S VICARIOUS LIABILITY TEST**

II. **CENTENNIAL AND UHS ARE *NOT* STRICTLY LIABLE FOR FARMER'S ASSAULT UNDER PLAINTIFF'S IMPROPER NON-DELEGABLE PREMISE LIABILITY AND COMMON CARRIER STRICT LIABILITY ARGUMENTS**

III. **CENTENNIAL AND UHS DID NOT RATIFY FARMER'S ASSAULT**

LEGAL ARGUMENT

Even though Farmer has been criminally convicted, there still remain numerous issues of material fact that must be resolved in order to hold Centennial and UHS liable for Farmer's intentional conduct. In order for Plaintiff to prevail on her Motion, there must be no evidence on which a reasonable jury could find in favor of Defendants, with regard to any of the above issues. ***Any evidence presented on each of these issues must be drawn in favor of Defendants***, which means that the Court must construe any "close calls" in Defendants' favor.[9] Because genuine issues of material fact remain as to the above issues, Plaintiff's Motion must be denied.

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[8] *Liberty Lobby, Inc.*, 477 U.S. at 255, 106 S. Ct. at 2513.

[9] *Id.* at 255, 106 S. Ct. at 2513-14 (emphasis added).

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I. PLAINTIFF IS NOT ENTITLED TO SUMMARY JUDGMENT BECAUSE GENUINE ISSUES OF MATERIAL FACT REMAIN AS TO THE ELEMENTS OF NRS 41.745'S VICARIOUS LIABILITY TEST

NRS 41.745 is an exception to Nevada's general vicarious liability law that bars recovery against employers for their employees' unforeseeable intentional torts that are committed outside the course and scope of their employment:[10]

> 1. An employer is ***not liable*** for harm or injury caused by the intentional conduct of an employee if the conduct of the employee:
> (a) Was a truly ***independent venture*** of the employee;
> (b) Was not committed ***in the course of the very task assigned*** to the employee; and
> (c) Was ***not reasonably foreseeable under the facts and circumstances of the case*** considering the nature and scope of his or her employment.
> Ê For the purposes of this subsection, conduct of an employee is reasonably foreseeable if a person of ordinary intelligence and prudence could have ***reasonably anticipated the conduct*** and the probability of injury.
> 2. ***Nothing in this section imposes strict liability on an employer for any unforeseeable intentional act of an employee.***
>
> (Emphasis added).

The Nevada Legislature enacted Assembly Bill 595 as NRS 41.745, which took effect on July 11, 1997, in response to the March 27, 1997, decision by the Nevada Supreme Court in *State v. Jimenez*,[11] which announced a new test for employer liability that "would have placed employers at a great disadvantage" by essentially imposing strict liability on employers "in any litigation based upon the intentional acts of employees that result in harm or injury."[12] Despite

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[10] NRS 41.130

[11] *State, Dep't of Human Res., Div. of Mental Hygiene & Mental Retardation v. Jimenez*, 113 Nev. 356, 359, 935 P.2d 274, 275-76 *opinion withdrawn, reh'g dismissed*, 113 Nev. 735, 941 P.2d 969 (1997).

[12] *See Provisions Governing Civil Liability Of Public And Private Employers For Intentional Conduct Of Employees*: Minutes of Hearing Before the Assem. Comm. On Judiciary, 1997 Leg., 69th Sess. (Nev. 1997) [hereinafter cited as "NRS 41.745 legislative history"] (Summary of Assembly Bill 595), attached hereto as Exhibit "A".

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the Nevada Supreme Court's withdrawal of the *Jimenez* decision, the Nevada Legislature passed Assembly Bill 595 "to establish[] workable criteria for employer liability."[13]

NRS 41.745 "does not alter the normal rules of civil procedure in civil actions where the burden of proof is on the plaintiff."[14] ***"[P]laintiff retain[s] the burden of proof with respect to the provisions of section 1, subsection 1" of NRS 41.745.***[15] Therefore, Plaintiff must show that the elements of NRS 41.745(1) *cannot be met* in order to hold Centennial and UHS vicariously liable for Farmer's sexual assault as a matter of law.

A. Genuine Issues Of Material Fact Remain About Whether Farmer Was An "Employee" To Hold Centennial And UHS Vicariously Liable For His Acts

"[A]n employer can be vicariously responsible only for the acts of his employees not someone else, and one way of establishing the employment relationship is to determine when the 'employee' is under the control of the 'employer.' "[16] "This element of control requires that the employer '***have control and direction*** not only of the employment to which the contract relates but also ***of all of its details and the method of performing the work....***' "[17] A showing at an entity retains *some control* over an individual is insufficient to establish an employment relationship.[18] Because genuine issues of fact exist as to whether Centennial and UHS had sufficient control over Farmer to establish an employment relationship, summary judgment is improper.

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[13] *Id.*

[14] *See* NRS 41.745 legislative history (Summary of Assembly Bill 595).

[15] *Id.* at 9 (statement of Brooke Nielson, Assistant Attorney General) (emphasis added).

[16] *National Convenience Stores v. Fantauzzi, 94 Nev. 655, 657, 584 P.2d 689, 691 (1978).*

[17] *Rockwell v. Sun Harbor Budget Suites,* 112 Nev. 1217, 1223, 925 P.2d 1175, 1179 (1996) (emphasis added) (quoting *Kennel v. Carson City School District,* 738 F.Supp. 376, 378 (D.Nev.1990))

[18] *Kennel,* 738 F.Supp. at 378 (holding that a school district did not possess the requisite control over a referee for a finding of vicarious liability, despite the school district's ability to request that a referee not officiate an event, or reinstate a player over a referee's disqualification).

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1. Plaintiff Mischaracterizes The Applicable Law To Establish An Employment Relationship For The Purpose Of Finding Vicarious Liability

Plaintiff mischaracterizes the applicable law and relies upon insufficient evidence to support her argument that Farmer was an employee of Centennial and UHS.[19] The Nevada Supreme Court's decision in *Terry v. Sapphire Gentlemen's Club* is wholly inapplicable to the issue of Farmer's employment, as the Court's definition of an "employee" in *Terry* was limited to the issue of determining wages, not vicarious liability.[20] Accordingly, the *Terry* decision is inapplicable to this matter. Plaintiff also mischaracterizes the Nevada Supreme Court's finding of an employment relationship in *Rockwell*, as the Court's determination was limited to its ruling that a property own that hires security personnel to protect its patrons has a personal and *non-delegable duty* to provide responsible security personnel.[21] Indeed, as discussed more fully herein, the *Rockwell* Court's decision imposed a strict liability finding against the land owner, which is inapplicable to the instant matter, as NRS 41.745 does not impose strict vicarious liability on an employer for unforeseeable intentional torts.[22]

2. The Evidence Shows That Farmer Was Not A Centennial Or UHS Employee

In addition to her mischaracterization of the applicable law, Plaintiff ignores the multitude of evidence that shows Farmer was *not* an employee of Centennial and UHS. In fact, the only evidence Plaintiff relies upon in support of her argument on this issue, are (1) Farmer's name badge; and (2) Centennial's assignment of Farmer to the 6th floor on the night of the

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[19] Pl.'s Reply 11-13.

[20] *Terry v. Sapphire Gentlemen's Club*, 130 Nev. Adv. Op. 87, 336 P.3d 951, 954 (2014).

[21] *Rockwell*, 112 Nev. at 1223, 925 P.2d at 1179.

[22] *See* discussion of NRS 41.745's legislative history regarding the issues of foreseeability and strict liability herein pp. 14-21; *see also* NRS 41.745(2).

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subject incident.[23] However, Farmer's name badge actually shows that Farmer was *not* an employee of Centennial and UHS, as Farmer's badge expressly states that he was "contract staff," which Mr. Sparacino explained to mean that, "they were not part of us."[24] In addition, Centennial's assignment of Farmer's location is clearly insufficient evidence to support an argument that Centennial and UHS were Farmer's employers, as such an assignment in no way shows control over the ***details and the method of performing the work***.[25] Furthermore, Farmer's HR file shows that Farmer completed an ANS employment application, conducted an interview with ANS personnel, that ANS provided the CNA job description for which Farmer applied, and that Farmer completed a CNA skills test at ANS's request.[26] This evidence, *and all reasonable inferences drawn from it in Defendants' favor*, show that genuine issues of material fact remain as to whether an employment relationship existed between Farmer and Defendants, Centennial and UHS. Because Centennial and UHS cannot be held vicariously liable for a non-employee's act, and there remain genuine material issue of fact regarding the status of Farmer's employment with Centennial and UHS, Plaintiff's Motion must be denied.

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[23] Pl.'s Reply 11.

[24] Sparacino Dep. 8:1-6 and Ex. 2, March 13, 2013.

[25] *Rockwell,* 112 Nev. at 1223, 925 P.2d at 1179 (emphasis added) (internal citation omitted). Plaintiff's argument on this issue is inherently flawed, as Nevada's well-settled ostensible agency doctrine expressly limits a hospital's liability for non-employees, despite the fact hospitals generally retain control over assigning all personnel (both employee and non-employee) to certain areas and locations within the hospital. To illustrate, an OB/GYN generally would not be working in the Emergency Department or pediatrics areas. Likewise, a CNA or nurse would be assigned an area of the hospital in accordance with his/her background and skill set (med/surg, ICU, PACU, etc.). Plaintiff's argument, if accepted, would effectively abrogate Nevada's ostensible agency law by finding an employment relationship where one does not otherwise exist, merely because the hospital designates certain locations of practice within its facility.

[26] *See* Farmer's HR File, attached to Defs. Centennial and UHS's Opp'n, Ex. D.

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B. Even If Farmer Was An Agent Or Employee, Genuine Issues of Material Fact Remain As To Whether (1) His Sexual Assault Of Decedent Was And Independent Venture, (2) Not In The Course Of The Very Tasks Assigned To Him, (3) And Not Reasonably Foreseeable Under the Facts and Circumstances of This Case

Plaintiff's recovery against Centennial and UHS under a vicarious liability theory is dependent upon the proper interpretation of the following terms contained within NRS 41.745's statutory language: "independent venture," "in the course of the very task assigned" and "reasonably foreseeable"[27] "When interpreting a statute, ***legislative intent is the controlling factor.***"[28] In determining the legislative intent of a statute, the courts are instructed to first look at its plain language.[29] "But when the statutory language lends itself to two or more reasonable interpretations, the statute is ambiguous, and the court may then look beyond the statute in determining legislative intent."[30] Specifically, Nevada Supreme Court has instructed courts to look to the ***legislative history*** and "***construe the statute in a manner that is consistent with reason and public policy.***"[31] The legislative history of NRS 41.745 provides significant guidance with regard to the proper interpretation of each of the above contested terms, and unequivocally shows that Plaintiff is not entitled to Summary Judgment against Centennial and UHS on the issue of liability.

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[27] Defendants have previously briefed their argument in opposition to Plaintiff's claim that Defendant Farmer was an employee at the time of the subject incident, and in the interest of promoting judicial economy, have not re-stated their previous argument herein. However, Defendants maintain that genuine issues of material fact exist as to whether Farmer was an employee of Centennial and UHS at the time of the subject incident, and this Sur-Reply should in no way be considered a concession on this issue.

[28] *State v. Lucero,* 127 Nev. ——, ——, 249 P.3d 1226, 1228 (2011) (internal quotation marks omitted).

[29] *Id.*

[30] *Id.* (internal quotation marks omitted).

[31] *Id. State v. White*, 130 Nev. Adv. Op. 56, 330 P.3d 482, 484 (2014) (emphasis added).

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1. Genuine Issues of Material Fact Remain As To Whether Farmer's Sexual Assault Was "Independent Venture" And "Not In The Course Of The Very Task Assigned To Him"

Subsections 1(a) and (b) of NRS 41.745 codified the Nevada Supreme Court's ruling in *Prell Hotel Corp. v. Antonacci*, that an employer is not vicariously liable for an employee's intentional tort that "is truly an independent venture of his own and not committed in the course of the very task assigned him. . ."[32] "Whether or not an act [is] within or without the scope could be ***very fact intensive.***"[33] "***Rather than have the court instruct the jury that it's within the scope, it should be argued before the jury and left to them to decide.***" *Id.*

The Nevada Legislature's intent was clear that the issue of whether an employee's intentional tort was within the course of the very task assigned to him requires a fact intensive analysis, which is properly determined by the trier of fact, not on summary judgment. Because genuine issues of material fact remain as to whether Farmer's actions were an independent venture outside the scope of the very tasks assigned to him, Centennial and UHS are not vicariously liable, and Plaintiff's Motion must be denied.

a. Plaintiff Misstates The Applicable Law For Determining Whether Farmer's Actions Were In The Course And Scope Of His Employment

Plaintiff misstates the applicable law, and therefore cannot meet her burden to show that Farmer's sexual assault of Decedent was not an independent venture, but committed in the course of the very task assigned to him.[34] Specifically, Plaintiff, relying upon a June 5, 1997, Order Denying a Motion To Dismiss, claims that "[t]he obvious focus for litigants in respondeat

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[32] *Id.*

[33] NRS 41.745 legislative history 10 (statement of Tom Ray, Solicitor General in charge of the Litigation Division of the Attorney General's Office) (emphasis added).

[34] *See* NRS 41.745(1)(a) and (b).

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superior cases based upon intentional acts is . . . whether it was committed in the course of a series of acts of the agent which were authorized by the principal."[35] However, Plaintiff failed to advise the Court that United States District Judge Pro's analysis and ruling were ***based upon the now withdrawn Jimenez decision, which was abrogated by NRS 41.745 on July 11, 1997.***[36,37]

Plaintiff also cites a United States District Court for the District of Nevada's order granting in part and denying in part a defendant school district's motion for summary judgment on a plaintiff's vicarious liability claim, where a school district employee was accused of molesting a minor.[38] However, the *Estes* court did not have the benefit of the Nevada Legislature's intent regarding vicarious liability for intentional torts in making its determination, as this order was also decided before NRS 41.745 took effect on July 11, 1997. Furthermore, the *Estes* court's denial of the school district's motion for summary judgment on the vicarious liability issue did not unequivocally hold the school district vicariously liable, but rather preserved the issue for determination by the fact-finder.[39] Although it is Plaintiff who has moved for summary adjudication on the issue of liability in the instant matter, the same principle applies that this issue is best preserved for determination by the fact-finder, and not on summary judgment.

Finally, Plaintiff improperly relies upon another United States District Court for the District of Nevada Order granting in part a plaintiff's motion for summary judgment on the issue

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[35] Pl.'s Reply 14 (quoting *Ray v. Value Behavioral Health, Inc.*, 967 F. Supp. 417, 421 (D. Nev. 1997)).

[36] *See Ray*, 967 F. Supp. at 421 (D. Nev. 1997) (quoting *Jimenez*, 935 P.2d at 281); *see also,* NRS 41.745 legislative history (Summary of Assembly Bill 595) (NRS 41.745 took effect on July 11, 1997, and does not apply to cases filed prior to its effective date).

[37] NV ST RPC Rule 3.3(a)(1) requires a lawyer to correct a previously made false statement of material law to the Court.

[38] Pl.'s Reply 15 (quoting *Doe By & Through Knackert v. Estes*, 926 F. Supp. 979, 989 (D. Nev. 1996)).

[39] *Estes*, 926 F. Supp. at 990.

of respondeat superior liability against a school district for the intentional torts committed by a school counselor.[40] However, the district court improperly relied upon the now withdrawn *Jimenez* decision, as well as the United States District Court's decisions in *Ray* and *Estes*, previously discussed herein, in making its determination.[41] Accordingly, the *Green* decision, which was based upon invalid law, cannot properly support Plaintiff's claim that Farmer's sexual assault of Decedent was not an independent venture, and in the course of the very tasks assigned to him.[42] As such, Plaintiff's Motion must be denied, as she has failed to show that Farmer's actions were in the course of the very task assigned to him.

b. There Is Sufficient Evidence To Show That Farmer's Actions Were An Independent Venture And Not Committed In The Course Of The Very Task Assigned To Him

Despite Plaintiff's arguments to the contrary, there is sufficient evidence to show that Farmer was not acting in the course and scope of his employment as a Certified Nurse's Assistant.[43] Even Plaintiff's own proffer of evidence in support of her Motion shows that Farmer's actions were outside the scope of his tasks as a CNA. For example, Plaintiff relies upon the Nevada State Board of Nursing's "CNA Skills Guidelines" to show that Farmer was acting the course of his employment when he sexually assaulted Decedent.[44] However, these

[40] Pl.'s Reply 15 (quoting *Doe A. v. Green*, 298 F. Supp. 2d 1025, 1042 (D. Nev. 2004))

[41] *Green*, 298 F. Supp. 2d at 1042-43.

[42] The *Green* court also failed to make specific findings of fact and conclusions of law on the issue of NRS 41.745(1)(c)'s foreseeability requirement, and therefore should not be relied upon in making a determination on Plaintiff's Motion. (Although district courts need not make 'findings of fact and conclusions of law' when deciding a summary judgment motion, "Rule 52(a), . . ., does not relieve a court of the burden of stating its reasons somewhere in the record when its 'underlying holdings would otherwise be ambiguous or inascertainable. *Holly D. v. California Inst. of Tech.*, 339 F.3d 1158, 1180 (9th Cir. 2003)).

[43] *See* Defs. Centennial and UHS's Opp'n 5-8.

[44] *See* Pl.'s Reply 4-5.

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"Guidelines" also require a CNA to "understand patient rights" and "use standard precautions."[45] Clearly, sexual assault is a violation of a patient's rights and does not use standard precautions. Furthermore, Decedent's testimony during Farmer's criminal trial strongly indicates that Farmer had no legitimate work-related reason for being in her room as she did not require CNA treatment, such as replacement of her leads,[46] perineal care[47] or adjustment of her catheter.[48] Accordingly, Farmer's sexual assault was an independent venture outside the scope of the very tasks he was assigned, and therefore Plaintiff's Motion must be denied.

2. Genuine Issues of Material Fact Remain As To Whether Farmer's Sexual Assault On Decedent Was "Reasonably Foreseeable" Under The Facts And Circumstances Of This Case

NRS 41.745's legislative history extensively discusses the meaning and intent of enacting subsection (1)(c)'s "reasonably foreseeable" requirement, and clearly espouses the legislature's intent to abrogate *Jimenez's* strict liability foreseeability test. In its committee hearing to adopt NRS 41.745, the legislature specifically addressed the *Jimenez* foreseeability test, which was defined as "any content that was not so unusual or startling that it would seem unfair to include the loss resulting from it among the other costs of the employer's business."[49] "***This is what greatly concerned the public and private sector***."[50] Subsection (1)(c) "was added into the Bill" with the ***intent to reject Jimenez's loss allocation foreseeability standard***, and "to bring it back to an ordinary negligence standard . . . by returning it to a more reasonable test of

[45] *See* Defs. Centennial and UHS's Opp'n, Ex. A.

[46] *See* Preservation of Witness Testimony, DOE, Jan. 20, 2012, pp. 8-9.

[47] *Id.* at pp. 11-13, 16; Grand Jury Testimony, DOE, Nov. 18, 2008, pp. 13-16.

[48] Doe Jan. 20, 2012 Preservation Testimony, pp. 11-13, 16.; Doe Nov. 18, 2008 Grand Jury Testimony, p. 20.

[49] NRS 41.745 legislative history at 14 (statement by Assemblywoman Barbara Buckley).

[50] *Id.*

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foreseeability."[51] Specifically, NRS 41.745(1)(c) requires the particular harm or injury to be "anticipated" to be foreseeable.[52] Although the legislature recognized that the language of this provision could be debated, "it was important to specifically back away from the 'spreading the risk' theory and talk about foreseeability so the policy was clear when the Supreme Court considered the issue again."[53] "[S]ection 1, subsection 1(c) needed to be included so that ***the definition of foreseeability as spreading the risk to private employers was overruled***."[54] Accordingly, "[NRS 41.745] ***does not impose strict liability on an employer for any unforeseeable intentional act of an employee***."[55] Therefore, Plaintiff's argument on this issue fails as a matter of law.

a. Plaintiff Misstates The Applicable Law For Determining Whether Farmer's Actions Were Reasonably Foreseeable

Plaintiff's statement of NRS 41.745(1)(c)'s foreseeability requirement is clearly incorrect, as she misinterprets the Nevada Supreme Court's analysis of foreseeability in *Wood v. Safeway*.[56] Specifically, Plaintiff's characterization of NRS 41.745(1)(c)'s foreseeability test is compiled of several block quotes contained in a footnote of the *Wood v. Safeway* decision, wherein the Nevada Supreme Court referenced its former strict liability foreseeability test based on California jurisprudence *prior to* the enactment of NRS 41.745.[57] However, ***Plaintiff completely disregards the Court's recognition that this "highly extraordinary standard is an***

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[51] *Id.* (statements by Ms. Berger and Assemblywoman Buckley).

[52] *Id.*

[53] *Id.* at 14-15. (Buckley).

[54] *Id.*

[55] *See* NRS 41.745 legislative history (Bill summary) (emphasis added).

[56] *See* Pl.'s Reply 17-18.

[57] *See* Pl.'s Reply at 17-18 (*quoting* 121 Nev. 724, 739-40, 121 P.3d 1026, fn 53).

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incorrect statement of the law" under NRS 41.745.[58] Indeed, the *Wood* Court clarified its departure from this prior foreseeability test in the same footnote, "***[t]his court quoted a portion of the above language with approval in State, Department of Human Resources v. Jimenez. . . However, that opinion was later withdrawn.***"[59] In determining whether the defendant employee's repeated sexual assaults on the doe plaintiff were foreseeable, the *Wood* court analyzed *the assailant's individual background*, including his lack of prior criminal history, employment references, and lack of prior complaints of sexual harassment, and ultimately determined that "***[u]nder the circumstances of this case, it was not reasonably foreseeable that Ronquillo-Nino would sexually assault a Safeway employee.***"[60]

Accordingly, despite her claims to the contrary, *it is Plaintiff who has misunderstood and misstated NRS 41.745(1)(c)'s foreseeability requirement.* Accordingly, Plaintiff's arguments that Farmer's actions were reasonably foreseeable, as well as her "evidence" in support of the same, fail as a matter of law.[61] Indeed, Plaintiff's extensive analysis of risk allocation being the underlying policy of the foreseeability requirement, and her references to evidence supporting this allegation, are irrelevant and cannot properly support her Motion for Summary Judgment. Defendants' possession of insurance coverage for sexual assault, or their ability to allocate such a risk, is irrelevant in determining whether Farmer's acts were foreseeable. Accordingly, Plaintiff has failed to show that Farmer's actions were foreseeable as a matter of law.

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[58] *Wood,* 121 Nev. at 739 (emphasis added).

[59] *Id.*, 121 Nev. 724, 739-40, 121 P.3d 1026, fn 53

[60] *Id.* at 740, 121 P.3d at 1037. (emphasis added).

[61] *See* Pl.'s Reply 16-27.

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b. There Is Sufficient Evidence To Show That Farmer's Sexual Assault Was Not Reasonably Foreseeable By Defendants Centennial And UHS

Like Defendant Safeway in *Wood*, Defendants Centennial and UHS lacked information and evidence such that they could have reasonably anticipated Farmer's conduct, because *such information was unavailable to Centennial and UHS prior to the subject incident.* At the time he was working at Centennial Hills Hospital, Farmer was a certified nurses' assistant in Nevada, and therefore had to affirm that he was of good moral character in good mental health, and that he had not committed any acts that would be grounds for disciplinary action, in order to receive his certification.[62] Furthermore, ANS provided Centennial with a negative criminal background check, proof of negative drug test, and sufficient employment background information to support Farmer's continued licensure as a CNA under the requirements set forth in NRS 632.2852, prior to Centennial booking shifts with Farmer.[63] Centennial also performed a primary source verification with the Nevada State Board of Nursing before allowing Farmer to work at their facility.[64] In addition, Centennial did not receive any reports of bad character prior to allowing Farmer to work at their facility.[65]

Although Plaintiff alleges that ANS was on notice of a prior incident involving Farmer, where he was placed on "Do Not Return" status at Rawson Neal Hospital,[66] Farmer was cleared of any wrongdoing, and the incident was not reported to the Nevada Board of Nursing. Furthermore, ANS did not provide any information regarding the Rawson Neal Hospital

[62] NRS 632.2852

[63] Defs. Centennial and UHS's Opp'n, Ex. D.

[64] *Id.*

[65] *Id.*

[66] Pl.'s Reply 32-33.

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accusations to Centennial prior to the subject incident, and therefore this event cannot be imputed to Centennial and UHS to put them on notice that Farmer's assault of Decedent was foreseeable.

Plaintiff also claims that Centennial and UHS were on prior notice of Farmer's criminal propensity; by referring to an alleged incident in February or March 2008 where a former patient was heard yelling that she did not want Farmer in her room.[67] However, Plaintiff refers to admissible hearsay evidence in support of this argument, which, as previously discussed herein, cannot properly support her Motion. Accordingly, there is no admissible evidence that Centennial had reasonable cause to anticipate Farmer's alleged conduct and the probability of injury resulting therefrom. Indeed, when drawing all justifiable inferences from the evidence presented on this issue in Defendants' favor, the evidence suggests that Centennial and UHS, much like Defendant Safeway in *Wood*, could *not* reasonably foresee Famer's sexual assault of Decedent as a matter of law.

II. CENTENNIAL AND UHS ARE *NOT* STRICTLY LIABLE FOR FARMER'S ASSAULT UNDER PLAINTIFF'S IMPROPER NON-DELEGABLE PREMISE LIABILITY AND COMMON CARRIER STRICT LIABILITY ARGUMENTS

As an alternative to her claim that NRS 41.745 does not apply, Plaintiff argues that Centennial and UHS are strictly liable for Farmer's assault under a non-delegable premise liability agency theory, as well as a common carrier strict liability theory, which Plaintiff seeks to apply to hospitals.[68]

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[67] *See* Pl.'s Reply 35-36.

[68] Pl.'s Reply 37-41.

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A. Plaintiff's Strict Premise Liability Argument Mischaracterizes Nevada Law

In support of her non-delegable, strict premise liability argument, Plaintiff cites to the Nevada Supreme Court's decisions in *Alcantara v. Wal-Mart Stores, Inc.*[69] and *Scialabba v. Brandise Constr. Co.,*[70] which discuss premise liability claims against landowners for assaults committed on their properties by a third party,[71] to support their claim. However, neither of these cases supports Plaintiff's allegations, as neither case imposed strict vicarious liability on an employer for independent, unforeseeable intentional torts.

Alcantara only addressed the plaintiff's premise liability negligence claim against the landowner for the purpose of determining whether the plaintiff was precluded from asserting such a claim.[72] The *Alcantara* court did not address the substance of plaintiff's negligence claim, aside from citing to the Nevada Supreme Court's decision in *Rockwell v. Sun Harbor Budget Suites*, wherein the Court determined that a property owner has a non-delegable duty ***to provide responsible security personnel***, "even if the property owner engaged a third party to hire the security personnel."[73] In *Rockwell*, the court analyzed a property owner's vicarious and independent liability for its security officer's intentional tort under the *Prell* test to determine whether the security guard acted in the course and scope of his employment when he murdered a tenant living on the landowner's property with whom he previously had an affair.[74] However, the *Rockwell* court did not analyze the foreseeability of the assailant's actions in terms of NRS 41.745(1)(c), as the case was decided before NRS 41.745's enactment. Notably, the *Rockwell*

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[69] *Alcantara ex rel. Alcantara v. Wal-Mart Stores, Inc.*, 130 Nev. Adv. Op. 28, 321 P.3d 912, (2014).

[70] *Scialabba v. Brandise Const. Co.*, 112 Nev. 965, 969, 921 P.2d 928, 930 (1996).

[71] *See Id.*; *Alcantara*, 120 Nev. Adv. Op. 28, 321 P.3d 912.

[72] *Alcantara*, 321 P.3d at 916.

[73] *Id.* (quoting *Rockwell*, 112 Nev. at 1223, 925 P.2d at 1179 (emphasis added)).

[74] *Rockwell*, 112 Nev. at 1220, 1224, 925 P.2d at 1177, 1180.

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case was specifically addressed by the Nevada Legislature in their hearing to adopt NRS 41.745, wherein they concluded that the *Rockwell* decision "would not pass muster under the *Prell* standard."[75] The Legislature also pointed out the fact that the *Rockwell* court determined that the assailant's actions "did not hold to course and scope," but that the Court rested on the fact that the assailant had a significant history of aggressive behavior, including a prior conviction as a sex offender, which the Legislature determined would be applicable to an independent negligence claim against the employer.[76] Accordingly, *Alcantara* and *Rockwell* do not support Plaintiff's proposition that Centennial and UHS are strictly liable for Farmer's actions.

The *Scialabba* court does not address the issue of vicarious liability for an intentional tort, and therefore is inapplicable to Plaintiff's Motion. Rather, the *Scialabba* court reviewed a district court's grant of summary judgment in favor of a defendant construction company on the issue of negligence in a case where the plaintiff was assaulted by an independent third party who had hidden in an unlocked vacant apartment immediately preceding the attack.[77] The court reaffirmed its prior ruling that a landowner has a duty to use reasonable care protect against third-party criminal activity; however, the court also reaffirmed that "***the duty to protect from injury caused by a third person is circumscribed by the reasonable foreseeability of the third person's actions*** and the injuries resulting from the condition or circumstances which facilitated the harm."[78] Furthermore, the *Scialabba* court reaffirmed the *Doud* ruling that "foreseeability is

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[75] NRS 41.745 legislative history 12 (statements by Brent Kolvet, Representative, Nevada Association of Counties, League of Cities, Nevada Public Agency Insurance Pool, and Assemblywoman Buckley). Mr. Kolvet and Ms. Buckley inadvertently refer to the *Rockwell* decision as *"Sunbelt."* However, it is clear that this is an immaterial misstatement, as defense counsel was unable to find any Nevada case called that could be referenced as *Sunbelt* on this issue, and the specific facts of the case discussed during the legislature's hearing are the *Rockwell* facts.

[76] *Id.*

[77] *Scialabba*, 112 Nev. at 967-68, 921 P.2d at 929-30.

[78] *Id.* at 969 (emphasis added) (quoting *Doud v. Las Vegas Hilton Corp.*, 109 Nev. 1096, 1101, 864 P.2d 796, 799 (1993).

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determined on a totality-of-the-circumstances basis."[79] As such, *Scialabba* also fails to support Plaintiff's strict liability argument.

In light of the foregoing, it is clear that *Alcantara* or *Scialabba* do not support Plaintiff's improper proposition that Centennial and UHS are strictly liable for Farmer's assault on Decedent. Rather, both of these cases, as well as the supporting case law cited by the court in each of these decisions, unequivocally reaffirm that Plaintiff must show that NRS 41.745 does not apply as to Centennial and UHS in order to hold Defendant's vicarious liability for Farmer's assault on Plaintiff. Furthermore, the Nevada Legislature's enactment of NRS 41.745 expressly abrogated strict vicariously liability for an employee's intentional torts.[80] As previously analyzed herein, as well as Defendants' Opposition and Joinder, Plaintiff has failed to meet her burden. Therefore Plaintiff's Motion must be denied.

B. Centennial Hills Hospital Is Not A Common Carrier

A "Common Carrier" is defined as "a business or agency that is available to the public ***for transportation*** of persons, goods, or messages."[81] Thus, in order to apply the heightened duty applied to common carriers, Defendants must be a business that is available to the public for transportation of persons, goods or messages. Defendants are not, have not and never will be considered a common carrier.

Despite the blatant impropriety of characterizing a hospital as a common carrier, Plaintiff analogizes the subject incident to being a passenger of a common carrier in what is nothing more than a desperate attempt to improperly hold Centennial and UHS strictly vicariously liable for

[79] *Id.* at 970, 921 P.2d at 931.

[80] *See* Pl.'s Reply 37-40.

[81] "Common Carrier." Merriam-Webster.com. Merriam-Webster, n.d. Web. 10 Dec. 2014. http://www.merriam-webster.com/dictionary/common carrier (emphasis added).

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Farmer's actions. Specifically, Plaintiff claims that a non-delegable heightened duty applies to Defendants.

Relying on an Indiana case, *Stropes v. Heritage House Childrens' Center, Inc.*,[82] Plaintiff asserts that the admission to a hospital equates to a "contract of passage," and that common carriers (hospitals) are strictly liable for sexual assaults committed by crewmen (medical personnel working at the hospital, regardless of their employment relationship, or lack thereof). In making her argument, Plaintiff ignores the *Stropes* court's analysis that Indiana law has a long history of extending common carrier liability to enterprises outside of common carriers.[83] Plaintiff also fails to mention the *Stropes* court's lengthy analysis of a factually similar case in South Carolina where the Fourth Circuit Court of Appeals found no indication that South Carolina's Supreme Court would extend the common carrier exception to encompass other enterprises.[84] Likewise, California has declined to extend the *Stropes* case and the common carrier exception to residential facilities.[85] The California Court of Appeals found that the analysis of the *Stropes* case was contrary to the weight of California authority and was not persuasive.[86]

Here, Plaintiff has not and cannot provide *any* Nevada statutory scheme or case law to even suggest that the Nevada Supreme Court intends for the common carrier heightened duty of care to be extended beyond common carriers. To the contrary, a recent Nevada Supreme Court

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[82] 547 N.E.2d 244 (Ind. 1989).

[83] *Id.* at 252.

[84] Id. at 1282 (analyzing *Rabon v. Guardsmark, Inc.*, 571 F.2d 1277 (4th Cir.1978)).

[85] *See John Y. v. Chaparral Treatment Center, Inc.*, 101 Cal.App.4th 565, 124 Cal.Rptr.2d 330 (Cal.App. 4 Dist.,2002).

[86] *Id* at 577-578.

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decision reaffirmed that policy decisions to heighten a duty are better left to the legislature.[87] Specifically, the Nevada Supreme Court declined to impose a nondelegable duty on hospitals based upon public policy.[88] The Nevada Supreme Court held:

> This court may refuse to decide an issue if it involves policy questions better left to the Legislature. *Nevada Hwy. Patrol v. State, Dep't Mtr. Veh.*, 107 Nev. 547, 550–51, 815 P.2d 608, 610–11 (1991); *see also Niece v. Elmview Group Home*, 131 Wash.2d 39, 929 P.2d 420, 428 (1997) (noting that the policy decision to expand the scope of an employer's liability for an employee's intentional acts against a person to whom the employer owes a duty of care "should be left to the legislature"). The Legislature has heavily regulated hospitals and would have codified a nondelegable duty to emergency room patients if the Legislature had intended such a duty to be imposed on hospitals.[89]

The Nevada Supreme Court's *Vanderford* decision is a clear acknowledgement that the Nevada Legislature, which has heavily regulated the hospital industry in this state for years, is the best vehicle through which policy decisions should be determined. Accordingly, Plaintiff's common carrier argument is fatally flawed, as it is squarely within the Nevada Legislature's purview to create a heightened duty of care for hospitals if such a duty to be imposed. Accordingly, Plaintiff's argument that Centennial and UHS are bound by Farmer's assault under a common carrier strict liability theory should be denied in its entirety.

III. CENTENNIAL AND UHS DID NOT RATIFY FARMER'S ASSAULT

Plaintiff's argument that Centennial and UHS "ratified" Farmer's assault by "assisting" with his criminal defense case is completely frivolous, as there is no good-faith basis on which to support her argument. Essentially, Plaintiff seeks to hold Centennial and UHS vicariously liable by improperly claiming that their attorneys "aided and abetted" Farmer in his criminal defense

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[87] *Renown Health v. Vanderford,* 126 Nev. Adv. Op. 24, 235 P.3d 614, 616 (2010).

[88] *Id.*

[89] *Id.*

trial, which should be deemed a ratification by Defendants of Farmer's assault.[90] ***There is no case or statutory law that supports Plaintiff's position.*** Rather, Plaintiff premises her frivolous argument on a Virginia Supreme Court decision, *Kilby v. Pickurel*, wherein the court determined that a principal was bound by an unauthorized agent's previous acceptance of a settlement agreement, because the principal "ratified" the agent's settlement when he failed to disavow the agent's settlement, and he enjoyed the benefits the settlement provided.[91] Nothing in the Virginia Supreme Court's decision even remotely supports Plaintiff's proposition.

Furthermore, Plaintiff's "evidentiary support" for this improper contention likely would be inadmissible at trial, as it is irrelevant to the issues to be addressed in this civil matter, and therefore cannot properly support a Motion for Summary Judgment. Accordingly, Plaintiff's argument on this matter fails as a matter of law. Therefore, Plaintiff's Motion must be denied.

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[90] Pl.'s Reply 41-43.

[91] 240 Va. 271, 396 S.E.2d 666 (1990).

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CONCLUSION

To date, the parties have submitted a multitude of conflicting points, authorities, and evidentiary support, which, at minimum, show that the specific terms that govern the applicability of NRS 41.745 are susceptible to multiple reasonable interpretations. More importantly, the evidence and briefing before the Court on this issue show that Famer's assault was an independent venture that was not committed within the course of the very tasks assigned to him, and the assault was not foreseeable. Accordingly, summary judgment on the issue of Centennial and UHS's liability is not ripe for determination, and Plaintiff's Motion must be denied.

DATED this 10th day of December, 2014.

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CERTIFICATE OF E-SERVICE

I HEREBY CERTIFY that I am an employee of HALL PRANGLE & SCHOONVELD, LLC; that on the 10th day of December, 2014, I served a true and correct copy of the foregoing **DEFENDANTS' CENTENNIAL HILLS HOSPITAL AND UNIVERSAL HEALTH SERVICES, INC.'S SUPPLEMENTAL BRIEFING IN OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT** via E-Service Master List for the above referenced matter in the Eighth Judicial District Court e-filing System in accordance with the electronic service requirements of Administrative Order 14-2 and the Nevada Electronic Filing and Conversion Rules to the following counsel of record:

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