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. 67886

District Court No. 09-A-595780-C

Dept. II

PETITIONERS VALLEY HEALTH SYSTEM, LLC, d/b/a CENTENNIAL HILLS HOSPITAL MEDICAL CENTER'S AND UNIVERSAL HEALTH SERVICES, INC.'S AMENDED PETITION FOR WRIT OF MANDAMUS AND/OR WRIT OF PROHIBITION

MICHAEL E. PRANGLE, ESQ.
Nevada Bar No. 8619
JOHN F. BEMIS, ESQ.
Nevada Bar No. 9509
HALL PRANGLE & SCHOONVELD, LLC
1160 N. Town Center Drive, Suite 200
Las Vegas, Nevada 89144
Attorneys for Petitioners Valley Health System, LLC, d/b/a Centennial Hills Hospital Medical Center and Universal Health Services, Inc.

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Petitioner VALLEY HEALTH SYSTEM, LLC, d/b/a CENTENNIAL HILLS HOSPITAL MEDICAL CENTER is a Delaware Limited Liability Company that is wholly-owned and operated by UHS OF DELAWARE, INC., a Delaware Corporation that is the management company for Co-Petitioner, UNIVERSAL HEALTH SERVICES, INC., also a Delaware Corporation and a holding company that is a wholly-owned subsidiary UNIVERSAL HEALTH SERVICES, a publicly-held company that owns 10% or more of petitioners' stock.

UHS is a registered trademark of UHS of Delaware, Inc., the management company for Universal Health Services, Inc. and a wholly owned subsidiary of Universal Health Services.

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Petitioners, 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, have been represented by various partners and associates of the law firm of HALL PRANGLE & SCHOONVELD, LLC, in all proceedings in the district court action, and expect to present petitioners before The Nevada Supreme Court, with regard to the instant matter.

DATED this 15 day of May, 2015.

HALL PRANGLE & SCHOONVELD, LLC

MICHAEL E. PRANGLE, ESQ.
Nevada Bar No. 8619
JOHN E. BEMIS, ESQ.
Nevada Bar No. 9509
1160 N. Town Center Drive, Suite 200
Las Vegas, Nevada 89144
Attorneys for Petitioners
Valley Health System, LLC, d/b/a
Centennial Hills Hospital Medical Center
and Universal Health Services, Inc.

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NRAP 21(a)(5) VERIFICATION

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

JOHN F. BEMIS, ESQ.

SUBSCRIBED AND SWORN to before me

This 15 day of May, 2015

NOTARY PUBLIC in and
for said County and State

NOTARY PUBLIC
County of Clark, State of Nevada
TAMIE PHILLIPS
No. 03-84280-1
Appointment Expires Sept. 19, 2015

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PETITION FOR WRIT OF MANDAMUS AND/OR PROHIBITION

Petitioners Valley Health System, LLC, a Delaware limited liability company d/b/a Centennial Hills Hospital Medical Center (hereinafter "Centennial Hills"), and Universal Health Services, Inc., a Delaware corporation (hereinafter "UHS"), by and through their attorneys of record Hall Prangle & Schoonveld, LLC, pursuant to Nevada Rule of Appellate Procedure 21, and based on this Court's original jurisdiction set forth Art. 6, Sec. 4 of the Nevada Constitution and NRS 34.160, hereby respectfully petition this Honorable Court to issue a Writ of Mandamus and/or Writ of Prohibition, as appropriate, directing the Respondent District Court (the Honorable Richard F. Scotti) to vacate that portion of his February 27, 2015 Order granting Plaintiff's Motion for Summary Judgment Re: Liability in Part, wherein Respondent:

1. Held that for purposes of imposing liability on an employer for the intentional criminal conduct of an employee under NRS 41.745, Plaintiff's burden of proof is limited to establishing only "general foreseeability," while *the defendant employer has the burden to prove* that the conduct of the particular criminal assailant employee was not reasonably foreseeable under the facts and circumstances of the particular case (WA0852, Vol. IV); and

2. Found that the criminal assailant in this case (Steven Farmer), an employee of American Nursing Services, Inc. ("ANS"), was *as a matter of law* also an employee of Centennial Hills and its parent company UHS. (WA0852, Vol. IV).

A. Proximate Cause And Burden Of Proof Issues.

NRS 41.745 provides in part:

> **Liability of employer for intentional conduct of employee; limitations.**
>
> 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.**
> 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)**

No known prior Nevada case involving NRS 41.745 has ever imposed the "dual" burden of proof set forth in Respondent's order – an unworkable

proposition that will necessarily leave a lay jury in a state of hopeless confusion. Thus, writ relief is particularly appropriate before the resources of the parties and the district court are expended attempting to follow such an impossible procedural course, the result of which would likely be another trial under proper burden of proof rules. *See MountainView Hosp., Inc. v. Eighth Judicial Dist. Ct.*, 273 P.3d 861, 864-65, 128 Nev. Adv. Op. 17 (2012) (citing "judicial economy" as a proper basis for granting writ).

Moreover, Respondent's order reflects the pressing need for this Court to clarify its decade old decision in *Wood v. Safeway, Inc.*, 121 Nev. 724, 739, 121 P.3d 1026, 1036 (2005), wherein this Court affirmed summary judgment for an employer sued for its employee's criminal assaults and rejected the "general foreseeability" standard set forth in Respondent's order. In *Wood*, this Court gave no indication that the traditional burden of proof rules were altered, much less that Plaintiff did not have the burden to prove "reasonable foreseeability" and the other requirements for employer liability set forth in NRS 41.745.

Centennial Hills and UHS believe the plain language of NRS 41.745, the holding of this Court in *Wood,* and the legislative history of NRS 41.745 make clear that the Nevada legislature intended to eliminate the "general foreseeability" standard and to place the burden to prove all the statutory elements required for employer liability under NRS 41.745 on plaintiff – including the burden to prove

"specific foreseeability," *i.e.*, that the particular employee's intentional conduct was "reasonably foreseeable" to the employer "under the facts and circumstances of the case." NRS 41.745(c). Respondent's contrary order, however, reflects an urgent need for this Court's clarification of its holding in *Wood* and the burden of proof imposed by NRS 41.745. *See Rolf Jensen & Assoc., Inc. v. Eighth Judicial Dist. Ct.,* 282 P.3d 743, 746, 128 Nev. Adv. Op. 42 (2012) (noting the "need for clarification" of Nevada law as an appropriate basis for granting a writ petition); *International Game Technology, Inc. v. Second Judicial Dist. Ct.,* 124 Nev. 193, 198, 179 P.3d 556, 559 (2008) (writ petition would be granted where it "raise[d] an important legal issue in need of clarification, involving public policy, of which this court's review would promote sound judicial economy and administration").

B. Employment Issues.

This Court's intervention is also needed to address Respondent's summary judgment order that the criminal assailant in this case, an employee of ANS (a hospital staffing agency), was also an employee of Centennial Hills, as well as its parent corporation UHS, *as a matter of law.* (WA0852, Vol. IV). At best, these issues raise questions of fact for the jury to resolve.

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RELIEF SOUGHT

Wherefore, Petitioners Centennial Hills and UHS request this Honorable Court's intervention to correct Respondent's erroneous burden of proof and employment rulings. Granting the Writ will benefit the entire Nevada bench and bar by making clear that the general foreseeability standard embodied in Respondent's Order is inapplicable, and that under NRS 41.745 plaintiff bears the burden to prove that the criminal conduct by the employee involved was reasonably foreseeable to the employer under the facts and circumstances of the given case.

DATED this 15 day of May, 2015

HALL PRANGLE & SCHOONVELD, LLC

MICHAEL E. PRANGLE, ESQ.
Nevada Bar No. 8619
JOHN F. BEMIS, ESQ.
Nevada Bar No. 9509
1160 N. Town Center Drive, Suite 200
Las Vegas, Nevada 89144
Attorneys for Petitioners
Valley Health System, LLC, d/b/a
Centennial Hills Hospital Medical Center
and Universal Health Services, Inc.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. ISSUES PRESENTED FOR REVIEW.

A. Issues Concerning The Burden Of Proof And Foreseeability Standard Under NRS 41.745 On Which This Court's Guidance Is Urgently Needed.

1. In an action against an alleged employer for injuries caused by the intentional criminal conduct of an alleged employee under NRS 41.745:

a) Does the "general foreseeability" standard have any remaining viability given the statutory language of NRS 41.745, this Court's decision in *Wood v. Safeway, Inc.,* 121 Nev. 724, 121 P.3d 1026 (2005), and the statute's legislative history; and

b) Does plaintiff have the burden to prove the statutory elements necessary for recovery against an employer under NRS 41.745, including the burden to prove that the employee's intentional criminal conduct was "reasonably foreseeable" to the employer "under the facts and circumstances of the case"?

B. Employment Issues That Should Be Resolved By A Jury, Not The District Court As A Matter Of Law.

2. Does the assailant's alleged employment by entities other than his direct employer present a fact issue that should be resolved by the trier of fact, not by the district court as a matter of law on a summary judgment motion?

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II. STATUTE INVOLVED

41.745. Liability of employer for intentional conduct of employee; limitations

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.

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.

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, an employee of a university school for profoundly gifted pupils described in chapter 392A of NRS or a 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, a university school for profoundly gifted pupils described in chapter 392A of NRS, 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.

Added by Laws 1997, p. 1357. Amended by Laws 2005, c. 481, § 22, eff. July 1, 2005.

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III. STATEMENT OF FACTS AND PROCEDURAL HISTORY

Jane Doe Suffers From Seizure Disorder.

In May 2008, Jane Doe was a fifty-one year old woman who had a medical history of severe anxiety and depression, as well as a seizure, or a "pseudoseizure" disorder as the result of a traumatic brain injury, which caused her to experience "uncontrollable sensory overload." (WA0328-29, Vol. II). Ms. Doe testified that when she had seizures, her body would "clench" and "tighten," and that she does not know what is going on around her." (WA0329, Vol. II). Ms. Doe further testified that after a seizure she was unable to speak or move, and was effectively immobilized for a period of time, which can last 24 to 48 hours following a seizure episode. (WA0270, Vol. II; WA0329-30, Vol. II). Ms. Doe also testified that, despite this immobilization, she is completely aware of everything going on around her, but that she "just can't participate in any of it." (WA0270, Vol. II).

Jane Doe Is Admitted To Centennial Hills Hospital.

On May 13, 2008, Ms. Doe was transported to Centennial Hills Hospital's emergency department via ambulance, after having suffered a seizure episode in the parking lot of a grocery store earlier that same day. (WA0330, Vol. II). Ms. Doe arrived at Centennial Hills' emergency department sometime between 5:10 p.m. and 5:35 p.m. on May 13, 2008. (WA0857, Vol. IV; WA0859-60). Upon her arrival to the emergency department, Ms. Doe was assessed and it was determined

that she was suffering from a prolonged postictal (post-seizure) period. (WA0855, Vol. IV; WA0856, Vol. IV; WA0859-60, Vol. IV). Shortly after Ms. Doe arrived in the emergency department, Dr. Erik Evensen conducted a physical examination and ordered an IV, a cardiac monitor, pulse oximeter, O_2 nasal cannula, and Foley catheter, all of which were placed or inserted by the emergency department nursing staff. (WA0858-60, Vol. IV). Dr. Curtis Bazemore then ordered Ms. Doe's admission for observation and monitoring, and Ms. Doe was taken from the emergency department and to the med surg telemetry floor, room 614, sometime between 7:15 p.m. and 8.30 p.m., on May 13, 2008. (WA0859-60, Vol. IV).

Steven Farmer Supplied To Centennial Hills By ANS Pursuant To BroadLane Contract.

At the time of Ms. Doe's admission, Steven Farmer, a Certified Nursing Assistant ("CNA"), was an employee of American Nursing Services ("ANS"), a supplemental staffing agency (WA0162-204, Vol. I). Mr. Farmer had been certified as a CNA in both California and Nevada. (WA0162, Vol. I; WA0168-69, Vol. I; WA0176-81, Vol. I). *See* NRS 632.2852 (certification process). He was on Centennial Hills' premises pursuant to a contractual agreement, referred to as the "Broadlane Contract," by which ANS agreed, upon request, to provide staffing to Centennial Hills. (WA0127, Vol. I). Mr. Farmer had completed an application for employment with ANS, he had been interviewed by ANS staff, and he had completed a CNA "skills test" (WA0174, Vol. I) that was administered by ANS.

(WA0162-87, Vol. I). ANS also performed a criminal background investigation of Mr. Farmer, in accordance with its obligation under the Broadlane Contract, which revealed that he had no record of a criminal history. (WA0170-72, Vol. I). While on Centennial Hills' premises, Mr. Farmer wore an identification badge that listed the name of the facility at the top, then his name, then the term "Contract Staff," and then the name of his employer. (WA0699-700, Vol. III; WA0702, Vol. III).

As a CNA, Mr. Farmer's general job duties included performing a number nursing support tasks. *See* Nevada State Board of Nursing, "CNA Skills Guidelines." (WA0173, Vol. I).

Farmer Is Assigned To The Sixth Floor At Centennial Hills Hospital And Thereafter Assaults Ms. Doe.

On May 14, 2008, Mr. Farmer was scheduled to work in Centennial Hills Hospital's emergency department from 7:00 p.m. to 7:00 a.m. (WA0863, Vol. IV). At approximately 9:30 p.m., Mr. Farmer was reassigned to the Sixth Floor, where he allegedly remained for the duration of his shift into the early morning of May 15, 2008. (WA0863-64, Vol. IV). During this time period, Mr. Farmer entered Ms. Doe's room on multiple occasions and committed various sexual assaults on her. (WA0122-24, Vol. I).

Farmer Is Charged And Convicted Of The Alleged Assaults.

Farmer was subsequently charged, indicted, and ultimately convicted in the Eighth Judicial District, Clark County, Nevada, Case No. 08 C 245739/C249693, of six crimes committed against Jane Doe, consisting of sexual assault, open or gross lewdness, and indecent exposure. (WA0122-24, Vol. I).

Evidence That There Was No Work-Related Reason For Farmer To Enter Ms. Doe's Room At The Time Of The Sexual Assaults.

During the criminal trial, Ms. Doe testified concerning the sexual assaults by Mr. Farmer. She testified that on one occasion, Farmer entered her room and pinched her nipples, stating that "one [of] the leads has come off on your heart monitor." (WA0076, Vol. I). However, Ms. Doe testified that the leads "were not on [her] nipples" and that she did not hear "the beeping sound" that the telemetry machine makes when a lead has fallen off. (WA0076-77, Vol. I). Ms. Doe described another incident when Farmer entered her room, claiming that he had to clean feces from her leg, and instead inserted his fingers into her anus. (WA0080, Vol. I). However, Ms. Doe did not feel that she had gone to the bathroom (WA0101, Vol. I) and further testified that Farmer did not wipe her off, he did not change the blue pad that was underneath her to protect against a bowel movement or a catheter leak, and he did not change her hospital gown. (WA0080-81, Vol. I). On another occasion, Ms. Doe testified that Farmer digitally penetrated her vagina, advising that he was checking her catheter. (WA0081-82, Vol. I). However, Ms.

Doe testified that the catheter was not inside her vagina. (WA0081-84, Vol. I). On another occasion, Farmer entered Ms. Doe's room for no stated reason and lifted up her gown so that he could see her entire body. (WA0079, Vol. I).

Plaintiff's Complaint And Amended Complaint.

On July 23, 2009, Ms. Doe filed the instant action against Steven A. Farmer, ANS, Centennial Hills and UHS, alleging that in or around May of 2008, Farmer sexually assaulted her while she was a patient at Centennial Hills. (WA0001-06, Vol. I; WA0007-12, Vol. I). Plaintiff alleged that the corporate defendants (ANS, Centennial Hills and UHS) were liable to Plaintiff for the intentional acts of their alleged employee, Farmer, based *inter alia* on the doctrine of *respondeat superior*. (WA0004, Vol. I; WA0010, Vol. I). Plaintiff's complaint sought general and punitive damages. (WA0006, Vol. I; WA0012, Vol. I). Subsequently, Ms. Doe died of causes unrelated to this case, and Misty Peterson, Special Administrator of the Estate, was substituted as Plaintiff for Ms. Doe. (WA0042-3, Vol. I; WA0126, Vol. I; WA0248, Vol. II).

Plaintiff Moves For Summary Judgment On Liability.

On September 29, 2014, Plaintiff moved for summary judgment on the issue of liability, not only against the criminal assailant Mr. Farmer, but also against ANS and Centennial Hills. Plaintiff urged that each of these corporate entities was vicariously liable as a matter of law for Farmer's criminal assaults on Ms. Doe.

(WA0062-64, Vol. I). However, Plaintiff's initial motion did not cite NRS 41.745 or even argue the issue of foreseeability as to any of the corporate defendants. (WA0053-124, Vol. I).

Centennial Hills and UHS (Centennial's parent company) (WA0028, Vol. I) responded to Plaintiff's summary judgment motion, citing NRS 41.745 and urging that Plaintiff could not recover even at a jury trial, much less as a matter of law, unless she proved: that Mr. Farmer's criminal assaults against Ms. Doe were not a truly independent venture; that the assaults occurred within the course and scope of the very tasks assigned to him; and that these criminal sexual assaults by Mr. Farmer were reasonably foreseeable to Centennial Hills. (WA0129, Vol. I). Centennial Hills and UHS urged that in criminally assaulting Ms. Doe, Farmer was engaged in a truly independent venture; that he was not acting within the course and scope of any assigned task or duties as nurse assistant; and that his criminal assaults of Ms. Doe were not reasonably foreseeable to Centennial Hills. (WA0129-35, Vol. I).

With respect to the issue of reasonable foreseeability, Centennial Hills and UHS relied upon this Court's decision in *Wood v. Safeway, Inc.,* 121 Nev. 724, 737, 121 P.3d 1026, 1035 (2005), and urged that there were no known prior acts or any other circumstances that could have put Centennial Hills on notice that Farmer would sexually assault Ms. Doe, or any other patient. (WA0132-35, Vol. I).

Centennial Hills had been provided with documentation by ANS showing that Farmer was certified as a CNA in both California and Nevada, that he had passed a criminal background test in both states, and that his drug test was negative. (WA0133-34, Vol. I; WA0170-72, Vol. I; WA0183, Vol. I). ANS had also provided Centennial Hills with Farmer's prior employment information, and there were no reports of any improper conduct or bad character. (WA0133-34, Vol. I).

In her Reply, Plaintiff urged that she was required to prove only the "general foreseeability" discussed in *State Dep't of Hum. Res. v. Jimenez*, 113 Nev. 735, 941 P.2d 969 (1997), even though that opinion was subsequently withdrawn. (WA0521, Vol. III). Plaintiff acknowledged that the Nevada legislature intended to overrule *Jimenez* when it drafted NRS 41.745. (WA0519, fn. 9, Vol. III). Nevertheless, Plaintiff urged that it was sufficient for her to show that Farmer's sexual assaults were "not so unusual or startling," given that CNA's and other hospital personnel often have physical contact with a patient. (WA0521-24, Vol. III). Relying on this concept of "general foreseeability," Plaintiff even urged that foreseeability was established as to ANS by the fact that prior to Farmer's assaults on Ms. Doe, ANS had purchased liability insurance to cover those kinds of claims. (WA0523, Vol. III). Plaintiff also filed "expert" affidavits asserting the "general foreseeability" of such assaults, again referring to the fact that hospitals often insure against such incidents. (WA0525-26, Vol. III). Plaintiff claimed that these

general foreseeability assertions satisfied "the foreseeability element of *Wood's respondeat superior* analysis." (WA0525, Vol. III).

Ultimately, Plaintiff ignored the foreseeability issue altogether and argued that Centennial Hills and UHS should be "strictly liable" for Farmer's conduct (WA0541, Vol. III), even though NRS 41.745(2) provides expressly to the contrary: "Nothing in this section imposes strict liability on an employer for any unforeseeable intentional act of employee."

Centennial and UHS filed a supplemental brief, pointing out that the foreseeability standard applied by this Court in *Wood* was not general foreseeability, but rather was a fact specific "reasonable foreseeability" standard pertaining to the specific employee involved in the criminal assault and the facts and circumstances of the particular case. (WA0762-87, Vol. IV). Centennial and UHS further urged that the burden of proof for all the statutory elements required for imposing liability on an employer for an employee's intentional misconduct under NRS 41.745 remained on the plaintiff. (WA0768, Vol. IV).

Respondent Grants Plaintiff's Motion On Liability In Part.

On February 27, 2015, Respondent entered its order granting Plaintiff's Motion for Summary Judgment on Liability in part. (WA0847-54, Vol. IV). Respondent's Order included *inter alia* the following findings of fact and conclusions of law:

Findings of Fact

- "In May 2008, Centennial/UHS had a contractual agreement whereby ANS would provide certain Hospital Staff, which including Certified Nursing Assistants ("CNA");"
- "In May 2008, Farmer was an agency CNA working at Centennial/UHS through ANS;"
- "On May 14, 2008, Farmer originally was told to work in the Emergency Room by Centennial/UHS;"
- "In May 2008, Farmer wore an employee badge that had his name, ANS, Centennial/UHS, and contract staff written on it;"
- "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;"
- "On May 14, 2008, Jane Doe was on the Sixth Floor in Room 614 at Centennial/UHS;"
- "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;"
- "In addition, Farmer was expected to give bed baths, cleanup stool, cleanup urine, and check monitor leads;"
- "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;"
- "Farmer had contact with Jane Doe in her room on the Sixth Floor of Centennial/UHS."

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Conclusions of Law

- "Pursuant to NRS 41.133, and based upon Farmer's criminal conviction for the acts underlying the instant lawsuit, Plaintiff's Motion as to Farmer's liability is granted, however the issue of damages as to Farmer remains an issue for the time of trial;"

- "Farmer, at the time the criminal acts were committed, **was the employee of American Nursing Services, Inc., Universal Health Services, Inc., and Valley Health Systems, LLC**;"

- "With regard to negligence, the Court further finds that **plaintiff must prove general foreseeability**;"

- "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;"

- "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;"

- "Hence, the Court denies Plaintiff's Motion for Partial Summary Judgment without prejudice, pursuant to NRCP 56, *Wood v. Safeway,* 121 Nev. 724, 121 P.3d 1026 (2005); *Prell Hotel Corp. v. Antonacci,* 86 Nev. 390, 469 P.2d 399 (1970); and NRS 41.745." (WA0847-54, Vol. IV) (all emphasis added).

IV. REASONS WHY A WRIT OF MANDAMUS SHOULD ISSUE.

A. Standard Of Review

A writ of mandamus is available (1) "to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station," NRS 34.160, (2) "to control a manifest abuse of or arbitrary or capricious exercise of discretion," or (3) *"to clarify an important issue of law." Bennett v.*

Eighth Judicial Dist. Ct., 121 Nev. 802, 806, 121 P.3d 605, 608 (2005) (emphasis added). When the District Court's findings raise questions of law, such as those at issue in this petition, they are reviewed *de novo*. *Marquis v. Eighth Judicial Dist. Ct.*, 122 Nev. 1147, 1156, 146 P.3d 1130, 1136 (2006); *Borger v. Eighth Judicial Dist. Ct.*, 120 Nev. 1021, 1026, 102 P.3d 600, 604 (2004). The writ shall be issued in all cases where the petitioner does not have a plain, speedy and adequate remedy in the ordinary course of law. NRS 34.170.

B. Respondent's "Dual" Burden Of Proof Order, Requiring Plaintiff To Prove Only A "General Foreseeability" And Imposing On Centennial And UHS The Burden Of Proof Under NRS 41.745, Raises Legal Issues On Which This Court's Clarification Of Nevada Law Is Urgently Needed.

1. The plain language of NRS 41.745, this Court's holding in *Wood*, and the relevant legislative history make clear that the "general foreseeability" standard does not comport with Nevada negligence law.

a. The plain language of NRS 41.745 sets forth a specific "reasonable foreseeability" standard.

NRS 41.745 states in pertinent part that an employer is not liable for the harm or injury caused by the intentional conduct of an employee if the conduct of the employee:

> c) Was not reasonably foreseeable *under the facts and circumstances of the case considering the nature and scope of his or her employment.*
>
> For 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.* (emphasis added).

Thus, the plain language of NRS 41.745 itself establishes that the foreseeability required to impose liability on an employer for the intentional criminal acts of an employee is a fact specific "reasonable foreseeability" to be determined "under the facts and circumstances of the case," and not the "general foreseeability" urged by Plaintiff and set forth in Respondent's Order. (WA0519-25, Vol. III; WA0852, Vol. IV).

b. This Court held in *Wood* that the "general foreseeability" standard is an incorrect statement of Nevada law.

This Court has already interpreted NRS 41.745 and in doing so, expressly endorsed the statute's specific foreseeability standard by which an employer is not liable for an employee's criminal conduct unless that conduct by that employee was reasonably foreseeable to the employer under the facts and circumstances of the particular case. In *Wood v. Safeway, Inc.,* 121 Nev. 724, 121 P.3d 1026 (2005), plaintiff, a mentally disabled Safeway employee, sued her employer (Safeway) and the company that provided Safeway with janitorial service, after she was sexually assaulted by a one of the janitorial company's employees. Plaintiff alleged that the assailant's acts were foreseeable to the janitorial service company because it was not "highly extraordinary" that a workforce comprised of highly transient, untrained, largely unsupervised illegal aliens would sexually assault "vulnerable

females" such as herself. *Wood,* 121 Nev. at 739, 121 P.3d at 1036. This Court rejected all of plaintiff's arguments and affirmed summary judgment in favor of defendants under NRS 41.745. *Id.* at 1037.

On the issue of foreseeability, the Court explained that the "highly extraordinary" standard was "an incorrect statement of the law." *Wood,* 121 Nev. at 739-40; 121 P.3d at 1036. Rather, "whether an intentional act is reasonably foreseeable depends on whether one has 'reasonable cause to anticipate *such act and the probability of injury resulting therefrom.*'" *Wood,* 121 Nev. at 739-40; 121 P.3d at 1036 (emphasis added). The Court then held that plaintiff failed to show a material issue of fact as to the reasonable foreseeability of the criminal assailant employee's conduct in *Wood,* given that the employee had no prior criminal history in the United States or Mexico and the janitorial service had received no complaints of misconduct or sexual harassment involving the assailant or any other employee in the past ten years. *Wood,* 121 Nev. at 740; 121 P.3d at 1036-37. Accordingly, "*[u]nder the circumstances of this case*, it was not reasonably foreseeable that Ronguillo-Nino would sexually assault a Safeway employee." *Wood,* 121 Nev. at 740; 121 P.3d at 1037 (emphasis added).[1]

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[1] Relying on the same absence of evidence of reasonable foreseeability, this Court in *Wood* further held that the janitorial service company was entitled to summary judgment on the

Thus, as demonstrated by this Court's analysis in *Wood,* the foreseeability required to impose employer liability under NRS 41.745 is "specific foreseeability" – *i.e.*, the criminal conduct of the particular assailant employee must be reasonably foreseeable to the employer under the facts and circumstances of the particular case – and the "general foreseeability" set forth in Respondent's Order (WA0852) is not the law.

c. The "reasonable foreseeability" standard applied in *Wood* comports with the legislature's intent behind its enactment of NRS 41.745.

The plain language of NRS 41.745 and this Court's holding in *Wood* should make it clear that "reasonable foreseeability" under the specific facts and circumstances of the case, not "general foreseeability," is required to impose employer liability under NRS 41.745. However, to the extent any ambiguity exists and/or remains, it is resolved by the statute's legislative history.

NRS 41.745, formerly Assembly Bill 595, was enacted by the Legislature in response to this Court's March 27, 1997 decision in *State, Dep't of Human Res., Division Of Mental Hygiene & Mental Retardation v. Jimenez,* 113 Nev. 356, 359, 935 P.2d 274, 275-76 (1997), *opinion withdrawn, reh'g dismissed,* 113 Nev. 735, 941 P.2d 969 (1997), wherein a new test for employer liability was announced,

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additional ground that the employee's criminal assaults constituted an unforeseeable intervening and superseding cause. *Wood,* 121 Nev. at 741; 121 P.3d at 1037.

replacing the previous test from *Prell Hotel Corp. v. Antonacci,* 86 Nev. 390, 469 P.2d 399 (1970). Under the *Jimenez* test, an employee's intentional torts were considered foreseeable if, in the context of the particular enterprise, the employee's conduct was not "so 'unusual or startling' that it would seem unfair to include the loss resulting from it in the costs of the employer's business." *Jimenez,* 113 Nev. at 365, 935P.2d at 279-80.

Recognizing that this new spreading of the risk/general foreseeability test set forth in *Jimenez* essentially imposed strict liability on employers for an employee's intentional wrongdoing, the Legislature enacted NRS 41.745 both to codify the "old" standard from *Prell* – contained within NRS 41.745(1)(a) and (b) – and to add a "reasonable foreseeability" standard set forth in NRS 41.745(1)(c). *See* Hearings on A.B. 595, 69th Leg., Assem. Comm. on Jud., at 14, 15 (Nev. June 19, 1997). (WA0789-90, Vol. IV; WA0791-808, Vol. IV). Indeed, in her comments to the Assembly Committee on Judiciary, Assistant Attorney General Brooke Neilsen, whose office proposed the bill, testified that "the language in section 1, subsection 1(c), which required the conduct of an employee 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" to "try and get the court and jury to focus on what happened in a particular case." (WA0795, Vol. IV; WA0797, Vol. IV). Committee Counsel Risa L. Berger further explained that

"[t]he intent of [section 1, subsection 1(c)] was to bring it back to an ordinary negligence standard." (WA0800, Vol. IV). Most succinctly, Assemblywoman and Vice Chairman Barbara Buckley testified that "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.*" (WA0801, Vol. IV) (emphasis added).

2. Under fundamental negligence principles and relevant legislative history, the burden to prove the reasonable foreseeability required under NRS 41.745 remains on Plaintiff.

The fact that Respondent's Order applies the "general foreseeability" standard rejected in *Wood* is grounds in itself for this Court to intervene and vacate that aspect of Respondent's February 27, 2015 Order. Furthermore, Respondent's concurrent finding that the defendant employer has the burden of proof on all issues under NRS 41.745 (WA0852, Vol. IV), presents yet another compelling basis for writ relief. Neither this Court's holding in *Wood,* nor the language of NRS 41.745, nor the statute's legislative history, support the proposition that traditional negligence principles – imposing the burden of proof on plaintiff – do not apply in a case where plaintiff sues an employer for an employee's intentional criminal acts.

To recover in a negligence action, "a *plaintiff* must demonstrate (1) that the defendant owed the plaintiff a duty of care, (2) that the defendant breached that

duty, (3) that breach of the duty caused harm to the plaintiff *that was reasonably foreseeable*, and (4) damages." *Butler ex rel. Biller v. Bayer,* 123 Nev. 450, 464, 168 P.3d 1055, 1065 (2007) (emphasis added). With respect to the element of proximate cause in a negligence action, this Court has long recognized that the burden of proof remains with the plaintiff and that he or she must show "that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances." *Yamaha Motor Co., U.S.A. v. Arnoult,* 114 Nev. 233, 238, 955 P.2d 661, 664 (1980). (citations omitted).

The plain language of NRS 41.745 does not alter or amend these fundamental burden of proof principles. NRS 41.745 sets forth "reasonable foreseeability" and other elements required to render an employer liable for the intentional conduct of its alleged employee. In *Wood,* the Court affirmed summary judgment in favor of the employer, and gave no indication that the traditional burden of proof rules would be altered in a jury trial under NRS 41.745.[2] Thus, to recover under NRS 41.745 at trial a plaintiff must prove all three of the following requirements: (a) the employee's conduct was not an independent venture; (b) the

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[2] *Wood* involved the employer's summary judgment motion; thus the employer had the "burden" to produce evidence establishing that there were no material issues of fact requiring a trial. See NRCP 56(c).

employee's conduct was committed in the course of his or her assigned tasks; and (c) the employee's conduct was reasonably foreseeable under the facts and circumstances of the case considering the nature and scope of his or her employment.

Nonetheless, to the extent there is any ambiguity in NRS 41.745 as to which party bears the burden of proof, it is again resolved by the statute's clear legislative history. In her testimony before the Assembly Committee on Judiciary, Assistant Attorney General Brooke Neilsen testified that "*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.*" (WA0795, Vol. IV) (emphasis added).

In sum, NRS 41.745 was not intended to alter "the normal rules of civil procedure applied to civil actions" – including the normal rule that plaintiff has the burden to prove every element necessary to impose liability on an employer for the intentional criminal acts of an employee. Accordingly, the Writ should be granted to vacate Respondent's contrary ruling that "[t]o refute *respondeat superior* liability per NRS 41.130, the *defendants must prove* the various sections and provisions in NRS 41.745. (WA0852, Vol. IV) (emphasis added).

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C. Writ Review Is Also Needed Because Farmer's Employment Status With Respect To Centennial And UHS Raise Questions Of Fact That Must Be Decided By A Jury And Not The District Court As A Matter Of Law On A Summary Judgment.

Respondent's Order granted Plaintiff's summary judgment motion on the issue of who was Farmer's employer at the time the sexual assaults occurred. Specifically, Respondent held that Farmer, an employee of real party in interest ANS, was *as a matter of law* also an employee of Centennial Hills and its parent corporation UHS. (WA0852, Vol. IV).

In her briefing to the district court, Plaintiff expressly disclaimed any reliance on a theory of ostensible agency for purposes of establishing the alleged employment relationship. (WA0515, Vol. III). Rather, plaintiff has steadfastly argued that Farmer was an employee of Centennial Hills and UHS based upon the following evidence: (1) Farmer was an agency CNA working at Centennial Hills through ANS; (2) ANS sent Farmer to Centennial Hills to work there as a CNA; (3) Farmer was originally told to work in the Emergency Room but was then later moved to the Sixth Floor by Centennial Hills to work; and that (4) Farmer wore a badge which stated his name, Centennial Hills, ANS, and "Contract Staff." (WA0057-59, Vol. I; WA0848-49, Vol. IV). This is the *entirety* of the evidence upon which Plaintiff relies, and upon which Respondent based its finding that Farmer was as a matter of law an employee of Centennial Hills and its parent corporation UHS at the time of the sexual assaults.

Centennial Hills and UHS denied that Farmer was their employee and in support of this denial, presented additional evidence that Farmer was not their employee, including: Farmer's HR file which included a completed ANS employment application; evidence that he had completed an interview with ANS personnel; evidence that ANS provided the job description for which Farmer applied; and evidence that Farmer had completed a CNA skills test at ANS' request. (WA0125-38, Vol. I; WA0762-87, Vol. IV). There was no evidence that Centennial Hills or UHS paid Farmer or provided workers' compensation benefits or any other remuneration for his services.

In *Rockwell v. Sun Harbor Budget Suites*, 112 Nev. 1217, 1223, 925 P.2d 1175, 1179 (1996), this Court recognized that in order for an employer-employee relationship to exist, the purported employer must maintain control over the purported employee, and that control must relate to all the "details and method of performing the work" within the course and scope of the alleged employment.[3] Normally such issues of control and scope of employment are questions of fact for the jury. *Yellow Cab of Reno, Inc. v. Second Judicial Dist. Ct.*, 262 P.3d 699, 704, 127 Nev. Adv. Op. 52 (2011). That should certainly be true here where there is no

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[3] The *Rockwell* Court found employment status as a matter of law based upon a property owner's non-delegable duty to provide responsible security personnel. *Rockwell,* 112 Nev. at 1223; 925 P.2d at 1179. No such non-delegable duty exists here.

evidence that Centennial Hills or UHS directed Farmer to enter Plaintiff's room at any of the times at issue or directed him to do any of the things that he claimed that he was doing at the time of the assaults (cleaning up bowel movement, checking catheter placement, or replacing a telemetry lead that had fallen off). Indeed, the testimony of Ms. Doe herself, *supra*, would give the jury an ample basis to conclude that Farmer had no work-related reason for entering her room at the time of any of the assaults, and thus he was clearly acting outside the scope of any alleged employment or control by Centennial Hills or UHS. *See Kornton v. Conrad, Inc.,* 119 Nev. 123, 124, 67 P.3d 316, 317 (2003);[4] *J.C. Penney Co. v. Gravelle*, 62 Nev. 434, 450, 155 P.2d 477, 482 (1945). Accordingly, Respondent's finding that Farmer was an employee of Centennial Hills and UHS *as a matter of law* should be vacated.

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[4] The district court made only general findings about the course and scope of Farmer's employment (WA0848-49, Vol. IV), and properly did not address the factual issues of whether Farmer was in the course and scope of his employment at the time of the sexual assaults on Ms. Doe, or whether he was actually performing any assigned task at the time the assaults occurred.

CONCLUSION

Despite the clear language of NRS 41.745, this Court's ostensibly clear holding in *Wood*, and the relevant legislative history, Respondent's Order demonstrates a fundamental misunderstanding of the burden of proof applicable to an action against an employer for the intentional criminal conduct of an alleged employee. As such, Respondent's Order demonstrates an urgent need for this Court to grant the requested Writ in order to clarify Nevada law on this important and recurring legal issue – thereby also promoting judicial economy and the administration of justice throughout the State. Certainly, Respondent's facially erroneous "dual" burden of proof Order should not be allowed to persist and potentially affect other pending and future Nevada cases involving an employer's liability for its employees' intentional torts.

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Accordingly, Petitioners Centennial Hills and UHS respectfully request that relief be granted, and a Writ of Mandamus or Prohibition, as appropriate, be issued directing the Respondent District Court to vacate those portions of its February 27, 2015 Order that: require Plaintiff to prove only "general foreseeability;" impose on Petitioners the burden of proof under NRS 41.745; and find as a matter of law that Petitioners were the employer of the criminal assailant.

Dated this 15 day of May, 2015

HALL PRANGLE & SCHOONVELD, LLC

MICHAEL E. PRANGLE, ESQ.
Nevada Bar No. 8619
JOHN F. BEMIS, ESQ.
Nevada Bar No. 9509
1160 N. Town Center Drive, Suite 200
Las Vegas, Nevada 89144
Attorneys for Petitioners
Valley Health System, LLC, d/b/a
Centennial Hills Hospital Medical Center
and Universal Health Services, Inc.

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NRAP 28.2 ATTORNEY'S CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing complies with the requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the style requirements of NRAP 32(a)(6). This Amended Petition has been prepared in a proportionally-spaced typeface using Microsoft Word with 14-point, double-spaced Times New Roman font.

I further certify that I have read Petitioners Valley Health System, LLC d/b/a Centennial Hills Hospital Medical Center and Universal Health Services, Inc.'s Amended Petition for Writ of Mandamus and/or Writ of Prohibition, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this Amended Petition complies with all applicable rules, including the requirement of NRAP 28(e) that every assertion in the brief regarding matters in the record be supported by a reference to the page and volume number, if any, of the appendix where the matter relied on is to by found.

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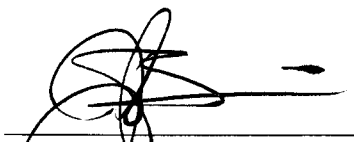
I understand that I may be subject to sanctions if the accompanying brief is not in conformity with the requirements of NRAP.

DATED this 15 day of May, 2015.

HALL PRANGLE & SCHOONVELD, LLC



MICHAEL E. PRANGLE, ESQ.
Nevada Bar No. 8619
JOHN F. BEMIS, ESQ.
Nevada Bar No. 9509
1160 N. Town Center Drive, Suite 200
Las Vegas, Nevada 89144
Attorneys for Petitioners
Valley Health System, LLC, d/b/a
Centennial Hills Hospital Medical Center
and Universal Health Services, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on the 15 day of May, 2015, I electronically filed the foregoing served the foregoing **PETITIONERS' VALLEY HEALTH SYSTEM, LLC, d/b/a CENTENNIAL HILLS HOSPITAL MEDICAL CENTER'S AND UNIVERSAL HEALTH SERVICES, INC.'S PETITION FOR WRIT OF MANDAMUS AND/OR WRIT OF PROHIBITION** in a sealed envelope, via U.S. Mail, first-class, postage pre-paid, to the following parties at their last known address:

Robert E. Murdock, Esq.
MURDOCK & ASSOCIATES, CHTD.
520 South Fourth Street
Las Vegas, Nevada 89101
-and-
Eckley M. Keach, Esq.
ECKLEY M. KEACH, CHTD.
520 South Fourth Street
Las Vegas, Nevada 89101

Attorneys for Real Parties in Interest Estate of Jane Doe, by and through its Special Administrator, Misty Peterson

Robert C. McBride, Esq.
CARROL, KELLY, TROTTER, FRANZEN, MCKENNA & PEABODY
8329 W. Sunset Road, Suite 260
Las Vegas, NV 89113
Attorneys for Real Parties in Interest Steven Dale Farmer

S. Brent Vogel, Esq.
LEWIS BRISBOIS BISGAARD & SMITH
6385 South Rainbow Blvd., Suite 600
Las Vegas, NV 89118
-and-
James P.C. Silvestri, Esq.
PYATT SILVESTRI
701 Bridger Ave., Suite 600
Las Vegas, NV 89101
Attorneys for Real Parties in Interest American Nursing Services, Inc.

///

Catherine Cortez Masto, Esq.
Attorney General
Nevada Department of Justice
100 North Carson Street
Carson City, NV 89701
Counsel for Respondents
The Honorable Richard F. Scotti

The Honorable Richard Scotti
Eighth Judicial District Court
Department 2
Phoenix Building
330 S. Third St., Courtroom 110
Las Vegas, NV 89155

An Employee of Hall Prangle & Schoonveld, LLC

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