IN THE SUPREME COURT OF THE STATE OF NEVADA

TAWNI McCROSKY, individually and as the natural parent of LYAM McCROSKY, a minor child, Petitioners, vs. THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE JAMES T. RUSSELL, Respondents. CARSON TAHOE REGIONAL MEDICAL CENTER, a Nevada business entity, Real Party in Interest.	Supreme Court Case No. FJDC Case No. 13TRT000281B

PETITION FOR WRIT OF MANDAMUS

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VERIFICATION

Under the penalty of perjury, the undersigned declares that she is the attorney for Petitioner named in the instant Petition and knows the contents of the Petition. The pleading and facts stated therein are true of her own knowledge, except as to those matters stated on information and belief, and that as such matters she believes them to be true. This verification is made by the undersigned attorney pursuant to NRAP 21(a)(5).

Executed this 25th day of September, 2015.

ALLASIA L. BRENNAN, ESQ.

State of Nevada
County of Washoe
Subscribed and Sworn to before me
by Allasia L. Brennan, Esq. on
this 25th day of September, 2015.

NOTARY PUBLIC

ANDREA UMANA
Notary Public - State of Nevada
Appointment Recorded in Washoe County
No: 05-95837-2 - Expires April 4, 2017

PETITION FOR WRIT OF MANDAMUS

I. INTRODUCTION

Petitioner Tawni McCrosky, individually and as the natural parent of Lyam McCrosky, a minor child, petitions this Court to direct the District Court to vacate its orders permitting a settling former defendant to be placed on the jury verdict form and granting partial summary judgment in favor of the real party in interest, Carson Tahoe Regional Medical Center ("CTRMC"). The two issues presented in this Petition are limited in scope to the questions of: (1) whether a settling former defendant, whose settlement was confirmed by the District Court as having been entered in good faith, can be placed on the jury verdict form[1]; and, (2) whether the District Court improperly granted partial summary judgment in favor of CTRMC on the issue of vicarious liability finding no genuine issues of material fact remain as to Dr. Amy Sue Hayes' status as an apparent/ostensible agent of CTRMC. The parties and the District Court all recognize that these two issues pose significant legal problems requiring this Court's immediate resolution.

The District Court improperly rewrote NRS 41A.045 to include non-parties. The District Court clearly invaded the province of the Legislature where the Legislature deliberately declined to include non-parties during the legislative session that recently concluded this year.

Allowing a settling former defendant to be placed on the jury verdict form also directly contravenes NRS 41.141(3). Ms. McCrosky submits that the District Court must interpret and apply NRS 41A.045 in a manner consistent with NRS 41.141(3). In interpreting NRS 41A.045 with NRS 41.141(3), the only interpretation that would not render NRS 41.141 (3) meaningless is that only those defendants remaining in the

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[1] This Court previously exercised its discretion to consider a writ petition raising a nearly identical issue in *Piroozi v. Eighth Judicial Dist. Ct.*, Case No. 64946. Ms. McCrosky therefore urges this Court to exercise its discretion to consider the instant Petition.

action are severally liable. This Court has not addressed the issue as to whether NRS 41A.045 can be applied in a manner that is harmonious with NRS 41.141(3).

Although the District Court conceded that genuine issues of material fact exist with respect to more than one of the four factors enunciated by this Court in *Schlotfeldt v. Charter Hosp. of Las Vegas* to determine the status of a physician as an apparent/ostensible agent of the hospital, the District Court nevertheless granted partial summary judgment finding that no genuine issues of material fact exist with respect to one factor. 112 Nev. 42, 910 P.2d 271 (1996). By doing so, the District Court usurped the function of the jury.

Both CTRMC and the District Court are under the mistaken impression that Ms. McCrosky must show that there are no genuine issues of material fact as to all of the four *Schlotfeldt* factors. Ms. McCrosky submits that no one factor is dispositive, and so long as genuine issues of material fact exist with respect to at least one factor, the District Court was required to allow the jury to decide the issue of apparent/ostensible agency. An important issue of law therefore is presented to this Court for clarification.

II. STATEMENT OF FACTS

A. Background Facts.

This case involves a traumatic injury suffered by Ms. McCrosky's son, Lyam, during his labor and delivery at CTRMC. Appendix 1-10 (hereinafter referred to as "APP"). Dr. Amy Sue Hayes was the obstetrician on call at CTRMC during the relevant time period. APP 217.

Ms. McCrosky filed a medical negligence action naming CTRMC and Dr. Hayes stemming from CTRMC's inadequate and substandard treatment of Ms. McCrosky and her baby. APP 1-10. Ms. McCroksy alleges that CTRMC fell below numerous standards of care by failing to properly monitor the patient, by failing to properly communicate the urgent needs of the patient to Dr. Hayes, by abandoning the patient, by making no attempts to initiate a chain of command intervention, by failing to obtain additional physician help and second opinions with regard to an acute

emergency, by virtue of numerous charting errors and omissions (some of which were created by Nurse Gia Parkhurst who was not even present when events occurred), and vicariously by virtue of the errors and omissions of its ostensible agent, Dr. Hayes. APP 1-10.

Ms. McCrosky has settled with Dr. Hayes. On June 18, 2015, Dr. Hayes filed a *Motion for Determination of Good Faith Settlement* ("*Motion for Good Faith Settlement*") under seal. CTRMC did not oppose Dr. Hayes' *Motion for Good Faith Settlement*. The District Court granted Dr. Hayes *Motion for Good Faith Settlement*. Dr. Hayes has been dismissed from the case and thus is no longer a named defendant in this action.

B. CTRMC's Motion to Include Co-Defendant, Amy Hayes, M.D. on the Verdict Form.

CTRMC moved for an order to include Dr. Hayes on the verdict form. APP 11-43. CTRMC relied solely upon NRS 41A.045 as grounds to do so. APP 11-43.

In opposition, Ms. McCrosky argued that the Legislature during this year's legislative session had the opportunity to amend NRS 41A.045 to permit the jury to consider the comparative fault of non-parties who have settled and no longer remain in the action, and the Legislature declined to pass the proposed amendments. APP 146-195. Ms. McCrosky further argued that the District Court could not consider NRS 41A.045 in isolation, but must also consider NRS 17.245, NRS 41.141, and case law interpreting these two statutes. APP 146-195. Although the Legislature specifically declined to legislate on the very issue posed by NRS 41A.045, the District Court improperly did so. APP 559-561. The District Court also failed to interpret and apply NRS 41A.045 in a manner that is harmonious with NRS 41.141. APP 559-561.

C. CTRMC's Motion for Partial Summary Judgment.

CTRMC moved for partial summary judgment on the grounds that it cannot be vicariously liable for the care and treatment rendered by Dr. Amy Sue Hayes. APP

254-468. CTRMC claimed that the elements for apparent/ostensible agency are purportedly absent. APP 254-468.

In opposition, Ms. McCrosky argued that genuine issues of material fact remain as to whether an apparent/ostensible agency relationship between CTRMC and Dr. Hayes existed to preclude the entry of partial summary judgment in favor of CTRMC on this issue. APP 196-245. Ms. McCrosky argued that the evidence before the District Court did not conclusively indicate that Ms. McCrosky should have known that Dr. Hayes was not CTRMC's agent, and therefore this issue must be left to the trier of fact. APP 196-245.

In direct contravention of this Court's decisions in *Schlotfeldt*, 112 Nev. at 42, 910 P.2d at 271 and *Renown Health v. Vanderford,* __ Nev. __, 235 P.3d 614 (2010), the District Court incorrectly found no genuine issues of material fact and entered partial summary judgment in favor of CTRMC. APP 555-558. Although the District Court acknowledged that genuine issues of material fact exist with respect to more than one of the four factors set forth in *Schlotfeldt,* the District Court erroneously focused on only one of these factors in granting partial summary judgment. APP 556-557.

III. ISSUES PRESENTED

The issues presented in the instant Petition are: (1) whether a settling former defendant, whose settlement was confirmed by the District Court as having been entered in good faith, can be placed on the jury verdict form; and, (2) whether the District Court improperly granted partial summary judgment in favor of CTRMC on the issue of vicarious liability because questions of material fact remain as to Dr. Hayes' status as an apparent/ostensible agent of CTRMC.

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

A. Standard of Review.

A writ of mandamus is available (1) to compel the performance of an act that the law requires; (2) to control a manifest abuse of or arbitrary or capricious exercise of discretion; or (3) to clarify an important issue of law. NRAP 21; *Bennett v. Eighth Judicial Dist. Ct.,* 121 Nev. __, 121 P.3d 605,608 (2005). This Court is vested with sound discretion to consider whether to issue a writ. *Bennett*, 121 Nev. at __, 121 P.3d at 608. This Court's sound discretion is guided by whether "an important issue of law needs clarification and considerations of sound judicial economy and administration . . ." *International Game Tech., Inc. v. Second Judicial Dist. Ct.,* 124 Nev. 193, 197-198, 179 P.3d 556, 559 (2008). The primary standard by which this Court exercises its discretion is the interest of judicial economy. *Smith v. Eighth Judicial Dist. Ct.,* 113 Nev. 1343, 950 P.2d 280 (1997).

A writ will generally not issue if the petitioner has a plain, speedy, and adequate remedy in the ordinary course of law. *Bennett,* 121 Nev. at __, 121 P.3d at 608. There is no plain, speedy, and adequate remedy at law where the law clearly required the District Court to deny partial summary judgment and the instant Petition presents important legal problems that demand this Court's immediate resolution. *D.R. Horton v. Eighth Judicial Dist. Ct.,* 125 Nev. 449, 453, 215 P.3d 697, 700 (2009).

The District Court committed manifest abuse of and arbitrarily and capriciously exercised its discretion when it: (1) improperly rewrote NRS 41A.045 to include non-parties where the Legislature declined to do so; (2) failed to interpret and apply NRS 41A.045 in a manner that is harmonious with NRS 41.141; and (3) granted partial summary judgment in favor of CTRMC when genuine issues of material fact clearly remain. Additionally, the issue of whether the District Court could properly allow Dr. Hayes to be included on the verdict form presents an issue of law requiring

clarification from this Court. The issue of whether the District Court can focus on only one factor enunciated by this Court in *Schlotfeldt* also requires clarification.

Such errors of law call for this Court to issue a writ of mandamus to prevent Ms. McCrosky and CTRMC from incurring exorbitant and unwarranted legal fees and costs[2] to try this case for over two weeks that will then have to be retried due to the obvious errors by the District Court. There is no plain, speedy, and adequate remedy available to Ms. McCrosky to address these derelictions by the District Court as Ms. McCrosky should not have to adjudicate a trial that will be unfair due to the clear errors of the District Court.

B. The District Court Manifestly Abused Its Discretion When It Allowed CTRMC to Include Dr. Hayes on the Verdict Form.

1. A Historical Perspective of NRS 41A.045.

During the 18th Special Legislative Session in 2002, the Legislature enacted the predecessor to NRS 41A.045 with the following measure: "In an action for damages for medical malpractice, each defendant is liable for noneconomic damages severally only, and not jointly, to the plaintiff only for that portion of the judgment which represents the percentage of negligence attributable to the defendant." APP 163-169 ("Current law provides that each one of multiple defendants in medical malpractice actions is severally, but not jointly liable for non economic damages. . . However, the current law treats economic damages differently, and provides that each defendant is not only severally liable but jointly liable for payment of economic damages . . ."). In 2004 by initiative petition, Nevada voters passed NRS 41A.045 titled "Several Liability of Defendants for Damages; Abrogation of Joint and Several Liability."

During this year's legislative session, the Legislature had the opportunity to amend NRS 41A.045 to permit the jury to consider the comparative fault of non-

[2] Ms. McCrosky will have numerous retained experts testify, as will CTRMC. The experts' rates vary, and some will require as much as $8,000/day for testimony.

parties who have settled and no longer remain in the action–the very issue posed to this Court. The Legislature failed to pass the proposed amendments that would have allowed the District Court to include Dr. Hayes on the verdict form.

On March 16, 2015, S.B. 292 was introduced and the following amendments were proposed for NRS 41A.045:

NRS 41A.045 is hereby amended to read as follows:

> 2. In an action described in subsection 1, the trier of fact shall determine the percentage of responsibility assigned to all persons relating to the harm caused for which recovery is being sought. The trier of fact shall consider the percentage of responsibility of any person who could have contributed to the alleged injury or death, regardless of whether the person was, or could have been, named as a party to the action. A determination of the percentage of responsibility for any nonparty:
>
> (a) May only be used as a vehicle for accurately determining the fault of the named parties;
>
> (b) Does not subject the nonparty to liability in the action or in any other action; and
>
> (c) May be introduced as evidence of liability in any action.
>
> 3. To establish the percentage of responsibility of any party or nonparty, a defendant may present to the trier of fact:
>
> (a) An affidavit produced pursuant to NRS 41A.071;
>
> (b) A report prepared by an expert pursuant to the Nevada Rules of Civil Procedure; and
>
> (c) Testimony of an expert designated by any party, at any time, pursuant to the Nevada Rules of Civil Procedure.

APP 175-180. These proposed amendments would have vested the District Court with the legal authority to include a settling tortfeasor, who has been dismissed from the case in a medical malpractice action, on the verdict form.

The Legislature rejected these proposed amendments. APP 182-188. The final version of S.B. 292 did not include the proposed amendments. APP 190-195. Although the Legislature specifically rejected these proposed amendments, the District Court improperly took it upon itself to nevertheless legislate on this very issue. The District Court incorrectly concluded that "defendant", as contemplated by NRS 41A.045, included a settling former defendant. The proposed amendments would have clarified whether a "defendant" included a settling former defendant.

2. "Defendant" As Contemplated by NRS 41A.045 Does Not Include a Settling Former Defendant.

NRS 41A.045 currently provides as follows:

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

NRS 41A.045 (emphasis added).[3]

It is clear that "defendant", as contemplated by NRS 41A.045, does not include a settling tortfeasor who has been dismissed from the case.[4] When "the language of a statute is plain and unambiguous, and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself." *Attorney General v. Nevada Tax Comm'n,* 124, 232, 240, 181 P.3d 675, 680 (2008) (quotations omitted). The plain language of NRS 41A.045 applies to only "defendants".

In the present case, Dr. Hayes is no longer a "defendant" in this case where she has been dismissed as a party. Pursuant to the plain and unambiguous language of NRS 41A.045, it cannot have any applicability as a matter of law. The District Court improperly rewrote NRS 41A.045 to include non-parties where the Legislature specifically declined to do so. AA 559-561. In rewriting NRS 41A.045, the District Court manifestly abused its discretion and exercised its discretion arbitrarily and capriciously.

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[3] Under this statute, if Ms. McCrosky proceeded to trial with both Dr. Hayes and CTRMC, they could only be severally liable.

[4] This interpretation of NRS 41A.045 is also consistent with the Legislature's intent when this Court views the language the Legislature employed on the issue of comparative fault in NRS 41.141(2)(b)(2) ("each party remaining in the action").

NRS 41.141(2) and (3) address the issue of the comparative fault of non-parties who have settled and no longer remain in the action. NRS 41.141 is the only statute that speaks to the issue of whether this Court can properly include Dr. Hayes on the verdict form after she has entered into a good faith settlement with Ms. McCrosky and has been dismissed from the case.

3. NRS 41.141 Precludes the Inclusion of Dr. Hayes on the Verdict Form.

Even if this Court concludes that NRS 41A.045 is ambiguous (and Ms. McCrosky submits that it is not in light of the plain language of the statute and the Legislature's refusal to adopt the proposed amendments to include non-parties as part of NRS 41A.045), NRS 41.141 and Nevada case law interpreting that statute provide that a settling defendant cannot be included on the verdict form. It is the only statute that speaks to the issue posed to this Court.

NRS 41.141 provides in pertinent part:

> 1. In any action to recover damages for death or injury to persons or for injury to property in which comparative negligence is asserted as a defense, the comparative negligence of the plaintiff or the plaintiff's decedent does not bar a recovery if that negligence was not greater than the negligence or gross negligence of the parties to the action against whom recovery is sought.
>
> 2. In those cases, the judge shall instruct the jury that:
> (a) The plaintiff may not recover if the plaintiff's comparative negligence or that of the plaintiff's decedent is greater than the negligence of the defendant or the combined negligence of multiple defendants.
> (b) If the jury determines the plaintiff is entitled to recover, it shall return:
> (1) By general verdict the total amount of damages the plaintiff would be entitled to recover without regard to the plaintiff's comparative negligence; and
> (2) ***A special verdict indicating the percentage of negligence attributable to each party remaining in the action.***
>
> 3. ***If a defendant in such an action settles with the plaintiff before the entry of judgment, the comparative negligence of that defendant and the amount of the settlement must not thereafter be admitted into evidence nor considered by the jury.*** The judge shall deduct the amount of the settlement from the net sum otherwise recoverable by the plaintiff pursuant to the general and special verdicts.

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

5. This section does not affect the joint and several liability, if any, of the defendants in an action based upon:
(a) Strict liability;
(b) An intentional tort;
(c) The emission, disposal or spillage of a toxic or hazardous substance;
(d) The concerted acts of the defendants; or
(e) An injury to any person or property resulting from a product which is manufactured, distributed, sold or used in this State.

6. As used in this section:
(a) "Concerted acts of the defendants" does not include negligent acts committed by providers of health care while working together to provide treatment to a patient.
(b) "Provider of health care" has the meaning ascribed to it in NRS 629.031.

NRS 41.141(1) - (4) (emphasis added). This statute must be read in its entirety.

Pursuant to subsections 1 and 4, defendants are jointly and severally liable in a multi-defendant tort action where the comparative negligence of the plaintiff may not be asserted as a defense. NRS 41.141(1) and (4). Where, however, the comparative negligence of a plaintiff may be asserted as a defense, the defendants are only severally liable unless the exceptions of subsection 5 apply. *Id.*

In essence, NRS 41.141 abrogated joint and several liability in situations where the plaintiff's comparative negligence may be asserted as a defense. *Id.* With NRS 41A.045, even if a plaintiff's comparative negligence may not be asserted as a defense in a medical malpractice action, defendants are still only severally liable. NRS 41A.045. This constitutes the only change to NRS 41.141 effected by NRS 41A.045.

NRS 41.141(2)(b)(2) clearly states that in an action for personal injury when the jury determines that the plaintiff is entitled to damages, the jury "shall return . . . [a] special verdict indicating the percentage of the negligence attributable ***to each party remaining in the action***." NRS 41.141(2)(b)(2) (emphasis added). The plain meaning of subsection 2 is clear on its face. The jury is to consider only "the

percentage of the negligence attributable ***to each party remaining in the action***." *Id.* (emphasis added). A party who has settled is no longer a "party remaining in the action."

NRS 41.141(3) is consistent with NRS 41.141(2). NRS 41.141(3) unambiguously provides that if a co-defendant settles with the plaintiff in a case in which the remaining defendant asserts a comparative negligence defense against other remaining defendants in the case, the jury may not consider the settling co-defendant's comparative negligence or the settlement amount. NRS 41.141(3); *see also Warmbrodt v. Blanchard,* 100 Nev. 793, 692 P.2d 1282 (1984) (holding error to submit question of attorney's negligence to jury under applicable comparative negligence statute where attorney prevailed on summary judgment). Subsection 3 further provides that after a jury returns its verdict, the settlement amount shall be deducted from the net sum recoverable by the plaintiff. NRS 41.141(3).

It is patently clear from the language in subsections 2 and 3 that the Legislature did not intend for the jury to consider the co-defendant's comparative negligence or the settlement amount in comparison to the parties remaining in the action. "Where the legislative intent can be clearly discerned from the plain language of the statute, it is the duty of the court to give effect to that intent and to effectuate, rather than nullify, the legislative purpose." *Sparks v. State,* 121 Nev. 107, 100-111, 110 P.3d 486, 488 (2005).

A cardinal rule of statutory construction is that a statute should be read as a harmonious whole with its various parts interpreted within their broader statutory context in a manner that furthers statutory purposes.

> Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme – because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with rest of the law.

United Savings Ass'n v. Timbers of Inwood Forest Associates, 484 U.S. 365, 371 (1988) (citations omitted).

Consistent with this cardinal rule of statutory construction, this Court recognizes the following salient principles: (1) in interpreting a statute, courts should consider the statute's multiple provisions as a whole; and, (2) "statutory interpretation should not render any part of a statute meaningless, and a statute's language 'should not be read to produce absurd or unreasonable results.'" *Leven v. Frey,* 123 Nev. 399, 405, 168 P.3d 712, 716 (2007) (quoting *Harris Associates v. Clark County School Dist.,* 119 Nev. 638, 642, 81 P.3d 532, 534 (2003)). Furthermore, when construing two statutes, the goal is to harmonize the two statutes in such a way that does not render them meaningless. *Hernandez v. Bennet-Haron,* __ Nev. __, __, 287 P.3d 305, 316 (2012) ("This court construes 'statutes to preserve harmony among them.'") (quoting *Canarelli v. Dist. Ct.,* __, Nev. __, __, 265 P.3d 673, 677 (2011)).

Under this rubric, this Court should construe NRS 41.141 and 41A.045 in the manner the Legislature intended and not attempt to rewrite the law as the District Court has done here. If the Legislature wanted to depart from NRS 41.141(2) and (3), it could have amended these two subsections when it enacted the predecessor to NRS 41A.045. The Legislature, however, did not do so and even rejected the recently proposed amendments to NRS 41A.045 that would have allowed a departure from NRS 41.141(2) and (3).

In interpreting NRS 41A.045 with NRS 41.141(2) and (3), the only interpretation that would not render NRS 41.141(2) and (3) meaningless is that only those defendants remaining in the action are severally liable.[5] In other words, NRS

[5] During oral arguments, CTRMC incorrectly contended that if the District Court allowed the jury to consider the question of apparent/ostensible agency, then evidence as to the negligence of Dr. Hayes must be considered by the jury and this would some how contravene NRS 41.141(3). APP 507-508. To establish vicarious liability, Ms. McCrosky need only establish that Dr. Hayes is negligent and because

41A.045 was never intended to abrogate NRS 41.141(2) and (3), but to work harmoniously with it. There is absolutely nothing in NRS 41A.045 that conflicts with or supersedes the comparative fault scheme set forth in NRS 41.141(2) and (3). Simply put, these two statutes are not at odds with each other so as to suggest that the Legislature intended one statute to supersede the other. This is bolstered by the undisputed fact that the Legislature rejected the proposed amendments to NRS 41A.045 that would have resulted in NRS 41A.045 abrogating NRS 41.141(3).

This Court's opinion in *Banks ex rel. Banks v. Sunrise Hosp.* further supports this conclusion:

> ***NRS 41.141 only prevents admission of evidence in support of a "comparative fault" or apportionment analysis of the case as to nonparties***, and a jury may only "compare" the negligence as between parties and nonparties. Nothing in NRS 41.141 prohibits a party defendant from attempting to establish that either no negligence occurred or that the entire responsibility for a plaintiff's injuries rests with nonparties, including those who have separately settled their liabilities with the plaintiff.

120 Nev. 822, 844-845, 102 P.3d 52, 67 (2004) (emphasis added). While *Banks* was decided after the current version of NRS 41A.045 was passed by the 2004 ballot initiative petition, its predecessor providing that in medical malpractice actions defendants can only be severally liable for noneconomic damages was in effect when this Court decided *Banks*.

This opinion makes it clear that in Nevada CTRMC is not permitted to allocate a percentage of fault to Dr. Hayes at trial. CTRMC is, however, permitted to argue that its nurses did not act negligently or that Dr. Hayes (now a non-party) is 100% or solely responsible for Lyam's injuries (i.e. the "empty chair defense" or the "sole proximate cause defense"). *Banks* and NRS 41.141 make it clear that when CTRMC

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she is an apparent/ostensible agent of CTRMC, the hospital is therefore negligent. In other words, Ms. McCrosky does not have to establish Dr. Hayes' *comparative negligence* with respect to the nurses for purposes of vicarious liability, but only that she was simply negligent. As such, allowing the jury to consider the question of apparent/ostensible agency does not in any way conflict with NRS 41.141(3).

attempts to allocate/compare its fault to a non-party, NRS 41.141(2) and (3) apply and specifically prohibit CTRMC from allocating or comparing its fault to Dr. Hayes at trial where she settled with Ms. McCrosky before trial.

This Court should interpret and apply NRS 41A.045 in a manner that is harmonious with NRS 41.141(2) and (3). Once Dr. Hayes settled with Ms. McCrosky and became a non-party, the District Court is precluded from admitting evidence of Dr. Hayes' comparative fault or an apportionment analysis. Such an interpretation and application of NRS 41A.045 is not only consistent with the Legislature's most recent rejection of the proposed amendments and NRS 41.141, but is further harmonious with NRS 17.245.

4. The Purpose and Intent of NRS 17.245 Would Be Eroded If This Court Does Not Direct the District Court to Vacate Its Order Allowing CTRMC to Include Dr. Hayes on the Verdict Form.

NRS 17.245 provides:

> 1. When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:
> (a) It does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and
> (b) It discharges the tortfeasor to whom it is given from all liability for contribution and for equitable indemnity to any other tortfeasor.
> 2. As used in this section, "equitable indemnity" means a right of indemnity that is created by the court rather than expressly provided for in a written agreement.

NRS 17.245. Once a trial court determines that a defendant has settled in good faith, NRS 17.245 provides that the settling defendant cannot be liable to co-defendants in a tort action for contribution or equitable indemnity if the defendant settles with the plaintiff in good faith. *Otak Nevada, L.L.C. v. Eight Jud. Dist. Ct.*, __ Nev. __, 312 P.3d 491 (2013).

The purpose of Nevada's good faith settlement statute is to encourage settlements by discharging all liability for contribution by a settling tortfeasor to others

upon a finding that the settlement was entered in good faith. *Kerr v. Wanderer & Wanderer*, 211 F.R.D. 625 (D. Nev. 2002). This Court recognizes that "public policy favors the settlement of disputes . . ." *Redrock Valley Ranch, LLC v. Washoe County*, __ Nev. __, 254 P.3d 641, 648 (2011).

NRS 17.245 provides the non-settling tortfeasors with a mechanism by which to challenge the proposed settlement if the non-settling tortfeasors believe that the proposed settlement amount is disproportionate to the "percentage of negligence attributable to the [settling] defendant." NRS 41A.045. In other words, CTRMC was at liberty to assert the lack of good faith with respect to the settlement entered into between Dr. Hayes and Ms. McCrosky on this ground.

CTRMC failed to avail itself of the opportunity to oppose the *Motion for Good Faith Settlement* on the grounds that the proposed settlement is disproportionate to the "percentage of negligence attributable to [Dr. Hayes]." NRS 41A.045. During oral arguments, CTRMC offered no reasons as to its failure to do so other than its belief that it would have been futile. APP 512.

Permitting the inclusion of settling tortfeasors on the verdict form after a determination that the settlement between the settling tortfeasor and the plaintiff was entered into in good faith would discourage plaintiffs from settling with any tortfeasors in a multi-defendant action. That is because the inclusion of settling tortfeasors on the verdict form could have the effect of reducing the judgment the plaintiff can recover overall.

This Court should consider the following hypothetical by way of example. Assume that a settling tortfeasor enters into a good faith settlement with a plaintiff for $1 million and Plaintiff proceeds to trial with the remaining non-settling defendant and the court permits the inclusion of the settling tortfeasor on the verdict form. The jury returns a verdict for $10 million and apportions 10% liability to the non-settling defendant and 90% liability to the settling-tortfeasor. This apportionment would mean

that the jury has effectively concluded the plaintiff is entitled to recover $9 million from the settling tortfeasor and $1 million from the non-settling defendant. But where the plaintiff has already settled with the settling tortfeasor for $1 million, in reality the plaintiff will recover absolutely nothing after the court deducts the $1 million settlement amount from the net sum recoverable by the plaintiff. The end result is that the plaintiff would not recover the damages actually awarded by the jury. In fact, in this scenario the plaintiff recovers nothing despite a jury award of $10 million. Why would any plaintiff choose to settle with one or more defendants in a multi-defendant tort action?

This perverse and absurd result cannot be what the Legislature intended with NRS 17.245, 41.141, and 41A.045. *See, e.g., Leven,* 123 Nev. at 399, 168 P.3d at 712 (statutes should not be read to produce absurd or unreasonable results). Under Nevada law, the non-settling defendant is only entitled to an offset of the settlement amount paid by the settling tortfeasor. In the hypothetical, such an unreasonable result would also provide the non-settling defendant with multiple unintended benefits: (1) a complete shift of the risks of litigation to the plaintiff; and, (2) impunity for its negligent and/or culpable conduct. In other words, a non-settling defendant will be entitled to "double dip" by being able to include a settling tortfeasor on the verdict form who has been dismissed from the case and receiving an offset pursuant to NRS 41.141.

In this same hypothetical, the plaintiff is egregiously penalized for settling with one defendant and proceeding to trial with the other. This simply does not promote the public policy favoring settlement of disputes. It is difficult to fathom that this is what the Legislature intended with these three statutes. Ms. McCrosky would not have settled with Dr. Hayes had she known that she would be penalized for doing so.

In light of NRS 17.245, 41.141, and 41A.045, the Legislature has determined that the public policy in this state is to encourage and not to discourage settlement of

disputes. If a defendant in a multi-defendant tort action chooses to proceed to trial rather than settle, then the Legislature has determined that the non-settling defendant is the party who should bear some of the risks attendant with taking the case to trial (the plaintiff will also bear some of the risks too where he/she could potentially recover nothing against the non-settling defendant).

The inclusion of a settling tortfeasor on the verdict form would completely eviscerate the purpose and intent of statutes specifically enacted to encourage settlement of disputes. Neither CTRMC nor the District Court made any attempts to address these significant public policy ramifications.

If plaintiffs in multi-defendant tort actions are discouraged from settling with any tortfeasors, there will be more trials on the courts' dockets and the costs of taking more cases to trial will increase significantly for all involved. This is clearly against the legislative intent of NRS 17.245, 41.141, and 41A.045.

C. The District Court Manifestly Abused Its Discretion When It Granted Partial Summary Judgment in Favor of CTRMC on the Issue of Vicarious Liability.

This Court reviews a district court's decision to grant partial summary judgment and its conclusions regarding questions of law de novo and without deference to the findings of the lower court. *See, e.g., Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026 (2005). Under this standard, this Court will be compelled to conclude that the District Court committed reversible error.

In *Schlotfeldt,* this Court concluded that the apparent or ostensible agency doctrine can apply to a situation where a patient comes to a hospital and the hospital selects a doctor to serve the patient. 112 Nev. at 42, 910 P.2d at 271. This Court in *Vanderford* affirmed this holding when it declined to impose an absolute nondelegable duty on hospitals where plaintiffs have available to them the ostensible agency doctrine as a basis for holding hospitals liable for the acts of their independent contractors. __ Nev. at __, 235 P.3d at 617.

In *Schlotfeldt,* this Court stated that the following "are typical questions of fact for the jury" to consider regarding whether apparent or ostensible agency exists:

> (1) whether a patient entrusted herself to the hospital, (2) whether the hospital selected the doctor to serve the patient, (3) whether a patient reasonably believed the doctor was an employee or agent of the hospital, and (4) whether the patient was put on notice that a doctor was an independent contractor.

Schlotfeldt, 112 Nev. at 48, 910 P.2d at 275.

CTRMC argued that it was required to show that no questions of material fact exist with respect to only one of these factors. APP 484, 486. Ms. McCrosky submits, however, that no one factor is dispositive and that the "[u]ltimate determination is made by considering the totality of circumstances . . ." *Sword v. NKC Hosp., Inc.,* 714 N.E.142, 152 (Ind. 1999) (holding questions of material fact existed with respect to physician's status as ostensible agent). The District Court agreed with CTRMC, however, the record uniquivocally shows that genuine issues of material fact exist with respect to all four factors. AA 557.

1. Ms. McCrosky Entrusted Herself to CTRMC.

At the hearing, counsel for CTRMC conceded that questions of fact exist as to whether Ms. McCrosky entrusted herself to CTRMC.

> [T]he only factor of, of an ostensible agency theory under the *Schlotfeldt* case that plaintiffs can say is a question of fact, is whether or not plaintiff and patient entrusted herself to the hospital.
>
> And, and I think, even on that sense, you know, arguably, you know, that's a question of fact that, that a jury can decide. I think we, we would acknowledge that the patient in this case was entrusting herself to the hospital and the employees of the hospital.

AA 500; *see also* AA 557.

2. CTRMC Selected Dr. Hayes to Serve Ms. McCrosky.

CTRMC argued that Dr. Hayes' group controlled the scheduling of physicians at CTRMC and therefore it cannot be said that the hospital selected Dr. Hayes to serve Ms. McCrosky. In opposition, Ms. McCrosky presented evidence showing that when she was admitted to CTRMC April 24, 2012, she did not choose a specific physician

to deliver her baby. AA 222. Dr. Hayes was the only obstetrician at CTRMC providing on-call coverage April 24-25, 2012, and therefore Dr. Hayes was the only obstetrician who could serve Ms. McCrosky. AA 217. At the hearing, CTRMC did not state who else could have served Ms. McCrosky April 24-25, 2012. For all intents and purposes, CTRMC selected Dr. Hayes.

Ms. McCrosky was subject to the choice made by CTRMC. Ms. McCrosky sought care from CTRMC rather than from any particular physician. Ms. McCroksy did not even know who Dr. Hayes was. AA 216, 222. She was not referred to CTRMC or advised or directed to go there by Dr. Hayes, and did not request to be treated by Dr. Hayes.

Faced with analogous facts, the court in *Loaiza v. Lam* held that questions of fact exist as to the hospital's vicarious liability under a theory of apparent or ostensible agency for the conduct of its attending physicians to preclude the entry of summary judgment in favor of the hospital:

> Here, the record shows that Loaiza did not have a private obstetrician. She came to [the hospital] for her prenatal treatment, and was seen by a different doctor on each visit. When she arrived at [the hospital] on December 11, 2007, in labor, she was seeking care from the hospital rather than from any particular physician. She did not even know who [the obstetrician who delivered her baby] was. She was not referred to [the hospital] or advised or directed to go there by [the obstetrician who delivered her baby], and did not request to be treated by him.

107 A.D.3d 951 (N.Y. 2013).

The District Court agreed with Ms. McCrosky on this second factor:

> [I]t appears to me when the hospital selects the group, and the group sends somebody, the hospital then technically is saying okay, this is who you get from this group, no matter what . . .

AA 501. The court in *Cuker v. Hillsborough County Hosp. Auth.* held that similar evidence raised an issue of fact for the jury to determine whether physicians who delivered a premature infant were apparent or ostensible agents of the hospital:

> In the instant case, the hospital contracted with a group of physicians to staff one of its departments full time. When Mrs. Cuker admitted for her Level III hospital needs, a staff physician was provided to her upon her

> arrival at the hospital. [The hospital] certainly held itself out as being equipped with a labor and delivery department which could handle the emergency needs of her infant. All appearances suggested that the labor and delivery department was an integral part of the institution, and there was nothing which put Mrs. Cuker on notice that various departments of the hospital had been franchised out to independent contractors. [citation omitted] Furthermore, Mrs. Cuker came to [the hospital] on the advice of her personal physician because it was a Level III hospital, capable of treating her baby should it be born prematurely. She did not attempt to secure physicians on her own, but accepted the physicians that were provided to her by the hospital.

605 S.E.2d 998, 1000 (Fla. Ct. App. 1992).

3. Ms. McCrosky Reasonably Believed that Dr. Hayes Was an Employee or Agent of CTRMC.

In analyzing the factors adopted by the court in *Schlotfeldt*, the focus is on Ms. McCrosky's beliefs. 112 Nev. at 48, 910 P.2d at 275; *see also Jennison v. Providence St. Vincent Med. Ctr.*, 25 P.3d 358, 364 (Or. Ct. App. 2001) (focus is "on the 'patient's belief that the hospital or its employees were rendering health care'") (quoting *Sword v. NKC Hosp., Inc.*, 714 N.E.2d 142, 152 (Ind. 1999)).

As to this third factor, the District Court again conceded the existence of generla issues of material fact and agreed that one cannot ignore the fact that Ms. McCrosky was handed paperwork and instructed to sign them without any explanation. AA 228.

> That's, that's her subjective belief. It doesn't really deal with the actual facts on what was presented.
> And I guess I make – I buy that to a certain extent from the standpoint that you can't – you don't know what's in her mind, nobody knows what's going on in her mind, but what do the actual facts show in this case in respect to that, and we're stuck with the conditions of admission, and her statement that nobody told her anything.

AA 504.

As far Ms. McCrosky understood, Dr. Hayes was assigned to her by CTRMC and employed by CTRMC, but she did not know for certain one way or the other. AA 229; *see also Lam*, 107 A.D.3d at 953 (triable issues of fact exist as to whether hospital can be held vicariously liable under theory of apparent or ostensible agency for malpractice committed by physicians where plaintiff understood that doctors who examined her and delivered baby were assigned to her and employed by hospital). The

evidence presented raises a fact issue for the jury to determine whether Ms. McCrosky reasonably believed that Dr. Hayes was an employee of CTRMC.

4. Questions of Fact Exist as to Whether Ms. McCrosky Was Put on Notice That Dr. Hayes Was an Independent Contractor.

The District Court concluded that no genuine issues of material fact exist as to the fourth *Schlotfeldt* factor. AA 556. The District Court predicated this ruling on the fact that Ms. McCrosky signed six "Conditions of Admission".[6] AA 556. Questions

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[6] During oral arguments, the District Court inquired as to what measures a hospital could take to meaningfully notify patients as to the status of the physicians. The cases relied upon by Plaintiff in her pleadings before the District Court are directive on this issue.

In *Baptist Mem. Hosp. Sys. v. Sampson,* there were multiple signs posted in the emergency room notifying patients that the emergency room physicians were independent contractors. 969 S.W.2d 945, 950 (Tex. 1998). There is no evidence of any similar signs posted in the labor and delivery department of CTRMC. Additionally, the admission form in *Sampson* is markedly different from those Ms. McCrosky signed because the *Sampson* form specifically explained in the document itself that the hospital "is not responsible for the judgment or conduct of any physicians who treats or provides a professional service to [the patient], but rather each physician is an independent contractor who is self-employed and is not the agent, servant, or employee of the hospital." *Id.* In stark comparison, paragraph 6 of the "Conditions of Admission"signed by Ms. McCrosky fails to inform that CTRMC is not responsible for the judgment or conduct of Dr. Hayes and further fails to explain to her that an independent contractor is not an employee or agent of the hospital. AA 139-140.

In *Fletcher v. So. Peninsula Hosp.,* the plaintiff in that case saw her personal physician for medical procedures. 71 P.3d 833 (Ala. 2003). For all of the procedures that were performed at the hospital, they were performed by the plaintiff's chosen and personal physician. *Id.* The hospital in *Fletcher* did not select the physician. *Id.* The hospital was merely a situs where the plaintiff's chosen physician performed the four procedures. *Id.*

The form at issue in *James v. Ingalls Mem. Hosp.* contained a statement providing that the signatory party had the opportunity to discuss the contents of the form and understood it. 701 N.E.2d 207 (Ill. Ct. App. 1999). In comparison, the "Conditions of Admission" at issue here contain no such statements. AA 139-140.

of fact, however, exist as to whether Ms. McCrosky was properly and adequately notified as to the employment status of Dr. Hayes.

Every time Ms. McCrosky presented to the MOM's Clinic or had any lab work done, she was required to sign a document titled "Conditions of Admission." AA 110. While she received prenatal care from the MOM's Clinic, she was never assigned to a specific physician. AA 221. In fact, Ms. McCrosky was seen only by nurses during her course of treatment at the MOM's Clinic. AA 221. Ms. McCrosky never saw a physician at the MOM's Clinic. AA 229.

The last "Conditions of Admission" Ms. McCrosky signed was dated April 2, 2012, twenty two days before she saw Dr. Hayes. AA 139-140. It was the only "Conditions of Admission" that was signed at CTRMC while all the others were signed at the MOM's Clinic.[7] AA 139-140.

While Ms. McCrosky acknowledges that she signed and initialed the "Conditions of Admission," she has no independent recollection of signing any of them. AA 229. She does not recall reading the paperwork she signed. AA 229. No one explained to her what any of the paperwork meant. AA 229.

Even assuming arguendo that Ms. McCrosky recalls reading the "Conditions of Admission," the operative paragraph in that document is vague and ambiguous. Paragraph 6 of the "Conditions of Admission" reads as follows:

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In *Churkey v. Sherman Hosp.*, the consent form at issue specified the physician's practice group by name. 768 N.E.2d 842 (Ill. Ct. App. 2002). In contrast here, the "Conditions of Admissions" did not even specify "obstetrician," let alone Dr. Hayes' practice group by name. AA 139-140.

[7] While Ms. McCrosky did not present in labor to CTRMC until April 24, 2012, the MOM's Clinic required her to pre-register with CTRMC as opposed to registering on the day she presented in labor. AA 229-232.

> All physicians and surgeons furnishing healthcare services to me/the patient, including the radiologist, pathologist, anesthesiologist, emergency room physicians, hospitalists, etc., are independent contractors and are NOT employees or agents of the hospital. I am advised that I will receive separate bills for these services.

AA 140.

While the radiologist, pathologist, anesthesiologist, emergency room physicians, and hospitalists are specifically identified, "obstetrician" is not. AA 140. This is peculiar considering the fact that CTRMC operates the MOM's Clinic and requires expecting mothers who receive treatment at the MOM's Clinic to pre-register at CTRMC.

Under these circumstances, questions of fact exist as to whether Ms. McCrosky was meaningfully notified of the employment status of the obstetrician who delivered her baby. *Cooper v. Binion* is instructive on this issue. 598 S.E.2d 6 (Ga. Ct. App. 2004), *superseded by statute on other grounds*.

In *Cooper*, the patients signed and initialed every paragraph of an admitting form. *Id.* One of the paragraphs initialed by the patients was an acknowledgment that the physician was an independent contractor. *Id.* The hospital also had signs posted in the emergency room stating that the emergency room physicians are not hospital employees. *Id.* Despite these facts, the court held that questions of fact remained as to whether the hospital meaningfully notified plaintiffs that the physician was an independent contractor where the acknowledgment in the admitting form was one of thirteen paragraphs in a two-page document and nothing else indicated that the hospital called attention to the acknowledgment. *Id.*

Similarly, the form at issue here was a two-page document and the acknowledgment was one of fifteen paragraphs. AA 139-140. No one called attention to paragraph 6 nor explained its meaning or significance to Ms. McCrosky. AA 229.

In any event, even assuming arguendo that paragraph 6 of the "Conditions of Admission" is not vague and ambiguous, the document is nothing more than a contract of adhesion under the specific facts of this case. *Obstetrics and Gynecologists v. Pepper,* 101 Nev. 105, 107, 693 P.2d 1259, 1260 (1985) (defining contract of adhesion "as a standardized contract form offered to consumers of goods and services essentially on a take it or leave it basis, without affording the consumer a realistic opportunity to bargain, and under such conditions that the consumer cannot obtain the desired product or service except by acquiescing to the form of the contract") (citation omitted).

"The distinctive feature of an adhesion contract is that the weaker party has no choice as to its terms." *Id.*, 693 P.2d at 1260. The "Conditions of Admission" was prepared by CTRMC "and presented to [Ms. McCrosky] as a condition of treatment." *Id.*, 693 P.2d at 1260. Ms. McCrosky "had no opportunity to modify any of its terms; her choices were to sign the agreement as it stood or to forego [delivering her baby at CTRMC]." *Id.*, 693 P.2d at 1261.

During oral arguments, counsel for CTRMC conceded that the "Conditions of Admission" could be considered an adhesion contract if Ms. McCrosky had to deliver at CTRMC.

> It's not a condition or requirement that she's treated in the MOM's clinic, she has to deliver at Carson Tahoe. That, your Honor, I think might be considered more of an adhesion contract. If there was some sort of requirement that if you, you participated in the treatment offered there, that you were required to deliver at Carson Tahoe, arguably you might have the making of an adhesion contract there.

AA 488-489. In fact, Ms. McCrosky was told that she had to register at CTRMC. AA 229. CTRMC's admitting clerk also testified that "when the patients go to the MOM's Clinic, . . . [t]hey are sent over to the main hospital to pre-register for their delivery . . ." AA 232. For these additional reasons, genuine issues of fact exist as to whether the "Conditions of Admission" constitute an adhesion contract.

The "Conditions of Admission" constitutes only one of many factors for the jury to consider in determining whether Dr. Hayes is an apparent or ostensible agent of CTRMC. The District Court committed reversible error when it concluded that no questions of fact exist with respect to the fourth factor,[8] and granted partial summary judgment in favor of CTRMC on the issue of vicarious liability. AA 556-557. In any event, questions of fact clearly exist as to whether Ms. McCrosky was put on notice that Dr. Hayes was an independent contractor.

In reviewing a motion for partial summary judgment, the District Court was required to view "the evidence, and any reasonable inferences drawn from it . . . in a light most favorable to the nonmoving party." *Wood,* 121 Nev. at 729, 121 P.3d at 1029. Here, the District Court improperly viewed the evidence and any reasonable inferences from it in the light most favorable to Defendant.

5. The District Court's Ruling that NRS 41A.045 and *Biddle v. Sartori Mem. Hosp.* Warranted a Grant of Partial Summary Judgment Amounts to Reversible Error.

In its Order, the District Court concluded that "[b]ecause vicarious liability derives solely from the principal's legal relation to the wrongdoer, settlement with the tortfeasor removes the basis for any additional recovery from the principal upon the same acts of negligence." AA 556. The District Court relied upon an Iowa case, *Biddle v. Sartori Mem. Hosp.*, 518 N.W.2d 796, 799 (Iowa 1994), for this proposition. AA 556. Such reliance constitutes reversible error.

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[8] To be clear, it is Ms. McCrosky's position that questions of fact exist as to the fourth factor, as well as the other three. By way of example, the circumstances under which each of the "Conditions of Admission" was signed, the fact that she did not receive care from a physician subsequent to signing these "Conditions of Admission", whether every particular paragraph of the fifteen paragraph "Conditions of Admission" was explained to Ms. McCrosky, and if so, whether Ms. McCrosky had an opportunity to discuss the contents of the form and/or understood it, all raise questions of fact.

The Iowa court in *Biddle* cited to the following Iowa statute when it held that a plaintiff's settlement with the physician extinguished her claim against the hospital:

> 2. In the trial of a claim involving the fault of more than one party to the claim, including third-party defendants and persons who have been released pursuant to section 668.7, the court, unless otherwise agreed by all parties, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings, indicating all of the following:
> a. The amount of damages each claimant will be entitled to recover if contributory fault is disregarded.
> b. The percentage of the total fault allocated to each claimant, defendant, third-party defendant, person who has been released from liability under section 668.7, and injured or deceased person whose injury or death provides a basis for a claim to recover damages for loss of consortium, services, companionship, or society. ***For this purpose the court may determine that two or more persons are to be treated as a single party.***

Iowa Code § 668.3(2)(b)(2) (emphasis added). Nevada has no such similar statute.

This Court in *Van Cleave v. Gamboni Construction Co.* held that a release of an employee does not release a vicariously liable employer. 101 Nev. 524, 706 P.2d 845 (1985) (hereinafter "*Gamboni*"). In *Gamboni*, a passenger brought suit against an employer for injuries the passenger sustained in a one car accident in which the employer's employee was the driver. *Id.,* 706 P.2d at 845. The passenger settled with the employee. *Id.,* 706 P.2d at 845. The issue this Court addressed: "[W]e must decide whether the Uniform Act [Uniform Contribution Among Tortfeasors Act] applies to vicarious liability situations, so that the release of an employee does not release a vicariously liable employer, unless the terms of the release document so provide." *Id.* at 527, 706 P.2d at 847.

This Court looked to a number of jurisdictions that have likewise adopted the Uniform Act and noted that "[c]ourts . . . have had no difficulty applying the Uniform Act to vicarious liability situations involving an employer and employee." *Id.*, 706 P.2d at 84. This Court also looked at decisions from jurisdictions holding that an employee's settlement with a plaintiff extinguished any further claim against the employer on a theory of vicarious liability and specifically rejected the holding and

the reasoning of those decisions. *Id.* at 528-529, 706 P.2d at 848. This Court agreed with "the better-reasoned analysis" from those courts holding that an employee's settlement with a plaintiff did not extinguish any further claim against the employer on a theory of vicarious liability "because '[i]n the first place, the rights of indemnity and contribution have nothing to do with the rights of the injured party." *Id.* at 529, 706 P.2d at 848 (quoting *Harris v. Aluminum Co.,* 550 F. Supp. 1024, 1034 (W.D. Va. 1982) (applying Virginia law)).

The reasoning for this Court's holding in *Gamboni* is sound:

> In the case before us, Van Cleave has settled with the employee, specifically not releasing her claim against the vicarious liable employer Gamboni. If we determined that the Uniform Act does not apply to her claim against the employer, we would be discouraging prompt resolutions of actions, not encouraging such settlements, in contravention of the expressed public policy of the Uniform Act. "An injured party probably would be reluctant to settle with the servant or agent, and thereby extinguish his cause of action against the master or principal, unless he could settle with the servant or agent for an amount sufficient to compensate him for his entire loss." *Id.* at 198. There is no indication, from our review of the record, that in settling promptly with the employee, Van Cleave believed she was settling for her entire loss.

Id. at 529-530, 706 P.2d at 849.

In light of *Gamboni,* it is patently clear that Ms. McCrosky's settlement with Dr. Hayes did not extinguish any further claim against CTRMC on a theory of vicarious liability where Ms. McCrosky specifically reserved the right to pursue her claims against CTRMC based upon Dr. Hayes' conduct. AA 518. For the reasons set forth above, *Gamboni* does not conflict with NRS 41A.045.

V. CONCLUSION

The District Court committed manifest abuse of and arbitrarily and capriciously exercised its discretion when it allowed Dr. Hayes to be included on the verdict form in violation of NRS 41.141(3) and granted partial summary judgment in favor of CTRMC when genuine issues of material fact remain for the jury. The District Court

was required to interpret and apply NRS 41A.045 in a manner that is harmonious with NRS 41.141 and if failed to do so. This Court should direct the District Court to vacate its orders.

DATED this 25th day of September, 2015.

DURNEY & BRENNAN, LTD.

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VII. CERTIFICATE OF COMPLIANCE

1. I certify that this Petition complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because it has been prepared in proportionally spaced typeface using Word Perfect in 14 point Times New Roman font.

2. I further certify that this Petition complies with the page-or type-volume limitations of NRAP 32(a)(7), excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it is proportionally spaced, has a typeface font of 14 points or more, and contains 10,344 words.

3. I certify that I have read this Petition, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 25th day of September, 2015.

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CERTIFICATE OF SERVICE

I certify that I am an employee of Durney & Brennan, Ltd., and that on the date shown below, pursuant to NRAP 25(d), I deposited in the United States mail at Reno, Nevada, a true copy of the foregoing document, addressed to:

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First Judicial District Court
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