

1 STATE OF NEVADA)
) ss.
2 WASHOE COUNTY)

3

4 I, DEBORA L. CECERE, DO HEREBY STATE:

5 That I transcribed and produced this
6 transcript from a digital videorecording - JAVS - that was
7 given to me by Sunshine Litigation Services, who received
8 it from Peter Durney; the disk with the videorecoring has
9 been certified by the clerk of the court; the hearing took
10 place on September 1, 2015, at the times and places herein
11 set forth; and that I transcribed said proceedings had upon
12 the matter captioned within to the best of my ability;

13 That the foregoing transcript, consists of
14 pages 1 through 64.

15 DATED: At Reno, Nevada, this 13th day of
16 September, 2015.

17 /s/ Debora Cecere



18 DEBORA L. CECERE

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CASE NO. 13TRT00028 IB
DEPT. NO. I

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2015 SEP 22 PM 4:08

SUSAN MERRIWETHER
CLERK
BY _____ DEPUTY

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR CARSON CITY

TAWNI McCROSKY, an individual and as
the natural parent of LYAM McCROSKY, a
minor child,

Plaintiffs,

vs.

CARSON TAHOE REGIONAL MEDICAL
CENTER, a Nevada business entity; AMY
SUE HAYES, M.D., and individual; and DOE
I-X, inclusive,

Defendants.

**ORDER GRANTING DEFENDANT
CARSON TAHOE REGIONAL
MEDICAL CENTER'S MOTION FOR
PARTIAL SUMMARY JUDGMENT**

This matter comes before the Court on Defendant, Carson Tahoe Regional Medical Center's Motion for Partial Summary Judgment filed on August 19, 2015. Plaintiffs' Opposition was filed on August 25, 2015 and on August 28, 2015, Defendant filed its Reply in Support of Carson Tahoe Regional Medical Center's Motion for Partial Summary Judgment. Hearing arguments of counsel on September 1, 2015, having reviewed all submitted briefs, and for good cause showing, the Court finds as follows:

- Nev. Rev. Stat. §41A.045 abrogates joint and several liability for providers of health care;
- As providers of health care, Dr. Hayes and Carson Tahoe Regional Medical Center are liable to Plaintiffs severally only, for the portion of judgment which represents the

- 1 percentage of negligence attributed to each separately;
- 2 • Because vicarious liability derives solely from the principal's legal relation to the
- 3 wrongdoer, settlement with the tortfeasor removes the basis for any additional recovery
- 4 from the principal upon the same acts of negligence. Biddle v. Sartori Memorial Hosp.
- 5 518 N.W.2d 795, 798 (Iowa 1994) (quoting Copeland v. Humana of Kentucky, Inc., 769
- 6 S.W.2d 67, 70 (Ky. App. 1989));
- 7
- 8 • As Nev. Rev. Stat. §41A.045 has clearly indicated several liability for providers of health
- 9 care and terminated joint liability, Van Cleave v. Gamboni Construction Company, 101
- 10 Nev. 524, 706 P.2d 845 (1985) does not apply;
- 11
- 12 • To effectuate Nev. Rev. Stat. §41A.045, Dr. Hayes' good faith settlement with Plaintiffs
- 13 removed the basis for any additional recovery from Carson Tahoe Regional Medical
- 14 Center for Dr. Hayes' conduct. To hold otherwise would result in a double recovery for
- 15 Plaintiffs for the acts of Dr. Hayes attributed to Carson Tahoe Regional Medical Center;
- 16
- 17 • The absence of agency between Dr. Hayes and Carson Tahoe Regional Medical Center is
- 18 evidenced by the fact that Plaintiff Tawni McCrosky signed and initialed six Conditions
- 19 of Admissions wherein she acknowledged six times that Dr. Hayes was an independent
- 20 contractor and not an employee or agent of Carson Tahoe Regional Medical Center;
- 21
- 22 • Plaintiff Tawni McCrosky knew or should have known based upon the number of
- 23 Conditions of Admissions signed by her that Dr. Hayes was an independent contractor.
- 24 Further, Dr. Hayes was an independent contractor and not an employee of Carson Tahoe
- 25 Regional Medical Center;
- 26
- 27 • Plaintiff Tawni McCrosky has not presented sufficient competent evidence to forward the
- 28 agency question to the jury;

1 • Although there are questions of fact with respect to some of those other factors raised
2 under the ostensible authority doctrine, it is clear that the doctor was an independent
3 contractor, and the consents for admissions are clear in the Court's mind with respect to
4 that particular factor; and

5 • As a matter of law, Dr. Hayes is not an ostensible agent of Carson Tahoe Regional
6 Medical Center.
7

8 For the above reasons, and the other and further arguments set forth in the moving papers
9 and in open court, it is hereby **ORDERED** that Defendant, Carson Tahoe Regional Medical
10 Center's Motion for Partial Summary Judgment is **GRANTED**.
11

12 **IT IS SO ORDERED.**

13 DATED this 22nd day of September, 2015.
14


15 
16 HONORABLE JAMES T. RUSSELL
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CERTIFICATE OF MAILING

The undersigned, an employee of the First Judicial District Court, hereby certifies that on the
22nd day of September, 2015, I served the foregoing Order by transmitting a copy thereof via facsimile,
addressed as follows:

Peter D. Durney, Esq.
FAX: 322-3014

Robert C. McBride, Esq.
FAX: 702-796-5855



Krystopher Benyamein
Law Clerk, Dept. 1

CASE NO. 13TRT00028 IB
DEPT. NO. I

REC'D & FILED

2015 SEP 22 PM 4:08

SUSAN MERRIN WETTER
BY [Signature] CLERK
DEPUTY

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR CARSON CITY

TAWNI McCROSKY, an individual and as
the natural parent of LYAM McCROSKY, a
minor child,

Plaintiffs,

vs.

CARSON TAHOE REGIONAL MEDICAL
CENTER, a Nevada business entity; AMY
SUE HAYES, M.D., and individual; and DOE
I-X, inclusive,

Defendants.

**ORDER GRANTING DEFENDANT
CARSON TAHOE REGIONAL
MEDICAL CENTER'S MOTION
INCLUDE CO-DEFENDANT,
AMY SUE HAYES, M.D. ON THE
VERDICT FORM**

This matter comes before the Court on Defendant, Carson Tahoe Regional Medical Center's Motion to Include Co-Defendant, Amy Sue Hayes, M.D. on the Verdict Form filed on August 5, 2015. Plaintiffs' Opposition was filed on August 21, 2015 and on August 28, 2015, Defendant filed its Reply in Support of Carson Tahoe Regional Medical Center's Motion to Include Co-Defendant, Amy Sue Hayes, M.D. on the Verdict Form. Hearing arguments of counsel on September 1, 2015, having reviewed all submitted briefs, and for good cause showing, the Court finds as follows:

- For purposes of Nev. Rev. Stat. §41A.045, Dr. Hayes is a defendant despite her dismissal pursuant to good faith settlement. Pursuant to the Complaint filed

herein, Dr. Hayes was a defendant in this case. Once a defendant is removed from the case based on a settlement, the requirement for attribution is not removed.

- Nev. Rev. Stat. §41A.045 clearly abrogates joint and several liability for providers of health care. Both Dr. Hayes and Carson Tahoe Regional Medical Center are providers of healthcare under the terms of Nev. Rev. Stat. §41A.045;
- As a provider of health care, Carson Tahoe Regional Medical Center is liable to Plaintiffs severally only, for the portion of judgment which represents the percentage of negligence attributed to Carson Tahoe Regional Medical Center;
- To effectuate Nev. Rev. Stat. §41A.045, the jury must apportion negligence among Dr. Hayes and Carson Tahoe Regional Medical Center. Otherwise, the provision of Nev. Rev. Stat. §41A.045 would be rendered meaningless.

For the above reasons, and the other and further arguments set forth in the moving papers and in open court, it is hereby **ORDERED** that Defendant, Carson Tahoe Regional Medical Center's Motion to Include Co-Defendant, Amy Sue Hayes, M.D. on the Verdict Form is **GRANTED**.

IT IS SO ORDERED.

DATED this 22nd day of September, 2015.


HONORABLE JAMES T. RUSSELL


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FAX: 322-3014

Robert C. McBride, Esq.
FAX: 702-796-5855


Krystopher Benyamein
Law Clerk, Dept. 1

1 CASE NO. 13TRT000281B

2 DEPT. NO. I

REC'D & FILED

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SUSAN MERRIWETHER
V. Alegria

BY _____
DEPUTY

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6 IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
7 IN AND FOR CARSON CITY

8 * * *

9 TAWNI McCROSKY, individually and as the
10 natural parent of LYAM McCROSKY, a minor
child,

11 Plaintiffs,

12 v.

13 CARSON TAHOE REGIONAL MEDICAL
14 CENTER, a Nevada business entity; AMY
15 SUE HAYES, M.D., and individual; and
16 DOES I-X, inclusive,

17 Defendants.

NOTICE OF ENTRY OF ORDER


18 PLEASE TAKE NOTICE that an *Order Granting Defendant's Motion for Partial*
19 *Summary Judgment* was entered and filed in the above-captioned matter on September 22, 2015.

20 A true and correct copy of the Order is attached hereto.

21 The undersigned does hereby affirm that the preceding document entitled does not
22 contain the social security number of any person.

23 DATED this 23RD day of SEPTEMBER, 2015.

24 DURNEY & BRENNAN, LTD.

25
26 
27 PETER D. DURNEY, ESQ., #57
28 ALLASIA L. BRENNAN, #9766
6900 So. McCarran Blvd., Ste. 2060
Reno, NV 89509
Attorneys for Plaintiffs


CERTIFICATE OF SERVICE

I certify that I am an employee of Durney & Brennan, Ltd., and that on the date shown below, pursuant to NRCP 5(b), I deposited in the United States mail at Reno, Nevada, a true copy of the foregoing document, addressed to:

John C. Kelly, Esq.
CARROLL, KELLY, TROTTER
FRANZEN & McKENNA
111 W. Ocean Blvd., 14th Fl.
Long Beach, CA 90801-5636

Robert C. McBride, Esq.
CARROLL, KELLY, TROTTER
FRANZEN, McKENNA & PEABODY
8329 W. Sunset Rd., Ste. 260
Las Vegas, NV 89113

DATED this 13th day of SEPTEMBER, 2015.


EMPLOYEE OF DURNEY & BRENNAN, LTD.

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EXHIBIT "1"

EXHIBIT "1"

percentage of negligence attributed to each separately;

- Because 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. Biddle v. Sartori Memorial Hosp., 518 N.W.2d 795, 798 (Iowa 1994) (quoting Copeland v. Humana of Kentucky, Inc., 769 S.W.2d 67, 70 (Ky. App. 1989));

- As Nev. Rev. Stat. §41A.045 has clearly indicated several liability for providers of health care and terminated joint liability, Van Cleave v. Gamboni Construction Company, 101 Nev. 524, 706 P.2d 845 (1985) does not apply;

- To effectuate Nev. Rev. Stat. §41A.045, Dr. Hayes' good faith settlement with Plaintiffs removed the basis for any additional recovery from Carson Tahoe Regional Medical Center for Dr. Hayes' conduct. To hold otherwise would result in a double recovery for Plaintiffs for the acts of Dr. Hayes attributed to Carson Tahoe Regional Medical Center;

- The absence of agency between Dr. Hayes and Carson Tahoe Regional Medical Center is evidenced by the fact that Plaintiff Tawni McCrosky signed and initialed six Conditions of Admissions wherein she acknowledged six times that Dr. Hayes was an independent contractor and not an employee or agent of Carson Tahoe Regional Medical Center;

- Plaintiff Tawni McCrosky knew or should have known based upon the number of Conditions of Admissions signed by her that Dr. Hayes was an independent contractor. Further, Dr. Hayes was an independent contractor and not an employee of Carson Tahoe Regional Medical Center;

- Plaintiff Tawni McCrosky has not presented sufficient competent evidence to forward the agency question to the jury;

- 1 • Although there are questions of fact with respect to some of those other factors raised
- 2 under the ostensible authority doctrine, it is clear that the doctor was an independent
- 3 contractor, and the consents for admissions are clear in the Court's mind with respect to
- 4 that particular factor; and
- 5
- 6 • As a matter of law, Dr. Hayes is not an ostensible agent of Carson Tahoe Regional
- 7 Medical Center.

8 For the above reasons, and the other and further arguments set forth in the moving papers
 9 and in open court, it is hereby **ORDERED** that Defendant, Carson Tahoe Regional Medical
 10 Center's Motion for Partial Summary Judgment is **GRANTED**.

11 **IT IS SO ORDERED.**

12 DATED this 22nd day of September, 2015.


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 15 
 16 HONORABLE JAMES T. RUSSELL
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CERTIFICATE OF MAILING

The undersigned, an employee of the First Judicial District Court, hereby certifies that on the 22nd day of September, 2015, I served the foregoing Order by transmitting a copy thereof via facsimile, addressed as follows:

Peter D. Durney, Esq.
FAX: 322-3014

Robert C. McBride, Esq.
FAX: 702-796-5855



Krystopher Benyamein
Law Clerk, Dept. 1

1 CASE NO. 13TRT000281B

2 DEPT. NO. I

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SUSAN HERRIWETHER
V. Alegria CLERK
BY _____ DEPUTY

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR CARSON CITY

TAWNI McCROSKY, individually and as the
natural parent of LYAM McCROSKY, a minor
child,

Plaintiffs,

v.

CARSON TAHOE REGIONAL MEDICAL
CENTER, a Nevada business entity; AMY
SUE HAYES, M.D., and individual; and
DOES I-X, inclusive,

Defendants.

NOTICE OF ENTRY OF ORDER


PLEASE TAKE NOTICE that an *Order Granting Defendant's Motion to Include Co-Defendant Amy Hayes, MD on the Verdict Form* was entered and filed in the above-captioned matter on September 22, 2015.

A true and correct copy of the Order is attached hereto.

The undersigned does hereby affirm that the preceding document entitled does not contain the social security number of any person.

DATED this 23RD day of SEPTEMBER, 2015.

DURNEY & BRENNAN, LTD.


PETER D. DURNEY, ESQ., #57
ALLASIA L. BRENNAN, #9766
6900 So. McCarran Blvd., Ste. 2060
Reno, NV 89509
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

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John C. Kelly, Esq.
CARROLL, KELLY, TROTTER
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111 W. Ocean Blvd., 14th Fl.
Long Beach, CA 90801-5636

Robert C. McBride, Esq.
CARROLL, KELLY, TROTTER
FRANZEN, McKENNA & PEABODY
8329 W. Sunset Rd., Ste. 260
Las Vegas, NV 89113

DATED this 23rd day of SEPTEMBER, 2015.


EMPLOYEE OF DURNEY & BRENNAN, LTD.

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EXHIBIT "1"

CASE NO. 13TRT00028 IB
DEPT. NO. I

REC'D & FILED

2015 SEP 22 PM 4:08

SUSAN MERRIN ETHER
CLERK

BY DEPUTY

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR CARSON CITY

TAWNI McCROSKY, an individual and as
the natural parent of LYAM McCROSKY, a
minor child,

Plaintiffs,

vs.

CARSON TAHOE REGIONAL MEDICAL
CENTER, a Nevada business entity; AMY
SUE HAYES, M.D., and individual; and DOE
I-X, inclusive,

Defendants.

**ORDER GRANTING DEFENDANT
CARSON TAHOE REGIONAL
MEDICAL CENTER'S MOTION
INCLUDE CO-DEFENDANT,
AMY SUE HAYES, M.D. ON THE
VERDICT FORM**

This matter comes before the Court on Defendant, Carson Tahoe Regional Medical Center's Motion to Include Co-Defendant, Amy Sue Hayes, M.D. on the Verdict Form filed on August 5, 2015. Plaintiffs' Opposition was filed on August 21, 2015 and on August 28, 2015, Defendant filed its Reply in Support of Carson Tahoe Regional Medical Center's Motion to Include Co-Defendant, Amy Sue Hayes, M.D. on the Verdict Form. Hearing arguments of counsel on September 1, 2015, having reviewed all submitted briefs, and for good cause showing, the Court finds as follows:

- For purposes of Nev. Rev. Stat. §41A.045, Dr. Hayes is a defendant despite her dismissal pursuant to good faith settlement. Pursuant to the Complaint filed

herein, Dr. Hayes was a defendant in this case. Once a defendant is removed from the case based on a settlement, the requirement for attribution is not removed.

- Nev. Rev. Stat. §41A.045 clearly abrogates joint and several liability for providers of health care. Both Dr. Hayes and Carson Tahoe Regional Medical Center are providers of healthcare under the terms of Nev. Rev. Stat. §41A.045;
- As a provider of health care, Carson Tahoe Regional Medical Center is liable to Plaintiffs severally only, for the portion of judgment which represents the percentage of negligence attributed to Carson Tahoe Regional Medical Center;
- To effectuate Nev. Rev. Stat. §41A.045, the jury must apportion negligence among Dr. Hayes and Carson Tahoe Regional Medical Center. Otherwise, the provision of Nev. Rev. Stat. §41A.045 would be rendered meaningless.

For the above reasons, and the other and further arguments set forth in the moving papers and in open court, it is hereby **ORDERED** that Defendant, Carson Tahoe Regional Medical Center's Motion to Include Co-Defendant, Amy Sue Hayes, M.D. on the Verdict Form is **GRANTED**.

IT IS SO ORDERED.

DATED this 22nd day of September, 2015.



HONORABLE JAMES T. RUSSELL

CERTIFICATE OF MAILING

The undersigned, an employee of the First Judicial District Court, hereby certifies that on the
22nd day of September, 2015, I served the foregoing Order by transmitting a copy thereof via facsimile,
addressed as follows:

Peter D. Durney, Esq.
FAX: 322-3014

Robert C. McBride, Esq.
FAX: 702-796-5855


Krystopher Benyamein
Law Clerk, Dept. 1

1 little more clear than I think you have to take, take the
2 sworn deposition testimony as to what was in her mind at
3 that time relative to, to this self-serving affidavit
4 saying that she now knows Dr. Hayes was an agent of, or
5 employee of the hospital.

6 And then, again, going to the conditions of
7 admission, your Honor, those, those are, are routine
8 informed consents that are provided to a patient.
9 They're -- they, the fact that she was not, was -- did not
10 read them, or did not bother to read them, the case law
11 that we cited on, on those sorts of informed consent issue
12 cases, it doesn't matter if they did not -- it doesn't
13 matter if they were ignorant of the terms or did not read
14 the document thoroughly.

15 So I think that we have met our burden of
16 dispelling, and in my opinion -- and, again, it goes to the
17 other thing, whether or not the hospital has gone to what
18 measures to dispel the inference of an employee
19 relationship.

20 THE COURT: The hospital done a better job in
21 respect to notification -- I don't know, I was trying to
22 look at the form. I looked at it earlier.

23 Did they initial on that particular line
24 specifically?

1 MR. MCBRIDE: You know, I don't have that form
2 in front of me.

3 MR. KELLY: Yes.

4 MR. MCBRIDE: But I believe that is -- according
5 to Mr. Kelly, that is something that they do initial on
6 that line specifically.

7 And I think, again, the, the issue as to what,
8 you know, whether that was clear, whether that term was
9 clear as to what was an independent contractor and so on,
10 it's very clear that in the first -- even though it does
11 not delineate an OB/GYN, that it does say the very first
12 sentence, All Physicians.

13 And so I think on that basis that that's --
14 that's as clear as, as you can possibly be that all of the
15 physicians are, are independent contractors.

16 THE COURT: Just for the record, it does
17 indicate clearly under Section 6 the legal relation between
18 the hospital and physicians, and it requires basically that
19 they initial that particular section.

20 MR. MCBRIDE: Right. And essentially, your
21 Honor, I think that defendants have met their burden of,
22 like I said, at least dispelling, in my opinion, one, if
23 not more than one, of the requirements or the elements of
24 an ostensible agency theory, and I think we would be

1 entitled to summary judgment on that issue.

2 Thank you.

3 THE COURT: Ms. Brennan, I'll give you one more
4 shot if you want to indicate anything.

5 MS. BRENNAN: No, I think that we said it all.

6 THE COURT: Well, moving on to the other motion,
7 and the other motion is basically in respect to the jury
8 form that we have to look at in light of the implication,
9 or what the implication of NRS 41.045 is in respect to that
10 particular matter.

11 Mr. McBride, are you arguing that one?

12 MR. MCBRIDE: Yes, your Honor.

13 Well, again, on this -- on this issue, your
14 Honor, I think you correctly identified that this is a very
15 complex issue. Combined with the ostensible agency theory,
16 I think it's even more complicated, I think. And I'll
17 explain that in a minute.

18 But this is something that, if it was, I think,
19 if it was a simple matter of interpreting the statute, and
20 one statute over another, I think that the fact that the
21 Supreme Court has had this exact issue in front of it --
22 and, again, I know that case in particular, because I'm
23 involved in that case.

24 THE COURT: Since October of 2014.

1 MR. MCBRIDE: Since October 2014, the Piroozi
2 case has been -- that's when it had been argued, and there
3 has been no decision by the Supreme Court on that issue.
4 And that was an en banc court consideration of that, and it
5 still has not come down with a decision. That, to me,
6 sends a message that this is, that it is more complicated,
7 and it is an issue that is not cut-and-dried.

8 But nonetheless, I think that the reasons why
9 this issue becomes even more important in the sense of an
10 ostensible agency theory is 41A.145, the, the, the statute
11 which abrogated joint and several liability and established
12 several liabilities in a professional malpractice case.

13 And, again, the Van Cleave case was not a
14 medical malpractice case. So that doesn't come into play,
15 and it doesn't become an issue. And so that's where
16 there's a distinction. And it's very clear that the
17 distinction is, is confined to medical malpractice actions.

18 Now the other complicating factor that we have
19 here is that we have plaintiff's own expert who has --
20 Dr. Schrimmer had, has opined that Dr. Hayes was negligent,
21 and has provided an affidavit as such, a report, and then
22 in his deposition, still testified that he holds those same
23 opinions.

24 Now the, the distinction being now that, that

1 with Dr. Hayes -- if Dr. Hayes is not included on the
2 verdict form, we have a problem.

3 Plaintiff argues that that could be -- the, the
4 answer to that issue is the fact that defendants would be
5 entitled to an offset under 41.141 because of the settling
6 contribution by Dr. Hayes.

7 But if you look at that statute, your Honor, I
8 don't know if you have it in front of you, but --

9 THE COURT: I have it right here.

10 MR. MCBRIDE: Okay. But if you look at that
11 statute, here's where we have a conundrum, because in that
12 statute, it says that -- it also refers to the comparative
13 negligence of a plaintiff and whether it's greater than the
14 negligence of the defendant.

15 That's not contained in 41A.045. But if you
16 look at subparagraph 3, and it says:

17 If a defendant in such an action
18 settles with the plaintiff before the
19 entry of judgment, the comparative
20 negligence of that defendant and the
21 amount of the settlement must not
22 thereafter be admitted into evidence
23 nor considered by the jury.

24 So what do you have here? You have -- if the

1 ostensible agency theory is allowed to be decided as a
2 question of fact for a jury to decide, the evidence that's
3 going to come in at trial is going to be about the
4 negligence of Dr. Hayes and the nurses. That's in direct
5 contradiction to 41.141, which says you are not allowed to
6 introduce that in front of a jury, and therefore a question
7 as to whether or not the defendants Carson Tahoe would be
8 entitled to any offset.

9 So I think that's a, that's a serious factor
10 that the Court has to decide in ruling on both the
11 ostensible agency theory, and the, the -- the motion
12 regarding Dr. Hayes on the verdict form.

13 But that still doesn't dispense with the, the
14 issue of Dr. Hayes on the verdict form, because in the
15 Piroozi case, that was not a case involving ostensible
16 agency, that was a case where a physician, a pediatrician
17 settled out of the case before trial, and his actions of,
18 of treating this patient came after the actions of the
19 other defendants who treated the patient in the hospital.

20 So in that case, the jury -- the Supreme Court
21 has in front of it the, the very real concerns that, not
22 including doctor, that doctor, that pediatrician on the
23 verdict form in that case, would still have the effect of,
24 of destroying or creating joint and several liability if

1 those other physicians are held to be accountable for the
2 entirety of that, that doctor's negligence as well, and for
3 the entirety of any verdict.

4 THE COURT: Does it matter that, like in this
5 case there were -- there was a motion for a good faith
6 settlement, does that have any implication in respect to
7 this?

8 MR. MCBRIDE: Well, again, there was a motion
9 for good faith settlement in that other case as well. And
10 so I think that that is really an issue that maybe the
11 court is struggling with.

12 But, again, as I mentioned before -- and, again,
13 it kind of further complicates matters, is that to the
14 extent that there was a motion for good faith settlement,
15 that references a release -- again, we haven't seen the
16 actual release between Dr. Hayes and the, and the
17 plaintiffs, is there language in there -- and typically I
18 know that from the settlement agreements and releases that
19 we enter into, there's general language which relieves or
20 discharges that, that physician's employers, and, and
21 agents, principals, and so on. There's language that's
22 pretty routine in those sorts of agreements.

23 We don't know what that settlement agreement
24 contains, so if that's the case, does that discharge

1 entirely the vicarious liability, going back to our, the
2 ostensible agency theory entirely of, of the hospital and
3 the plaintiff's theory of ostensible agency in that case.

4 But the, the thing to keep in mind is that the
5 Banks decision, which plaintiffs refer to in 41.141, that
6 did not consider the amendment to 41A.045.

7 So that is really -- it's not something that was
8 before the court when ruling on 41.141. So I think you
9 have to take that into consideration.

10 Similarly, as we pointed out, the fact that
11 there have been recent amendments to the legislation, and
12 the legislative history, the plaintiffs cite to, in terms
13 of the reasons that the fact that that specific provision,
14 including a defendant on a verdict form, was not included
15 in the, in the most recent amendments, that's information
16 that, again, there's no reference to that being an issue of
17 the -- that they were considering whether or not a
18 defendant should be apportioned liability. The question in
19 that case is whether or not there was an issue that
20 concerned, before the Legislature was whether the
21 defendant, a joint tortfeasor, could be brought in under a
22 third-party contribution claim.

23 So that whole issue -- and, again, the fact that
24 it's a subsequent legislative history, dialogue, that's not

1 to be -- that's to be given very little weight, if at all,
2 in considering this motion.

3 And clearly it's always been -- since the
4 enactment of 41A.045, it's always been the intent that each
5 party is liable for its own negligence.

6 So I would submit, your Honor, that plaintiff
7 can't have it both ways. They can't argue that Dr. Hayes
8 is, is a, an employee or, or agent of the hospital,
9 ostensible agent of the hospital, and then also seek to
10 establish his own independent negligence, settle with
11 Dr. Hayes, and then not have the jury be allowed to
12 determine the, the appropriate apportionment between
13 Dr. Hayes' negligence and the hospital's negligence.

14 THE COURT: That results for a double recovery
15 for the same acts?

16 MR. MCBRIDE: I think it does. I think it
17 potentially does.

18 And, and I think that's where the significance
19 of having Dr. Hayes on the verdict form really comes into
20 play. And I think that's an issue that the Supreme Court
21 is struggling with right now.

22 And so I do think that, that the testimony that
23 has been established from plaintiff's own expert, and
24 similar to, in California, as long as you have evidence

1 that a defendant or a non-party has been, has -- is
2 negligent in some fashion, they are allowed to be included
3 on the verdict form. And the clear case in this, in this
4 instance, is that Dr. Schrimmer, their own expert, has
5 listed all these theories of negligence which, which
6 Dr. Schrimmer still holds today.

7 And, again --

8 THE COURT: When there's a good faith
9 settlement, reading that particular provision of the law,
10 then that precludes essentially being able to proceed for
11 contribution indemnity, doesn't it?

12 MR. MCBRIDE: It does. It does.

13 And, again, the, the issues there also, you
14 know -- and typically motions for good faith settlement in,
15 in most considerations, if the, if the settlement is in the
16 ball park, the courts were considered to be, you know,
17 reasonable and within the ball park, the courts are
18 generally inclined to grant those motions for good faith
19 without a second thought, even if they are opposed.

20 And in this case, this complicating factor, as I
21 still go back to, is the terms of that release, what were
22 the terms of that release. And was there any information
23 contained in that release that, that discharges any
24 liability for the, for the hospital.

1 And, again, going back to the other issue that I
2 mentioned -- and this is my final point, your Honor, just
3 to reiterate, the fact that, that this 41A.045, and 41.141,
4 those are -- the 41A.045 is clearly the statute that has
5 intended to provide that there's several liability.

6 If 41.141 is applied in this case, and there's
7 still an issue of ostensible agency that's left for the
8 jury, we have the direct contradiction with subparagraph 3
9 that makes it impossible, because we would have violated,
10 or the parties would have violated the terms of that
11 statute, the language of that statute by introducing
12 evidence of the, of the fault of Dr. Hayes.

13 And so that's where there is a direct
14 contradiction between those statutes. But at the end of
15 the day, the intent of the Legislature -- and it hasn't
16 changed even from the recent amendments, is that there is
17 several liability, and that each defendant is liable for
18 their own conduct and their own percentage of fault.

19 And on that issue, your Honor, I would submit
20 that's the reason why Dr. Hayes needs to be included on the
21 verdict form.

22 THE COURT: Thank you. Mr. Durney?

23 MR. DURNEY: Your Honor, thank you very much.

24 I'll go in reverse order. The fault of

1 Dr. Hayes is an issue in this case for a number of reasons.
2 First, because she's an ostensible agent of the hospital.
3 And second, because she is a board certified OB/GYN who has
4 delivered thousands of babies in this community, and did
5 something that's incomprehensible, unless you realize that
6 she wasn't being told what was going on by these nurses --
7 these nurses, incidentally, who came in 12 and 16 hours
8 after the fact, and added to, deleted from, and changed the
9 medical record.

10 THE COURT: But doesn't all that go specifically
11 to the liability of the hospital, not to the liability in
12 respect to 41A.045?

13 I mean, I'm not saying the hospital --

14 MR. DURNEY: Absolutely right.

15 THE COURT: Huh?

16 MR. DURNEY: You're absolutely right. It goes
17 to the liability of the hospital because no well-trained
18 labor and delivery nurse, or nurse who listened to her
19 training, would have ignored what was going on if, in fact,
20 Dr. Hayes was in charge, was doing what she was supposed to
21 be doing. She was juggling several laboring mothers that
22 night. She had a lot to do. She was on the phone trying
23 to get colleagues to come in and help her. She had a lot
24 to do.

1 And so what we're saying, and the reason why --
2 first of all the reason why we had criticism of Dr. Hayes
3 is because she was a defendant in this case in the
4 beginning. And so we needed to express an opinion as to
5 where she fell below the standard of care. We did that.
6 But it feathers in to what the nurses didn't do. Because
7 what Dr. Hayes did, when this baby's heart rate plummeted
8 from 145 beats per minute to 60, in a minute, and stayed
9 there, the nurses didn't do anything. Nothing.

10 And --

11 THE COURT: But that's their liability.

12 MR. DURNEY: It is. It is their liability.

13 Now, absolutely it is their liability, and
14 that's why the inaction of Dr. Hayes is critical to the
15 hospital's liability.

16 But as far as Dr. Hayes's liability is
17 concerned, if that's what you're focusing on at this
18 moment, Dr. Hayes was a responsible defendant. She settled
19 her claims against this hospital for all of the indemnity
20 available to her contractually.

21 And now she's being penalized for doing what a
22 responsible defendant does because these people want to put
23 her on the verdict form and criticize her with an
24 assessment of liability with her not being present to

1 defend herself.

2 If they wanted to do that they had the right and
3 obligation to step before this court when the motion for
4 good faith settlement was filed and object. And they
5 didn't do it. They did not do it. They could have done it
6 then, and that's when they should have done it.

7 THE COURT: Doesn't NRS 41A.045 provide for
8 several liability in respect to that, and they turned
9 around -- and I, I understand what you did -- I -- in
10 respect to that, but how do you carry that over in respect
11 to the implications of the language? I mean, otherwise
12 41A.045 is meaningless. We might as well just throw it
13 out.

14 MR. DURNEY: No, it's not, because when you read
15 it strictly, as you must, it -- Mr. McBride used the word
16 parties in his argument to the court. The statute uses the
17 word defendants. Dr. Hayes is not a party nor a defendant.

18 THE COURT: But she was a defendant, Mr. Durney.

19 MR. DURNEY: But she is not anymore.

20 THE COURT: But she was a defendant when this
21 case was started, and she became a defendant in this
22 matter. And as a result of that, she's a, she's a
23 defendant. You can't just say okay, you were never a
24 defendant.

1 How do you remove that?

2 MR. DURNEY: Because she's been dismissed.

3 THE COURT: Well, that's not the way I read that
4 statute. And that's not the way I read the implication of
5 that statute. I think that basically you have to get to
6 the apportionment.

7 And I think that's what ends up having to do.
8 And that's why I think this is so complicated. How do you
9 do that in respect to that and come to that? Because I
10 think you have an action against the hospital, you can go
11 against the hospital for whatever you want. And you can go
12 after them for their conduct and whatever you think, but at
13 the end of the day, there has to be some kind of a
14 apportionment under 41A.045.

15 MR. DURNEY: Well, respectfully, I disagree,
16 because she is no longer a party. And the statute
17 specifically refers to defendants, which she is not.

18 THE COURT: And she was a defendant.

19 MR. DURNEY: I agree with you.

20 THE COURT: And she was a defendant in the
21 beginning, and she's a defendant from the Court's
22 standpoint at the end of the day.

23 MR. DURNEY: All right. Well, then this is what
24 I suggest. And let me clean up a couple of things.

1 The release, which they had the opportunity to
2 review and criticize, if they wanted, specifically
3 reserves:

4 All rights against the hospital
5 predicated upon the actions or
6 omissions of Dr. Hayes.

7 It protects that claim. And that was one of the
8 points that was being raised.

9 I understand the Court's concerns.
10 Apparently -- and I'm not as familiar as Mr. McBride with
11 the case that's before the Nevada Supreme Court, but we're
12 arguing about an issue that doesn't need to be decided
13 right now. We can wait for the Nevada Supreme Court to
14 decide, especially if this case isn't going to trial on
15 October 20th and doesn't go to trial until March, we might
16 have an opinion. We might have an opinion next week.

17 But if we're going to have an opinion from the
18 Supreme Court, we could at least wait, because we don't
19 have to decide what's on that verdict until days or even
20 hours before the case is submitted to the jury. So why do
21 we have to decide it now, given the fact that the Supreme
22 Court is apparently grappling with it.

23 THE COURT: Well, I gave you that opportunity
24 the last time we sat here and talked about whether or not

1 we would stay this particular action in respect to that,
2 and you said no, that --

3 MR. DURNEY: I don't want to stay the action,
4 your Honor. I can't -- we can't stay this action. This is
5 too critical for that.

6 But I've had cases before the Ninth Circuit
7 Court of Appeals, and the Ninth Circuit said this, this
8 issue is up before the United States Supreme Court, let's
9 wait until the Supreme Court speaks.

10 Well, in that case we're talking about an
11 appellate court doing what I'm simply asking the trial
12 court to do as a practical matter, without staying the
13 trial, but we at least have, what, two months? I don't
14 know if they'll decide it in the next two months, but they
15 might. And if they do, what you do here today might be
16 wrong.

17 THE COURT: Well, if, if I make my determination
18 now, and they change, and they change it, then I can change
19 it before trial and go down the road anyway.

20 MR. DURNEY: Well, you could do it that way if
21 you wanted.

22 THE COURT: Yeah.

23 MR. DURNEY: You could do it that way if you
24 wanted.

1 But as I said, that's certainly completely up to
2 you, but I would simply reiterate to the extent that
3 Mr. McBride feathers in the agency or the ostensible agency
4 argument, I think you began the discussion of that, your
5 Honor, by referencing Renown versus Vanderford. That's my
6 case. I know the facts of that case like I know the facts
7 of this case. In that case Judge Berry had the courage,
8 knowing how doctors are controlled by hospitals, to rule --

9 THE COURT: Now, are you making the argument
10 that Ms. Brennan should have made? Now we're back arguing
11 another, back arguing that.

12 MR. DURNEY: Well, to the extent that
13 Mr. McBride feathered the two in.

14 THE COURT: I just -- okay.

15 MR. DURNEY: In any event, I'll, I'll -- I'll
16 sit down, your Honor.

17 But the, the, the -- Mr. McBride suggested that
18 any one factor decided in their favor out of Schlotfeldt is
19 determinative, and that's not the law. It is a question of
20 fact --

21 MR. MCBRIDE: Well, your Honor, I would object
22 and --

23 MR. DURNEY: It is a question of fact. And the
24 Supreme Court has clearly said that it is. And the reason

1 that feathers into this argument, because if they're an
2 agent, if the jury decides that they're the ostensible --
3 that this doctor is the ostensible agent of the hospital,
4 then what purpose would be served in putting two lines on
5 the verdict form?

6 So but, I mean, as I said, I think it would be
7 reversible error to take that issue away from the jury.

8 Your Honor, thank you.

9 THE COURT: Well, they've -- that's what the
10 Supreme Court does in respect to that matter.

11 So any further comment?

12 MR. MCBRIDE: Just real briefly again, your
13 Honor.

14 It's very simple; very much like Mr. Durney
15 mentions how the defense could have, could have opposed or
16 objected to the motion for good faith settlement, more
17 importantly, plaintiffs could have kept Dr. Hayes in this,
18 in this matter, especially under a theory, if they were
19 intending to go with the theory of ostensible agency.

20 But they chose not to. They chose to settle and
21 get what they could from Dr. Hayes, and now they're trying
22 to go after the hospital for the independent acts of Dr.,
23 Dr. Hayes, in, in relation to the nurses as well and trying
24 to hold Dr. Hayes as an ostensible agent.

1 And, and I think that the, if the Court is to
2 rule on this issue about Dr. Hayes, the importance as to
3 why this needs to be before the Court, before this issue
4 needs to be decided before we even start trial, is for the
5 express reasons as I set forth of the contradiction in
6 41.141. We need to have a ruling on this issue about
7 Dr. Hayes on the verdict form because otherwise we have
8 this direct conflict with 41.141.

9 And I think if your Honor -- if plaintiff's
10 counsel is not willing to make a motion to request the
11 stay, then the defense would make a request or motion, oral
12 motion to stay this matter until the Supreme Court decides
13 the, the Piroozzi case, because I think it has a direct
14 impact on how this case proceeds to trial.

15 THE COURT: Well, even though I understand that
16 and respect that and appreciate the motion at this time,
17 it's the intent of the Court to rule on this matter.

18 I've looked at this matter. I've done my
19 research. I've reviewed it in respect to this particular
20 matter.

21 And in respect to the motion for summary --
22 partial summary judgment, the Court is going to grant that
23 motion. I believe that clearly under the case -- and I
24 primarily looked at a variety of cases, but the Iowa case,

1 I thought their language in respect to that was, the Court
2 felt it was clear:

3 Because of vicarious liability
4 derived solely from the principals'
5 legal relationship to the wrongdoer's
6 settlement with the tortfeasor,
7 removes the basis for any additional
8 recovery from the principal upon the
9 same acts of negligence.

10 The Court believes that applies. I believe it
11 applies clearly to this case. I believe primarily the
12 Court ties that in to NRS 41A.045, where the State of
13 Nevada clearly has adopted several liability in respect to
14 professional liability, otherwise that statute becomes
15 meaningless to me.

16 I think you have to give clear weight to that in
17 respect to this particular matter.

18 I also believe that there's an issue in respect
19 to -- although I think it's a close issue in regards to
20 whether or not it's a question of fact for the jury, I
21 think the signing of the releases, six of them, at least
22 clearly where there are initials, at least raises in the
23 Court's mind clearly the patient knew or should have known,
24 based upon the number of consents to admissions, that she

1 should have known primarily that, in fact, that the doctor
2 was an independent contractor.

3 So I don't believe ostensible authority applies
4 in respect to that, additionally in regards to this
5 particular case based upon that, and I, I have heard no
6 facts that really get rid of that particular aspect.

7 It's clear that the doctor was an independent
8 contractor in the Court's mind -- although there's
9 questions of fact in respect to some of those other factors
10 raised under the ostensible authority doctrine, it's clear
11 that at least the doctor was an independent contractor, and
12 the consents for admissions are clear in the Court's mind
13 with respect to that particular factor.

14 But ostensibly, the Court clearly believes that
15 under the Iowa case, and the implication is indicated in
16 the Iowa case, that once there's been a good faith
17 settlement -- here there was a good faith settlement that
18 existed, that's been approved, as a result of that,
19 primarily I think the result in respect to that is the
20 ostensible authority is gone.

21 I don't think the hospital can be held
22 responsible for the acts of Dr. Hayes as a result of that
23 law, and it was indicated clearly.

24 I don't think the Van Cleave case applies,

1 primarily because I think NRS 41A -- 41A.045 has clearly
2 indicated there's several liability in respect to this
3 matter, it's under a different statutory provision with
4 respect to that. As a result of that I think clearly
5 that's what's going to happen as a result. Therefore I'm
6 granting the motion for summary judgment.

7 Mr. McBride, you'll prepare the order for the
8 Court in respect to that.

9 In respect to NRS 41A.045, in respect to the
10 putting Dr. Hayes on the verdict form, it's the Court's
11 ruling that I think she has to be put on the verdict form.
12 To some extent, there has to be some way of making that
13 particular -- well, attributing the negligence in respect
14 to that.

15 We will need to have a jury instruction,
16 something to the effect that Dr. Amy Sue Hayes was
17 previously a defendant, and I think NRS 41A.045 applies to
18 anybody who was or is a defendant in the action. I don't
19 think they're suddenly removed from that provision because
20 they're no longer a defendant, otherwise that defeats the
21 purpose of the statute again in respect to that.

22 So Dr. Amy Sue Hayes --

23 Something along the lines --

24 Dr. Amy Sue Hayes was previously a

1 defendant in this case, and has been
2 dismissed based upon a settlement
3 with plaintiffs. If you determine
4 that Carson Tahoe Regional Medical
5 Center is liable to plaintiffs based
6 upon its negligence, you may only
7 assess damages for its negligence,
8 for that portion of the plaintiff's
9 damage which represents the
10 percentage of the negligence
11 attributed to Carson Tahoe Regional
12 Medical Center.

13 I think we're going to have to have instruction,
14 but I also think that the jury verdict form is going to
15 have to deal with that in some way.

16 But I also want to make it abundantly clear that
17 this ruling and the ruling of the Court does not relieve
18 the hospital from any of its liability under any
19 circumstance in respect to this particular matter for which
20 it is liable and liable only for its damages that are
21 attributed to them under NRS 41A.045.

22 Now, if the Supreme Court comes out with some
23 reversal decision before this matter gets to trial, either
24 in October or March, then obviously we'll have to deal with

1 that at that time and change the ruling and do some things
2 in respect to this matter.

3 But Mr. McBride, you'll prepare this order
4 granting your motion in respect to this as well?

5 MR. MCBRIDE: Yes, your Honor.

6 THE COURT: We have a rule providing it to
7 Mr. Durney so that he can review it.

8 So I spent a lot of time on this. It's a tough,
9 complicated issue. You know, this isn't easy for me,
10 because I think we have a small child that basically lots
11 of things happened in respect to that, but I think 41A.045
12 has really changed how everything has to be dealt with.

13 Vicarious liability is a joint theory. It's a
14 theory of joint liability under Prosser, under every theory
15 that I could look at, and as a result of that, it's been
16 terminated under 41A.045.

17 So thank you, Counsel. Thank you for --

18 MR. MCBRIDE: Thank you, Judge.

19 MR. DURNEY: And we have some things we'd like
20 to address, if we could.

21 THE COURT: You could, sure.

22 MR. DURNEY: First of all, you're going on
23 vacation, if you'll permit me?

24 THE COURT: Sure.

1 MR. DURNEY: When?

2 THE COURT: Leaving tomorrow.

3 MR. DURNEY: Have a good time, please.

4 But the pretrial order is a bit ambiguous,
5 because it says that motions in limine will be filed,
6 served, and submitted by October the 10th.

7 Do you mean that we have to back off of October
8 the 10th to a date which would allow --

9 THE COURT: No, it means that you have to file
10 them before October 10th.

11 MR. DURNEY: The deadline for filing my motion
12 is October the 10th?

13 THE COURT: We'll make it that. That's fine
14 with the Court.

15 MR. DURNEY: Okay. All right. Fine.

16 And then does the Court have any direction to
17 give us --

18 THE COURT: I think this is set for trial on
19 October 20th?

20 MR. DURNEY: And that's --

21 THE COURT: Is that -- does October 10th give
22 you enough time to file any response or reply? That would
23 be my only concern.

24 MR. DURNEY: That's my concern, too.

1 THE COURT: Maybe, maybe --

2 MR. MCBRIDE: October 1?

3 THE COURT: Let's make it October 1st.

4 MR. DURNEY: Filed and served.

5 THE COURT: Filed and served by October 1st.

6 Any reply has to be filed within, let's make it
7 five days, and then any response within five days, and any
8 reply within five days. And that gets us to October 11th,
9 give or take a little bit.

10 MR. DURNEY: That would be fine.

11 And then does the Court have any direction to
12 give us with regard to the submission of instructions,
13 proposed instructions?

14 THE COURT: Just get them -- I sent you a set.
15 Hopefully everybody got a set in respect to that. That's
16 one I've used in two or three cases. I modified them a
17 little bit in respect to that.

18 Take a look at them. Any proposed instructions,
19 if you can have them to me by the 10th of October, that's
20 fine with me. I just want them ahead -- ahead of the
21 trial.

22 This trial is set for quite a bit of time. So
23 generally, what the Court generally does is sometime during
24 the course of the trial, we'll sit down off the bench, sit

1 down and go through the instructions. So I would just like
2 to have any proposed instructions 10 days prior to the
3 trial.

4 MR. MCBRIDE: That's great, your Honor.

5 One other thing, too, if, if -- that we wanted
6 to address, because we do represent the hospital on this,
7 there's a number of witnesses, and a number of nurses who,
8 and employees of the hospital that Mr. Durney has already
9 deposed that are on the witness list. We'd kind of like
10 to -- and we can do this outside the presence, but I'd like
11 to be able to discuss some sort of order of the witnesses.

12 I know it's early, it's really early, but at
13 some point, maybe closer, but enough time that we can give
14 these, these employees notice that they're going to be
15 called and what days they're going to be called, so they
16 can take those days off, we can arrange for coverage,
17 because otherwise we're talking about a labor and delivery
18 department --

19 THE COURT: I understand that. And you two can
20 talk. If you can't agree, then the Court tries to
21 accommodate people on their schedules as best we can. We
22 can take people out of order. It doesn't work -- it
23 doesn't flow as good as possible, but if we can, you two
24 can talk and work it out.

1 Additionally, I have -- I'm calling an
2 additional panel, bigger panel. I'm concerned because
3 Carson is a small town, people know nurses, people know
4 people in respect to that, so I've called a larger panel.
5 I'm going to call 140 prospective jurors in this particular
6 case. Usually we call 120. I called additional ones.

7 It's my intent probably to -- you know,
8 obviously eight jurors -- it's my intent to maybe have, if
9 you think it's going to go longer than a week -- I think
10 it's probably going to go two weeks -- my intent is to have
11 maybe four alternates. Now, that's quite a few. Up in
12 Storey County I tried a case with two alternates, and we
13 were down to nobody at the end, and THAT was only four
14 days.

15 So things happen. So my intent is probably to
16 have four alternates. I'm thinking about it. I haven't
17 decided that. But we'll get to trial in respect to that.

18 We will give you each a selection sheet. We'll
19 do a lot of things for you that some courts do or don't do,
20 but we'll be ahead of them.

21 MR. DURNEY: We'll have a list of the jury
22 venire a week before?

23 THE CLERK: As soon as we pull it we give it to
24 them.

1 THE COURT: Yeah, the week before, usually week
2 before, we pull it 30 days.

3 THE CLERK: Yeah, it's four to five weeks.

4 THE COURT: Yeah. We'll have it ahead of time
5 for you.

6 MR. DURNEY: 30 days ahead of time, Ms. Clerk?
7 Thank you.

8 THE COURT: And we do have some jury
9 questionnaires, on some of them. Some send them in, some
10 don't. We're going to a new process where we think it's
11 going to work better for us. So we haven't gotten there
12 yet, so . . .

13 MR. DURNEY: There's one more matter that I'd
14 like to bring to the Court's attention.

15 We have still been doing discovery primarily
16 focused on the electronic medical record and the evolution
17 of the chart that we were given in the beginning of the
18 case, and the Court is familiar with some of that.

19 Because we've learned some things about the
20 chart, I would like to take the deposition of somebody who
21 has already been deposed. The person -- for a number of
22 reasons. The person I'm talking about is a nurse named
23 Veronica Klein. When Ms. Klein was deposed in December of
24 last year, she couldn't remember anything. She couldn't

1 remember if the notes were hers, she couldn't remember if
2 she was there, she couldn't remember who else was there.
3 She chose to remember nothing.

4 And now we see from the electronic record that
5 she was in that chart. She was in that chart remotely,
6 potentially even from home. After the fact. And so I want
7 to ask her about what we've now learned from the audits
8 that have been produced, number 1.

9 Number 2, I want to depose her because Ms. Klein
10 has never been identified as affiliated with the defense
11 lawyer. With regard to all the other nurses, they're
12 listed by name under the 16.1 witness disclosure in care of
13 Kelly Trotter, etc., the defense law firm.

14 Veronica Klein recently was listed on the 16.1
15 disclosure -- and I can't tell you how recently, but it's
16 been relatively recent -- as associated with their law
17 firm, and that she's going to testify now about the
18 standards of care that are applicable to her and the
19 nurses. So in light of that I'd like to have an idea of
20 what she's going to say. I'd like to redepose her, your
21 Honor.

22 THE COURT: Any comment on that?

23 MR. MCBRIDE: I'll let Mr. Kelly address that
24 since he was there at Ms. Kline's --

1 MR. KELLY: Thank you very much, your Honor.

2 First of all, Veronica Klein is not an employee
3 of Carson Tahoe. So we don't really have any control over
4 her. She was deposed. I was there at her deposition. It
5 is true she doesn't remember anything.

6 She's listed on 16.1 because we anticipate that
7 she's going to be a witness. And there is verbiage in the
8 16.1 that she will be here, that she's going to testify.
9 She will testify consistent with her deposition. I have no
10 reason to believe that she has any additional information.
11 There's no reason to redepose her. I have not met with her
12 since her deposition. I don't have any contact with her.
13 She's not an employee.

14 So I, I don't really see the need to redepose
15 her. I have no reason to believe that her testimony is
16 going to be any different. She was listed on 16.1 out of
17 an abundance of caution. She is clearly --

18 THE COURT: Well, what about Mr. Durney's
19 indication that basically on the nurse's notes, now
20 suddenly there's some notations and indication that she may
21 have some knowledge? Shouldn't he at least be able to ask
22 about those notations that now have come into his, his
23 purview?

24 MR. KELLY: I'd be curious to know exactly what

1 notations he's referring to.

2 MR. DURNEY: May it please the Court, several
3 audits have been produced in this case over the past
4 several months. And they've been recently explained to us.
5 An earlier effort was made to explain them to us, but the
6 deponent really didn't know the answers. His name was
7 David Scheideman.

8 We were just told this morning by Ms. Hueth, an
9 associate with Mr. Kelly and Mr. McBride, that a question
10 left over from the 30(b)(6) deposition of the individual
11 designated by the hospital to testify on those audits, Ms.
12 Celine Sink (phonetic spelling) -- she was deposed last
13 Wednesday -- there was a question left over, and that was
14 about the work station from which entries were made into
15 the medical chart.

16 One work station is called CT remote. And, and
17 I asked Ms. Sink, what does that mean. She didn't know
18 either. And so we left that question open.

19 And Ms. Hueth did the work that needed to be
20 done. She answered it this morning. She said that means
21 that somebody, in this case the CT remote notation is
22 attribute to Veronica Klein -- somebody -- or whoever that
23 person was that was Ms. Klein -- could have made access
24 from her home. The only way to find out --

1 THE COURT: Is to take her deposition.

2 MR. DURNEY: Yeah.

3 THE COURT: Well, I'm going to go ahead and
4 allow you to go ahead and redepose her as a result of that
5 for the limited purpose of going into the notes and going
6 into any information that she has as a result of these
7 matters.

8 MR. DURNEY: I appreciate that very broad
9 statement. And I'd like to make sure that Mr. Kelly and
10 Mr. McBride understand something.

11 One of the implications here -- all of these
12 notes are in the record attributed to Gia Parkhurst. Gia
13 Parkhurst has testified that they're not hers, which means
14 that somebody would have had to use her ID and password to
15 get into the computer to attribute them to her. So I'm
16 going to ask, I'm going to ask about that, too. So just to
17 be certain.

18 THE COURT: That's fine. Go ahead and --

19 MR. KELLY: I have no objection to that, your
20 Honor.

21 I just am appreciative of the Court limiting
22 this deposition, because Veronica Klein was one of the
23 primary nurses who was caring for Ms. McCrosky. Her
24 deposition was extensive. Granted, she didn't remember a

1 lot, but I think an attempt to regurgitate all of that
2 would be inappropriate, and I think if it's limited to this
3 issue with respect to the electronic medical record, I, I
4 have no problem with that.

5 Thank you.

6 MR. DURNEY: My only concern would be -- and
7 Mr. McBride and Mr. Kelly's word is fine with me -- that
8 she not come to trial and suddenly be clairvoyant after
9 saying -- I mean, I realize I can impeach her.

10 MR. KELLY: Well, that's what cross-examination
11 is for.

12 MR. DURNEY: That's what cross-examination is, I
13 appreciate --

14 MR. KELLY: That will take care of that.

15 MR. DURNEY: -- meet with her and find out that
16 she's now clairvoyant, I'd like to know that.

17 THE COURT: Well, again, I'll allow her to be
18 redeposed based upon the information you've discovered in
19 regards to the notes in respect to that area and those
20 areas. And as a result of those notes, if you get into any
21 other areas, the Court is probably going to be more
22 generous in allowing you to explore certain areas, but not
23 to redepose everything.

24 MR. DURNEY: Appreciate it.

1 THE COURT: Okay. Understood?

2 MR. KELLY: Yes, your Honor. The only other
3 point is, again, she's not an employee of the hospital. I
4 do not have any control over her.

5 THE COURT: Well, Mr. Durney can find her or
6 subpoena --

7 MR. KELLY: Subpoena.

8 MR. DURNEY: I subpoenaed her the first time,
9 I'll get her again.

10 THE COURT: And I have no doubt about that.

11 Anyway, thank you.

12 Thank you for the briefs. Again, we don't get
13 great briefs in a lot of cases. This is -- this is a very
14 complex, different issue, and I will tell you that, that
15 I've spent a lot of time getting to a very simple
16 resolution. I know that.

17 MR. KELLY: Thank you for the Court's time.

18 MR. DURNEY: I appreciate your time as well,
19 your Honor.

20 Please don't hold it against me if we file a
21 motion for reconsideration. I respect your work, and I
22 respect your opinion. But I do --

23 THE COURT: The local rule is you have to file a
24 request, to file a request for reconsideration --

1 MR. DURNEY: I understand.

2 THE COURT: -- before you file the
3 reconsideration.

4 MR. DURNEY: Thank you.

5 MR. MCBRIDE: Thank you, your Honor.

6

7 (Whereupon the proceedings were
8 concluded at 10:08 a.m.)

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Electronically Filed
Sep 25 2015 02:34 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

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

PETITIONER'S APPENDIX

VOLUME III

Petition for Writ of Mandamus

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ALPHABETICAL APPENDIX INDEX

<u>NO.</u>	<u>DOCUMENT</u>	<u>DATE</u>	<u>VOL.</u>	<u>PAGE NOS.</u>
1.	Defendant Carson Tahoe Regional Medical Center's Motion to Include Co-Defendant, Amy Sue Hayes, M.D. on the Verdict Form	August 5, 2015	I	011-043
2.	Defendant Carson Tahoe Regional Medical Center's Motion for Partial Summary Judgment	August 19, 2015	I	044-145
3.	Defendant Carson Tahoe Regional Medical Center's Reply in Support of Motion to Include Co-Defendant, Amy Sue Hayes, M.D. on the Verdict Form	August 28, 2015	II	246-253
4.	Defendant Carson Tahoe Regional Medical Center's Reply in Support of Motion for Partial Summary Judgment	August 28, 2015	II	254-468
5.	Notice of Entry of Order	September 23, 2015	III	569-575
6.	Notice of Entry of Order	September 23, 2015	III	562-568
7.	Order Granting Defendant Carson Tahoe Regional Medical Center's Motion to Include Co-Defendant, Amy Sue Hayes, M.D., on the Verdict Form	September 22, 2015	III	559-561
8.	Order Granting Defendant Carson Tahoe Regional Medical Center's Motion for Partial Summary Judgment	September 22, 2015	III	555-558
9.	Plaintiff's Opposition to Defendant Carson Tahoe Regional Medical Center's Motion to Include Co-Defendant, Amy Hayes, M.D., on the Verdict Form	August 21, 2015	I	146-195

1	10.	Plaintiff's Opposition to	August 25, 2015	I	196-245
2		Defendant Carson Tahoe			
3		Regional Medical Center's			
4		Motion for Partial Summary			
5		Judgment			
6	11.	Plaintiff's First Amended	April 17, 2015	I	001-010
7		Complaint			
8	12.	Sur-Reply to Defendant	August 31, 2015	II	469-475
9		Carson Tahoe Regional			
10		Medical Center's Motion for			
11		Partial Summary Judgment			
12	13.	Transcript of Proceedings	September 1, 2015	III	476-554
13		from JAVS Digital			
14		Recording Hearing,			
15		September 1, 2015			
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CHRONOLOGICAL INDEX TO APPENDIX

<u>NO.</u>	<u>DOCUMENT</u>	<u>DATE</u>	<u>VOL.</u>	<u>PAGE NOS.</u>
1.	Plaintiff's First Amended Complaint	April 17, 2015	I	001-010
2.	Defendant Carson Tahoe Regional Medical Center's Motion to Include Co-Defendant, Amy Sue Hayes, M.D. on the Verdict Form	August 5, 2015	I	011-043
3.	Defendant Carson Tahoe Regional Medical Center's Motion for Partial Summary Judgment	August 19, 2015	I	044-145
4.	Plaintiff's Opposition to Defendant Carson Tahoe Regional Medical Center's Motion to Include Co-Defendant, Amy Hayes, M.D., on the Verdict Form	August 21, 2015	I	146-195
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8.	Sur-Reply to Defendant Carson Tahoe Regional Medical Center's Motion for Partial Summary Judgment	August 31, 2015	II	469-475
9.	Transcript of Proceedings from JAVS Digital Recording Hearing, September 1, 2015	September 1, 2015	III	476-554
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12.	Notice of Entry of Order	September 23, 2015	III	562-568
13.	Notice of Entry of Order	September 23, 2015	III	569-575

1 **CERTIFICATE OF SERVICE**

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

5
6 The Honorable James T. Russell
7 First Judicial District Court
8 885 East Musser Street
9 Carson City, Nevada 89701
10 ***Respondent***

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14 111 W. Ocean Blvd., 14th Fl.
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21 8329 W. Sunset Rd., Ste. 260
22 Las Vegas, Nevada 89113
23 ***Attorneys for Real Party in Interest***
24 ***Carson Tahoe Regional Medical Center***

25 DATED this 25th day of September, 2015.

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ABBEY WHITFIELD

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2 151 Country Estates Circle
Reno, Nevada 89511
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4

5 FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

6 IN AND FOR CARSON CITY

7 HONORABLE JAMES T. RUSSELL, DISTRICT JUDGE

8 ***

9 TAWNI MCCROSKY, individually and Case No. 13TRT000281B
as the natural parent of LYAM
10 MCCROSKY, a minor child, Department No. I

11 Plaintiff,

12 vs.

13 CARSON TAHOE REGIONAL MEDICAL
CENTER, a Nevada business entity;
14 AMY SUE HAYES, M.D., an individual;
and DOES I-X, inclusive,
15

Defendants.

16 _____/
TRANSCRIPT OF PROCEEDINGS

17 FROM JAVS DIGITAL RECORDING

18 HEARING

19 September 1, 2015

20 Carson City, Nevada

21

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23 TRANSCRIBED BY: DEBORA L. CECERE

24 JOB NUMBER: 265831

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A P P E A R A N C E S

4

FOR THE PLAINTIFF:

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- AND -

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I N D E X

ARGUMENT BY	PAGE
MR. MCBRIDE	5
MR. DURNEY	16

1 SEPTEMBER 1, 2015, TUESDAY, 8:56 A.M., RENO, NEVADA

2 -oOo-

3

4 THE COURT: For the record, this is Case No.
5 13TRT000281B on McCrosky versus Carson Tahoe Regional
6 Medical Center.

7 At this time we're here -- this is a pretrial
8 conference in respect to this matter.

9 Present on behalf of the plaintiff is Mr. Peter
10 Durney.

11 Present on behalf of the defendant is Mr. Robert
12 McBride.

13 MR. MCBRIDE: And Mr. John Kelly.

14 THE COURT: And Mr. John Kelly as well --

15 MR. KELLY: Good morning, your Honor.

16 THE COURT: -- in respect to this matter.

17 Again, you are still a second setting. I want
18 you to know that. I tried to find out yesterday if there
19 was going to be any settlement coming down in respect to
20 that case. Although we received some information this
21 morning that lends me to believe that there's a good chance
22 you will go in respect to this matter.

23 So primarily the issues that I want to talk
24 about today -- and you can raise anything else you like --

1 is the motion for partial summary judgment and also the
2 motion that was filed in regards to the verdict form in
3 regards to including the enforcement in respect to
4 Dr. Hayes in respect to that.

5 So the first matter, unless counsel have
6 something else, I want to talk about the motion for partial
7 summary judgment.

8 Mr. McBride, are you ready to proceed?

9 MR. MCBRIDE: Yes, your Honor.

10 THE COURT: And counsel have received
11 Mr. Durney's --

12 MR. MCBRIDE: Surreply.

13 THE COURT: Surreply.

14 MR. MCBRIDE: I sure did, your Honor.

15 THE COURT: Which technically under our rules,
16 we don't allow surreplies, but I obviously felt it was
17 important because of the issues raised in the footnote in
18 regards to the case inside it, so . . .

19

20 ARGUMENT BY MR. MCBRIDE

21

22 MR. MCBRIDE: Yeah, and exactly, your Honor.

23 I think that I'm prepared to address that as
24 well as the, the case cited by Mr. Durney, the Van Cleave

1 case, which I think can be easily distinguished from our
2 case and the circumstances of our case.

3 In, in particular, if I can, by addressing that
4 issue, that Van Cleave case was -- first and foremost, that
5 was, that was a case that was -- as your Honor is aware of
6 the facts, was a construction company who was being sued
7 under respondeat superior earth theory that they were being
8 held vicariously liable for the actions of its employee,
9 contractual employee, who caused an accident that resulted
10 in the paraplegic and, and quite extensive damages.

11 This obviously did not -- this is not an
12 ostensible agency case. And I think the distinction is
13 important because there you have an actual contract of
14 employment. There is no independent acts of negligence
15 that were being alleged against the employer in that case,
16 unlike this case where there are independent acts being
17 alleged against the hospital.

18 THE COURT: Is joint tenancy -- I mean, is, is,
19 is vicarious liability and the ostensible authority
20 doctrine, is that a joint liability theory? I mean, I went
21 back to my old Prosser book and pulled out my old Prosser
22 book on tort law.

23 MR. MCBRIDE: Right.

24 THE COURT: And started there, and kind of

1 worked my way forward in respect.

2 . Are those concepts -- they're included in
3 Prosser under joint liability theories type of a deal.

4 MR. MCBRIDE: Right. And under the common law
5 and in most jurisdictions, it's my understanding as well it
6 is considered a joint liability theory.

7 And in this case, the -- but the distinction
8 being is that there you have an actual contract of an
9 employment between the, the driver and the, the
10 construction company.

11 And it's important to note, I think one of the
12 most important features of that case is that the court
13 ruled that unless there was some specific release that
14 discharged the liability of the, of the employer, then
15 this, this joint liability would, would apply.

16 So that raises an interesting question because
17 otherwise in, in our case, we don't know what the release
18 was between the hospital -- between Dr. Hayes and the
19 plaintiff. We don't know if Dr. Hayes in that release
20 discharges, or the plaintiff discharges any claims against
21 Dr. Hayes's employer, which if there is an ostensible
22 agency theory, would arguably discharge any liability on
23 the part of the hospital.

24 So I think that's a critical distinction. And I

1 think at the conclusion of today's hearing, I think we, at
2 the very least, should be entitled to see that release, to
3 see what language is included in that release, to see
4 whether or not there is --

5 THE COURT: Does NRS 41A.045 have any
6 implication in respect to that, because it got rid of joint
7 liability in respect to professionals in regards to that.
8 And does that have any implication in regards to even being
9 able to get vicarious liability or ostensible authority
10 under -- against, in this case?

11 MR. MCBRIDE: Well, I think that's where it's,
12 it's kind of a contradiction in terms, in terms -- in the
13 sense that --

14 THE COURT: And don't take anything by my
15 questions.

16 MR. MCBRIDE: Oh, I understand.

17 THE COURT: I have a lot of questions for
18 everybody, so . . .

19 MR. MCBRIDE: I, I -- I absolutely understand,
20 your Honor, and I think that -- and I'll address it more
21 completely in the motion relative to the verdict form. I
22 think that, that that issue necessarily is involved in the
23 whole ostensible agency issue. And also 41.141, which, not
24 to get ahead of myself, is also one of the things that

1 comes into play relative to the verdict form issue.

2 But, that being said, the issue that -- the Van
3 Cleave case, plaintiff's counsel makes a point saying that
4 that, that the Nevada Supreme Court has already ruled on
5 that as a matter of law, and, and so on. And it's our,
6 it's our position that that can be distinguished from this
7 case.

8 But that being said, the other issues relative
9 to the ostensible agency theory under the Schlotfeldt case,
10 which is the, the governing case or the authoritative case
11 here on ostensible agency, I think that that case clearly
12 shows that as long as there is -- if the defendant is able
13 to, to argue that one factor does not apply under the four
14 factors identified by the Schlotfeldt court, then they have
15 met their burden, and there is no ostensible agency.

16 And in this case, the agency -- as the Court
17 said, the agency theory doesn't exist if one element is
18 missing.

19 And, again, the four elements, your Honor, that
20 I'm sure you're aware of, the four elements are if the
21 hospital -- if the hospital held itself out to the
22 plaintiff or represented that the plaintiff was seeking
23 treatment there and sought treatment, and she relied on the
24 hospital for that purpose, if also the hospital -- if the

1 hospital did not -- or the plaintiff had no idea that the
2 doctor was not a, a independent contractor or employee of
3 the hospital, and what efforts that the hospital went to
4 dispel any issue of the agency theory.

5 In this case, clearly we've established
6 undisputed facts that Hayes was not an employee nor an
7 actual agent of the hospital. And that's undisputed. And
8 the case is -- the Schlotfeldt case, also cited the fact
9 that the mere affiliation with the hospital does not create
10 an agency theory.

11 And just simply because Dr. Hayes' group, Carson
12 Medical Group, was contracted with the hospital to provide
13 on-call services, that does not in and of itself indicate
14 that the hospital selected Dr. Hayes to treat this patient.
15 And so there's another distinction and the reason why
16 ostensible agency would not apply in this case.

17 THE COURT: Let me ask you this, because on the
18 Renown case -- I know it's kind of a, kind of a reverse
19 situation, in that it almost tells me that in every case
20 that that becomes a question of fact for the jury, in that
21 even if those, you know, you go to the jury in respect to
22 those four factors. And how do you feel about that?

23 Is it a jury question, do you think, as a, as a
24 matter of law that this Court can now, looking at the

1 Renown case, make a determination whether or not, as a
2 matter of law, that I can go ahead and basically dismiss
3 that?

4 MR. MCBRIDE: Well, again, your Honor, I think
5 that the, especially even in light of the Renown case, the
6 fact that the existence -- or nonexistence of one element
7 of those four elements establishes that there is no
8 ostensible agency, I think that as a matter of law, based
9 on the evidence which the Court has in front of it,
10 undisputed facts, the Court can rule as a matter of law
11 that there is no ostensible agency in this case. And I
12 don't think it's necessary for it to be submitted to the
13 jury.

14 Now the other issues relate to the extent
15 that -- and then we have the contradiction between
16 Ms. McCrosky's testimony at trial where she said that she
17 did not know one way or another whether the -- Dr. Hayes
18 was an employee of the hospital. And that's her sworn
19 deposition testimony.

20 Plaintiffs have now attempted to provide a
21 self-serving affidavit of Ms. McCrosky where she says that
22 she understood that they were employees of the hospital.
23 And I think you have to look at that in the context of the
24 purposes for which that affidavit is being offered here

1 today. And I think you have to look back to the sworn
2 testimony and the fact that she, she did not have a feeling
3 one way or another that they were employees of the
4 hospital.

5 The other factor, again, is that we have the
6 conditions of admission, that Ms. McCrosky signed on no
7 less than six occasions. And, again, the cases are --
8 there is a abundance of authority saying that the, the --
9 the ignorance of the terms of a condition of admission or
10 informed consent do not matter, and the fact that they were
11 provided to the patient, she signed them, they were
12 witnessed on more than one occasion --

13 THE COURT: What about Mr. Durney's argument, or
14 the, the plaintiff's argument that they're adhesion
15 contracts?

16 MR. MCBRIDE: Well, your Honor, if that were the
17 case, then I think that every court in this state, that
18 every time an informed consent is signed, in a context of a
19 medical treatment, that those informed consents could not
20 be relied upon by a court.

21 And, in fact, you have jury instructions,
22 specifically, Nevada Pattern Jury Instructions,
23 specifically dealing with the, the impact of informed
24 consent.

1 So I don't think that that -- I think that that
2 argument is, is a tried attempt or a, a -- a vague attempt
3 at trying to, to get around the, the, the realities of what
4 the law requires regarding an informed consent, what it
5 holds.

6 And I think that as long as there is an informed
7 consent that the patient has been provided, which even if
8 she didn't understand them, she was given the opportunity
9 to discuss the, the terms of the informed consent with
10 another witness from the hospital. And there's no evidence
11 that she ever even asked any questions in that regard.

12 Plaintiff's counsel brings up Jenny Glover as an
13 employee of the hospital who would have given the, the
14 informed consent to Ms. -- to Ms. McCrosky, saying that she
15 didn't know the distinction between an agent or an
16 independent contractor.

17 However, that's all well and good, but there's
18 no evidence that those questions were ever even asked of,
19 of Ms. Glover, or that Ms. McCrosky even relied on those.

20 Now, she's also aware, even though she wasn't
21 treated by any physicians at the MOM's Clinic, she was
22 aware that doctors routinely rotated through that clinic.
23 And in that sense, the MOM's Clinic was provided to her.

24 It's not a condition or requirement that she's

1 treated in the MOM's clinic, she has to deliver at Carson
2 Tahoe. That, your Honor, I think might be considered more
3 of an adhesion contract. If there was some sort of
4 requirement that if you, you participated in the treatment
5 offered there, that you were required to deliver at Carson
6 Tahoe, arguably you might have the makings of an adhesion
7 contract there. That doesn't exist. She was free to
8 deliver at Renown or at Saint Mary's, any other hospital in
9 the Reno area.

10 There's just no requirement for her to go, or to
11 seek treatment at Carson Tahoe Regional Medical Center.

12 The, the conditions of admission -- I think we
13 attached that -- also indicate that the relationship
14 between the patient and the physician is directed by the
15 patient. And, again, that goes to the, to the extent that
16 Tawni McCrosky had the option of going to Carson Tahoe and
17 delivering there or hiring her own independent OB/GYN to
18 provide treatment to her.

19 THE COURT: Well, she didn't have any money, and
20 as a result of that, that's why she was going to the MOM's
21 Clinic, wasn't she?

22 MR. MCBRIDE: True, she did not -- she did not
23 have insurance. But there's no indication that that in and
24 of itself should then -- the fact that she didn't have

1 insurance, then the services offered by the MOM's Clinic,
2 should not then make it that as a result of that inability
3 to pay, Dr. Hayes suddenly becomes an ostensible agent.
4 That, I think, is not what -- she still had the option and
5 could have gone elsewhere if she chose.

6 Again, the, the fact is -- and I think we've
7 established through all of the, the undisputed material
8 facts based on the evidence in this case, and the sworn
9 testimony of Ms. McCrosky, that the hospital took every
10 step possible to dispel any concerns or, or issues that
11 Dr. Hayes was an agent of the hospital. And I think under
12 the circumstances of this case, defendant has met its
13 burden of providing the evidence to show that there is no
14 genuine issue of material fact relative to one or more of
15 the critical elements of the ostensible agency theory as
16 the Schlotsfeldt court held.

17 And I think that under those -- under that
18 evidence, under those conditions, that we would be entitled
19 to partial summary judgment on that issue.

20 THE COURT: Thank you. Mr. Durney?

21 MS. BRENNAN: Mrs. Brennan.

22 THE COURT: Oh, excuse me. Thank you.

23 ///

24 ///

1 ARGUMENT BY MS. BRENNAN

2

3 MS. BRENNAN: Well, I think that this motion
4 boils to Schlotfeldt and the four factors. And I think
5 Mr. McBride's argument proves that there are questions of
6 fact as to each of the four factors.

7 And the four factors are one, whether or not
8 plaintiff entrusted herself to the care of Carson Tahoe.
9 In this case she had no OB/GYN, and she had been
10 participating in the prenatal program for nine months
11 without having seen a doctor, entrusting herself to the
12 care of Carson Tahoe and not to a doctor. So in that sense
13 she had entrusted herself to the care of Carson Tahoe and
14 not to any specific treater.

15 THE COURT: But isn't the MOM's Clinic a
16 separate limited liability company, a separate entity from
17 the hospital?

18 MS. BRENNAN: I look at it as being the same
19 because it's run by Carson Tahoe.

20 THE COURT: It's run by Carson Tahoe, but isn't
21 it a separate legal entity? I don't know. I'm just --

22 MS. BRENNAN: I don't know. I don't know that
23 it is a separate legal entity.

24 Is it?

1 MR. DURNEY: Your Honor, it's not. We deposed
2 an individual --

3 THE COURT: I don't know if it is or it isn't.
4 I'm just asking the question.

5 Is the MOM's --

6 MR. DURNEY: It's, it's owned, operated, and
7 staffed by the Carson Tahoe Hospital.

8 THE COURT: Well, they've got various limited
9 liability companies for other entities. I mean, so -- so
10 you don't know one way or the other whether it is or not?

11 MS. BRENNAN: I guess the point is, the point is
12 that she's entrusting herself to the care of this hospital
13 and not to the care of an OB/GYN that she selected herself.
14 And that's what Schlotfeldt is about.

15 In fact, the important quote from that case is:

16 The ostensible agency theory
17 applies --

18 Sorry, I'm shaking. Can I stand -- can I sit
19 down?

20 THE COURT: What?

21 MS. BRENNAN: Do you mind if I sit down? I'm
22 shaking.

23 THE COURT: You should stand when you argue a
24 case. Okay. I'm sure Mr. Durney would tell you that.

1 MS. BRENNAN: Sorry, I'm nervous.

2 The ostensible agency theory applies
3 when a patient comes to a hospital,
4 and the hospital selects a doctor to
5 serve the patient. The doctor has
6 apparent authority to bind the
7 hospital because a patient may
8 reasonably assume that a doctor
9 selected by the hospital is an agent
10 of the hospital.

11 That's the exact fact pattern here. So here
12 plaintiff entrusted herself to the hospital not to a
13 doctor.

14 Secondly, CTRMC selected Dr. Hayes.
15 Ms. McCrosky had never met Dr. Hayes, had never seen her.
16 Certainly had no choice in who her doctor was. Again,
17 she --

18 THE COURT: What about their argument, though,
19 that basically Dr. Hayes, the OB/GYN service at the
20 hospital, that provides the service to the hospital is a
21 separate legal entity, that they basically rotate their
22 doctors in and out in respect to who is on call that
23 particular date and night. With respect to that, does the
24 hospital really then select that doctor, because that

1 doctor is basically there based upon a rotation from its
2 own medical practice, so how is that basically the hospital
3 selecting that individual?

4 MS. BRENNAN: Carson Tahoe has an exclusive
5 contract with Dr. Hayes' practice group. They selected
6 that practice group to have the contract with them, and
7 they therefore approved those doctors as being the doctors
8 that are going to serve the patients that arrive at Carson
9 Tahoe. And certainly the patients who go to Carson Tahoe
10 have no privity of contract with that group. And so
11 they're just subject to whoever shows up. Carson Tahoe has
12 the ability to choose with whom it contracts. Whether or
13 not they schedule the doctor, they certainly select the
14 company that provides the doctors.

15 The third factor is whether plaintiff reasonably
16 believed that Dr. Hayes was an employee or agent.

17 In this case Ms. McCrosky is a 21-year-old girl
18 who has never been pregnant, has had no significant medical
19 experience, and is going through the MOM's program, MOM's
20 Clinic, and is believing that she's being cared for by
21 Carson Tahoe.

22 When she shows up at the labor and delivery
23 floor, a doctor is assigned to her who she's never met, and
24 we think it's reasonable for her to believe that that

1 doctor was an agent or an employee of the hospital.

2 THE COURT: What about all the six or more
3 conditions of admission that clearly indicate essentially
4 that they are not responsible and not employed? If you
5 read that language, it's not ambiguous, although it doesn't
6 include OB/GYNs in there, but it's pretty clear.

7 What about all those?

8 MS. BRENNAN: I'd argue that it's not clear.
9 Especially compared to other contracts that we saw in the
10 briefing where it was made very clear what the difference
11 was between an agent and an employee and an independent
12 contractor, and what the distinction meant.

13 Here they just said it's not an independent
14 contractor, but what does that -- or Dr. Hayes is an
15 independent contractor, but what does that mean to our
16 client?

17 THE COURT: It just means a 21 year old who
18 doesn't have any experience dealing with any of these
19 matters checking into the hospital, is that what you're
20 saying?

21 MS. BRENNAN: Sure. Well, and I'm also saying
22 that she testified that she didn't really read them, and
23 that she was just told sign here. And, in fact, she did
24 sign it six times, but she didn't sign it upon admission

1 for labor and delivery, she signed it six times when she
2 went to the MOM's Clinic to see a nurse.

3 THE COURT: How does a hospital protect itself
4 and make sure clearly that everybody understands that
5 somebody is an independent contractor unless they put it in
6 their conditions of admission, and in respect to that, what
7 do they have to do, have them sign a, sign a separate
8 statement, put it in big block letters?

9 What do they have to do in order to protect
10 themselves to make sure that the parties clearly understand
11 that they're not going to be vicarious liable for this
12 person?

13 MS. BRENNAN: Probably write a better paragraph
14 regarding independent contractors versus employees and what
15 it means, like the examples we saw in the briefing. Also,
16 have someone explain it, as we discussed Jenny Glover
17 who --

18 THE COURT: There was some testimony later, that
19 at least it's not before me in making this decision, that
20 one of the nurses traditionally under their particular
21 procedures explained what it means in respect to that --
22 although for this purpose of this hearing, that's not, I'm
23 not looking at that, but I guess I am bothered by the fact
24 that there wasn't one, there were six or more. I think

1 somebody said eight, but I think there was only six.

2 So doesn't that at least -- at some point in
3 time I guess if you signed one, you don't worry about
4 signing the other five or so.

5 MS. BRENNAN: I, I can only speak for myself. I
6 sign those contracts all the time when I agree to --

7 THE COURT: Do you think that that's an adhesion
8 contract? I mean, I read your argument, or Mr. Durney's,
9 but I presume you drafted it in respect, do you think it's
10 really an adhesion contract?

11 MS.,BRENNAN: I do believe so, because I don't
12 think that -- at least in this case, plaintiff, our client,
13 went through and read it and was adequately explained what
14 it meant.

15 I don't think to this day that she knows the
16 difference between an independent contractor and an
17 employee and what this all means.

18 THE COURT: Do you think there's any doubt in
19 this case that Dr. Hayes was not an employee of the
20 hospital? Clearly, she was an employee of the hospital.
21 So we have to get to the ostensible agency doctrine, right?

22 MS. BRENNAN: Right, which is what I'm trying to
23 go through with the factors of Schlotfeldt, is if we meet
24 those, or if we can show that at least there's a question

1 of fact as to those four, then we can -- then their motion
2 must fail because she could be an ostensible agent, and
3 that's a question for the jury.

4 THE COURT: What about the factor that
5 clearly -- and I asked Mr. McBride the same question -- do
6 you think vicarious liability and ostensible agency theory
7 are a joint liability theory?

8 MS. BRENNAN: I believe that the distinction is
9 blurred between the two.

10 THE COURT: Well, I will tell you that the
11 treatises that I looked at, they all indicate that it is
12 a -- vicarious liability comes under joint tortfeasor kind
13 of liability situation, and that's a theory of how you hold
14 more than one person liable for somebody else's negligence.
15 So --

16 MS. BRENNAN: I think in the Van Cleave case
17 that the employee/employer distinction versus here,
18 hospital agent distinction, is comparable. And I --

19 THE COURT: In the Van Cleave case, they
20 basically cite to the 1973 Nevada Legislature adopted the
21 1955 revised version of the Uniform Act. NRS 17.225 of the
22 Uniform Act states that the Uniform Act applies where two
23 or more persons become jointly or severally liable in tort
24 for the same injury to the person or property.

1 So that's what they're relying on in that case,
2 correct?

3 MS. BRENNAN: True.

4 THE COURT: How does that square up with
5 NRS 41A.045, which basically terminates joint and several
6 liability in regards to professionals?

7 MS. BRENNAN: I don't know how to answer your
8 question.

9 THE COURT: Just -- these are all, you know, I
10 don't -- I think this is a very complicated issue. I don't
11 think there's an easy issue. I've looked at it. I've
12 thought about it. I've done some research on it. And I
13 think it's a very difficult issue in light of the adoption
14 of that particular initiative that went through the
15 Legislature, and we adopted that statute. And what
16 implication that had in regards to all these issues in
17 regards to that. So we'll get to the jury form in a
18 minute.

19 Any other further argument?

20 MS. BRENNAN: Not at this time.

21 THE COURT: Okay. Thank you.

22 Mr. McBride, I don't know if you want any
23 additional argument. I usually give -- you know, it's your
24 motion.

1 MR. MCBRIDE: Just a few points, your Honor.

2 And, again, as far as the four factors that
3 counsel was referencing, I think we've made it clear, based
4 on the evidence that was submitted in our brief and
5 attached to our motion, that arguably the only factor of,
6 of an ostensible agency theory under the Schlotfeldt case
7 that plaintiffs can say is a question of fact, is whether
8 or not plaintiff and patient entrusted herself to the
9 hospital.

10 And, and I think, even on that sense, you know,
11 arguably, you know, that's a question of fact that, that a
12 jury can decide. I think we, we would probably acknowledge
13 that the patient in this case was entrusting herself to the
14 hospital and the employees of the hospital.

15 However, not for the independent acts of the
16 independent contractors. And that's where the other
17 factors are more important.

18 As far as the hospital selecting -- whether the
19 hospital selected the doctor for this patient, it's not
20 Carson Tahoe selecting Dr. Hayes for --

21 THE COURT: But they selected the group.

22 MR. MCBRIDE: They select the group. The group
23 selects the doctors. And that's the distinction.

24 So the group selects the doctors, not the

1 hospital saying Dr. Hayes, you know, you're going to be on
2 call this day, you're going to be seeing patients. It's
3 the group assigning the doctors to be on call based on
4 their schedules.

5 So that's the big distinction. It's not the
6 hospital directing which doctor is going to be there. It's
7 the -- it's the group directing, based on their schedules,
8 and who, who is going to be on call, who is going to be
9 treating patients in the office.

10 So I --

11 THE COURT: I have a little problem with that
12 distinction, I really do, because it appears to me when the
13 hospital selects the group, and the group sends somebody,
14 the hospital then technically is saying okay, this is who
15 you get from this group, no matter what, this is going to
16 end up, who is going to be there in respect to that. So
17 I'm not so sure I buy that argument, but you can go on to
18 the other two factors because I --

19 MR. MCBRIDE: Right. And the only reason that I
20 bring that up is because there are certain indications
21 where a radiologist is employed by the hospital, and, and
22 they basically hire the physicians independently. And they
23 hire those physicians to do those jobs. That's where
24 there's a distinction, I think, your Honor, and that's the

1 only point I wanted to make.

2 The other fact, again, that we've addressed is
3 whether the patient personally believed the doctor was an
4 employee of the hospital. And, again, from her testimony
5 she didn't know one way or another.

6 Now we have an affidavit that they've submitted
7 where says she believes that Dr. Hayes was an employee of
8 the hospital.

9 And that actually --

10 THE COURT: That's, that's her subjective
11 belief. It doesn't really deal with the actual facts on
12 what was presented.

13 And I guess I make -- I buy that to a certain
14 extent from the standpoint that you can't -- you don't know
15 what's in her mind, nobody knows what's going on in the
16 mind, but what do the actual facts show in this case in
17 respect to that, and we're stuck with the conditions of
18 admission, and her statement that nobody told her anything.

19 MR. MCBRIDE: No, but I understand that, but I
20 guess my point is just to make the distinction that her
21 affidavit now says that she understood that he was -- that
22 Dr. Hayes was -- she was an employee of the hospital.
23 That's in direct contradiction to what her testimony was.

24 So I think on that issue it's not -- it's a