IN THE SUPREME COURT OF THE STATE OF NEVADA
DOCKET NO. 72416

JOCELYN SEGOVIA,
Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE MICHELLE LEAVITT, DISTRICT JUDGE,
Respondents,

-and-

MADDEN DUDA, A MINOR BY AND THROUGH JOVAN DUDA, HIS NATURAL FATHER AND GUARDIAN; AUTUMN MATESI, INDIVIDUALLY AND AS AN HEIR TO THE ESTATE OF MARY ANN HAASE; AND ROBERT ANSARA AS SPECIAL ADMINISTRATOR OF THE ESTATE OF MARY ANN HAASE,
Real Party in Interest.

PETITION FOR WRIT OF PROHIBITION
OR, IN THE ALTERNATIVE, MANDAMUS
EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
DISTRICT COURT CASE NOS. A-13-677611-C and A-13-677720-C

REAL PARTY IN INTEREST MADDEN DUDA'S ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE

The Real Party in Interest Madden Duda, a minor, by and through Jovan Duda, his natural father and guardian, by and through his attorneys of record Murdock & Associates, Chtd., and Eckley M. Keach, Chtd., hereby submits his Disclosure Statement pursuant to NRAP 26.1

The undersigned counsel of record certifies that there are no parent corporations and/or publicly held company that owns 10% or more of the party's stock.

Madden Duda, a minor, by and through Jovan Duda, his natural father and guardian, has been represented by the law firms Murdock & Associates, Chtd., and Eckley M. Keach, Chtd., in all proceedings before the District Court and in the instant matter.

DATED this 5th day of May, 2017.

MURDOCK & ASSOCIATES, CHTD.
ECKLEY M. KEACH, CHTD.

/s/ Robert E. Murdock
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I. INTRODUCTION

Ms. Segovia completely disregards Section 11 of the actual bill that was passed and enrolled in 2015 adding "physician's assistants" to the definition of "provider of health care" in NRS 41A.017. Section 11 states "**The amendatory provisions of this act apply to a cause of action that accrues on or after the effective date of this act.**" Adding "physician's assistants" was an "amendatory provision" since the statute informed us of this: "NRS 41A.017 is hereby amended to read as follows…" Thus, the Legislature advised everyone that the statute was **prospective**. Among other things, Ms. Segovia's Writ fails to mention this.

This wrongful death lawsuit "accrued" on March 5, 2012 with the death of Mary Haase. The effective date of the statute amendment was June 9, 2015. Hence, the effective date of the change in the statute was *three years post accrual*. Accordingly, by the specific language of Section 11 of SB292, the change in statute is prospective.

Once the Legislature placed specific language in the statute stating that it was prospective, the Court should not engage in the clarification analysis argued by Ms. Segovia. Even if it was a 'clarification" (which it most assuredly isn't), the legislature has spoken and limited the amendments to causes of action that accrue "on or after the effective date of this act." Unless there is some sort of Constitutional issue (which Ms. Segovia has not raised), or, there is some ambiguity in the

prospective language (which there is not), the Court is bound by the Legislature's pronouncement that the addition of physician's assistants to the definition of "provider of health care" is prospective—it can only be applied "**to a cause of action that accrues on or after the effective date of this act.**"

Though Plaintiff[1] has addressed each argument of Ms. Segovia in an abundance of caution, the fact is, the issue begins, *and ends*, with Section 11 of SB292.

The Writ should be denied.

II. JURISDICTIONAL STATEMENT

The Supreme Court "has original jurisdiction to issue writs of mandamus and prohibition." *Mountain View Hosp., Inc. v. Eighth Judicial Dist. Court*, 128 Nev. 180, 184, 273 P.3d 861, 864 (2012).

However, this Court is not required to accept jurisdiction: "[N]either mandamus or prohibition is appropriate in the face of effective alternative remedies." *Jeep Corp. v. Second Judicial. Dist. Court,* 98 Nev. 440, 443, 652 P.2d 1183, 1185 (1982). See, also, NRS 34.170.

Whether to consider a writ petition is within this court's discretion. See *Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991). If there

[1] Rather than refer to itself as "Real Party in Interest," Madden Duda will use the term "Plaintiff" since that is the term used below.

is an adequate and speedy legal remedy in the form of an appeal from any adverse judgment, the Supreme Court will generally refrain from accepting jurisdiction and deny the writ. See *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008); *Valley Health Sys., LLC v. Eighth Judicial Dist. Court of Nev.*, 127 Nev. 167, 171, 252 P.3d 676, 678 (Nev. 2011).

III. STANDARD OF REVIEW

In the context of a writ petition, statutory interpretation is a question of law that this court reviews de novo. *Otak Nev., LLC v. Eighth Judicial Dist. Court*, 129 Nev., Adv. Op. 86, 312 P.3d 491, 498 (2013). Although the Supreme Court gives deference to the district court's factual findings[2], this court reviews the district court's conclusions of law, including statutory interpretation issues, de novo. *Torres v. Nev. Direct Ins. Co*., 131 Nev., Adv. Rep. 54, 353 P.3d 1203, 1206 (2015).

Petitioners bear the burden of demonstrating that extraordinary relief is warranted. *Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004).

IV. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did The Legislature Specifically Provide For The 2015 Amendment To NRS 41A.017 To Be Applied Prospectively?

[2] For the purposes of this Writ, the parties do not dispute the Court's factual findings—the issue is limited to the ultimate disposition of whether the 2015 Amendment should be applied prospectively or retrospectively. See Writ at 7.

V. LEGAL ARGUMENT

A. The Legislature Specifically Declared the Amendments Prospective

In her Writ of twenty pages, Ms. Segovia completely ignores that the Legislature has already told us that the statute amending NRS 41A.017 was prospective. At the Legislature, the bill took the form of SB292. See Appendix 000538-000543. The "as enrolled" bill text could not be any clearer.

Section 11 of SB292 states:

> "Sec. 11. The **amendatory provisions** of this act apply to a cause of action **that accrues on or after the effective date of this act**."

See Appendix 000543. There is no argument but that modifying NRS 41A.017 to add physician's assistants was an "amendatory provision" of SB292: Section 2 of SB292 states: "NRS 41A.017 is hereby **amended** to read as follows…" Accordingly, the change was an "amendatory provision."

Since the statute was "amended" to add physician's assistants, and the amendatory provisions are effective only to causes of action that accrue after the effective date (June 9, 2015), by its own words, the statute only applies prospectively.

In this matter, the heirs' wrongful death cause of action accrued on the date of death, i.e., March 5, 2012. The effective date of the Act (SB292) was June 9, 2015. Accordingly, it is clear that the Plaintiffs causes of action accrued **well before** the effective date of the statute.

The legislature could not have been more explicit and unambiguous. In such circumstances, there is no room for question, and the court is not permitted to search for meaning beyond the statute itself. See *Pro-Max Corp. v. Feenstra*, 117 Nev. 90, 95, 16 P.3d 1074 1078 (2001).

And, this Court has already decided the issue with NRS 41A. In *Humboldt Gen. Hosp. v. Sixth Judicial Dist. Court of Nev*., 376 P.3d 167 (Nev. 2016), the Court grappled with the issue of informed consent and a battery claim involving a physician and whether such constitutes "medical malpractice". In an *en banc* opinion with no competing opinions, Justice Hardesty discussed the 2015 amendments to NRS 41A:

> "Many statutes in NRS Chapter 41A were amended during the 2015 legislative session. See 2015 Nev. Stat., ch. 439, §§ 1-13, at 2526-29. NRS 41A.071 now states, in pertinent part: "If an action for professional negligence is filed in the district court, the district court shall dismiss the action, without prejudice, if the action is filed without an affidavit." (Emphasis added.) NRS 41A.015 defines "[p]rofessional negligence" as "the failure of a provider of health care, in rendering services, to use the reasonable care, skill or knowledge ordinarily used under similar circumstances by similarly trained and experienced providers of health care." **The amended language does not apply here because the amendments became effective after the district court entered its order in this matter, and our reference to the statutes in this section are to those in effect at the time of the cause of action.** See 2015 Nev. Stat., ch. 439, § 13, at 2529."

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Humboldt Gen. Hosp. v. Sixth Judicial Dist. Court of Nev., 376 P.3d 167, 170 fn2 (Nev. 2016)[3]. Had the 2015 amendments been a "clarification", and the legislature had not specifically stated the statute applied only to actions accruing after its enactment, Justice Hardesty could have applied the amended provisions. But, Justice Hardesty recognized that the statute as amended required prospective application.

Ms. Segovia wants this Court to gloss over (or actually disregard) Section 11 of SB292. **In fact, she doesn't even mention Section 11 in her Writ.** It's obvious why—it ameliorates her argument.

The Writ should be denied.

B. <u>Statutes Are Presumed To Be Prospective</u>

a. The Statute Is Clear On Its Face with No Ambiguity—It Is Prospective

Though the statute is specific in its prospective application, Plaintiff will discuss the balance of Ms. Segovia's brief in an abundance of caution.

Amendments to statutes are <u>presumed</u> to be prospective in application. See *Dash v. Van Kleec*k, 7 Johns. 477, 503 (N.Y. 1811) (noting that "[i]t is a principle in the English common law, as ancient as the law itself, that a statute, even of its

[3] Justice Hardesty actually cited to Section 13 of SB292 which states "This act becomes effective upon passage and approval." This type of language is discussed below and is *indicative of prospective application*. Justice Hardesty's citation and reliance upon Section 13 of SB292 is further buttressed by Section 11 which is <u>explicit</u> that the amendatory provisions are prospective. It is also noteworthy that Ms. Segovia does not discuss this case.

omnipotent parliament, is not to have a retrospective effect"). This presumption has long and deep roots:

> "It is contrary to fundamental notions of justice, and thus contrary to realistic assessment of probable legislative intent. The principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal. It was recognized by the Greeks . . . by the Romans . . . by [the] English common law.., and by the Code Napoleon... It has long been a solid foundation of American law."

Kaiser Aluminum & Chem. Corp. v. Bonjomo, 494 U.S. 827, 855 (1990). Nevada, of course, agrees with this. See *Sandpointe Apts., LLC v. Eighth Judicial Dist. Court of State*, 313 P.3d 849, 854, 129 Nev. Adv. Rep. 87 (Nev. 2013).

In *Holloway v. Barrett*, 87 Nev. 385, 390, 487P.2d 501, 504 (1971), the Nevada Supreme Court held that "statutes are presumed to operate prospectively and shall not apply retrospectively unless they are so strong, clear and imperative that they can have no other meaning or unless the intent of the legislature cannot be otherwise satisfied." See *Virden v. Smith*, 46 Nev. 208, 211-12,210 P. 129, 130 (1922) (stating that "[e]very reasonable doubt is resolved against a retroactive operation of a statute. If all the language of a statute can be satisfied by giving it prospective action only, that construction will be given it.") (internal citations omitted).

Nevertheless, if a statutory amendment "clarifies" the statute as opposed to modifying the statute, retroactive effect may be given. See *Fernandez v. Fernandez*,

126 Nev. 28, 35 n.6, 222 P.3d 1031, 1035 n.6 (2010) (indicating that a legislative amendment meant to clarify, rather than change, a statute *may* be applied retroactively). Of course, however, if the Legislature has made specific provisions for the amendment to be prospective, assuming there is no Constitutional issue or ambiguity, the Court must follow the Legislative declaration. "When the language of a statute is unambiguous, the courts are not permitted to look beyond the statute itself when determining its meaning." *Westpark Owners' Ass'n v. Eighth Judicial Dist. Court*, 123 Nev. 349, 357, 167 P.3d 421, 427, (Nev. 2007).

When determining whether a statutory amendment is a clarification such that retroactive application may be appropriate, Justice Gibbons advises the first part of the analysis should be to look at the statute to see if it provides an answer. If the statute does not explicitly provide for retroactivity, there is a presumption against retroactivity. See *Badger v. Eighth Judicial Dist. Court*, 373 P.3d 89, 94 fn1 (Nev. 2016). Obviously, in this case, the legislature provided for prospective application—to causes of action that accrue after its enactment.

However, in *Badger*, in her dissent, Justice Pickering provides additional prongs of analysis:

> "Whether a subsequent statute or amendment sheds light upon the meaning of a former statute depends upon a number of circumstances." 2B Singer & Singer, Statutes and Statutory Construction § 49:10, at 135.The force which should be given to subsequent legislation, as affecting prior legislation, depends largely upon the circumstances under which it takes place. If it follows immediately and after

> controversies upon the use of doubtful phraseology therein have arisen as to the true construction of the prior law it is entitled to great weight. Id. (emphasis added) (quoting People ex rel. Westchester Fire Ins. Co. v. Davenport, 91 N.Y. 574, 591-92 (1883)).”

Id. at 97-98 (Nev. 2016). Whether this Court uses Justice Gibbons' analysis, Justice Pickering's analysis, *or some amalgamation of the two*, the Section 11 of the statute is specific and unambiguous, in that it is to be applied prospectively. Even if the Court somehow finds Section 11 to be ambiguous, the Legislative history does not provide sufficient evidence to overcome the presumption that it is to be applied prospectively.

However, it does bear repeating that before any of this analysis takes place, the Court must find that there is some ambiguity regarding when the statute begins to apply. The first rule of statutory construction is that “[w]here a statute is clear on its face, a court may not go beyond the language of the statute in determining the legislature's intent.” *McKay v. Board of Supervisors*, 102 Nev. 644, 648, 730 P.2d 438, 441 (1986). “Only when a statute is ambiguous will this court "resolve that ambiguity by looking to the statute's legislative history and construing the statute in a manner that conforms to reason and public policy." *Las Vegas Dev. Assocs., LLC v. Eighth Judicial Dist. Court*, 130 Nev. Adv. Rep. 37, 325 P.3d 1259, 1262 (2014).” *Public Employees' Ret. Sys. v. Gitter*, 133 Nev. Adv. Op. 18 (2017). Only if the statute is ambiguous do we look beyond the statute's language to legislative history or other sources to determine the intent of the statute. *Attaguile v. State*, 122 Nev.

504, 507, 134 P.3d 715, 717 (2006). An ambiguity exists when the statute's "language lends itself to two or more reasonable interpretations." *State v. Catanio*, 120 Nev. 1030, 1033, 102 P.3d 588, 590 (2004).

Section 11's statement of prospective application contains no ambiguity. Ms. Segovia does not even argue that Section 11 is ambiguous (*of course, Ms. Segovia doesn't mention Section 11 at all*). Section 11 leads itself to one interpretation: the amendatory provisions, which include adding physician assistants to NRS 41A.017, are prospective in application. Though the legislative history *may* be ambiguous about whether the amendments were a clarification or not (and Plaintiff discusses this below), the resulting statute is not ambiguous at all. It would be inappropriate to start looking at legislative history when there is no ambiguity. See *Milner v. Department of Navy*, 562 U.S. 562, 572, 131 S. Ct. 1259, 179 L. Ed. 2d 268 (2011) ("Those of us who make use of legislative history believe that clear evidence of congressional intent may illuminate ambiguous text. We will not take the opposite tack of allowing ambiguous legislative history to muddy clear statutory language.").

Statutory ambiguity is, in effect, a condition precedent to evaluation of legislative history. Here, the statute is clear and certain. The application is prospective.

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Finally, the separation of powers[4] precludes this Court from changing what the Legislature did in making the bill prospective. The Legislature specifically limited application of the amendments to a "**cause of action that accrues on or after the effective date of this act.**" Assume the Legislature had included language in the statute that the amendments were a clarification due to an existing controversy. Then, let us also assume that the Legislature included the language of Section 11 that the clarification applied **"to cause of action that accrues on or after the effective date of this act."** Unless there was some ambiguity or Constitutional issue[5], the Court would have no basis or authority to alter what the Legislature wrote and the amended statute could only be applied prospectively. The separation of powers precludes the Court from changing the plain meaning of an unambiguous, otherwise constitutional legislative enactment. See *Article 3, Section 1(1) of the Nevada Constitution*. Even if the amendment followed controversies about what was being clarified, it wouldn't matter. The Legislature made a decision clearly and unambiguously. Yes, it is a clarification. But, regardless, the effective date is prospective.

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[4] See, e.g., *Comm'n on Ethics v. Hardy*, 125 Nev. 285, 291-294, 212 P.3d 1098, 1103-1105 (Nev. 2009).

[5] For example, *ex post facto* laws. See, e.g., *Miller v. Warden, Nevada State Prison*, 112 Nev. 930, 921 P.2d 88) (Nev. 1996).

An amendatory provision *may* be a clarification, an addition, or a change to a statute. But, an amendatory provision also may *not* be a clarification. Regardless of whether the underlying change is a clarification or not, if the amendatory provision itself is unambiguous, then the statute is read with its plain meaning and to be applied thusly. In our hypothetical, the statute was amended; it was a clarification; and, it is to be applied prospectively. The issue that Justice Pickering discusses in *Badger*, *supra*, requires an ambiguity. In other words, if the Legislature does not state when the effective date begins, as it did with Section 11, then, the Court would need to determine whether it is to be applied prospectively or retroactively, and the issue of clarification becomes relevant. But, when the Legislature has clearly spoken—the amendments apply **"to cause of action that accrues on or after the effective date of this act**"—there is no ambiguity and no basis for judicial intervention or modification. As this Court has stated:

> "The principles supporting Nevada's Separation of Powers Clause, Nev. Const. art. 3, § 1, preclude this court from having the "quintessentially legislat[ive] prerogative to make rules of law retroactive or prospective as we see fit."

Nev. Yellow Cab Corp. v. Eighth Judicial Dist. Court, 383 P.3d 246, 250, (Nev. 2016). When the Legislature speaks on the issue of prospective or retroactive application, unless there is some Constitutional issue or ambiguity, separation of powers mandates that the Court follow the Legislature. In *Nev. Yellow Cab*, the court discussed two earlier decisions dealing with a legislative amendment that clarified a

statute after a controversy arose, *Qunilan v. MidCentury Ins*., 103 Nev. 399, 741 P.2d 822 (1987) and *Breithaupt v. USAA Prop. & Cas. Ins. Co*., 867 P.2d 402, 405 (Nev. 1994). In *Quinlan*, the court ruled on the "must offer" notice requirement of uninsured/underinsured motorist coverage in NRS 687B.145(2), finding "insurance carriers must be required to notify their customers that such coverage is available." 103 Nev. at 403. In response to *Quinlan*, the 1990 Nevada Legislature amended the statute. In *Breithaupt*, appellant argued "the legislature considered *Quinlan* to be wrongly decided, and that the legislature had always intended the statute to impose a broader duty of disclosure upon insurers." 110 Nev. at 405, and sought retroactive application, which the Court refused. Explaining this, in *Nev. Yellow Cab*, this Court held:

> "…the issue in Breithaupt involved whether a rule passed by statute—the heightened notice requirement—should apply retroactivity. The 1987 Quinlan decision pronounced what statutory notice requirement was in effect at that time. The Legislature amended that requirement in 1990, but did not express an intent to apply the heightened standard retroactively--this court's analysis should have ended there. See Pub. Emps. Benefits Program v. Las Vegas Metro. Police Dept, 124 Nev. 138, 154, 179 P.3d 542, 553 (2008) ("In Nevada, as in other jurisdictions, statutes operate prospectively, unless the Legislature clearly manifests an intent to apply the statute retroactively." (internal quotations omitted)). It is not the duty of this court to determine whether rules adopted in statutory amendments apply retroactively based on equitable factors."

Nev. Yellow Cab Corp. v. Eighth Judicial Dist. Court, 383 P.3d 246, 251-252, 132 Nev. Adv. Rep. 77 (Nev. 2016). Clearly, the legislature clarified NRS 687B.145

when it was amended in 1990 in response to a controversy that arose over the "must offer" provision. That is, there was some ambiguity in the pre-amended version of the statute that needed clarification. But, the amended, clarified version of the statute was clear and unambiguous, and the Court refused retroactive application. As recently as last October, this Court reaffirmed the longstanding principle that "statutes operate prospectively, unless the Legislature clearly manifests an intent to apply the statute retroactively." No such intent is found in the 2015 amendment to Chapter 41A.

In the case at bar, the same analysis is present. **The plain meaning is unambiguous. SB292 (11) was crystal clear in that the amendatory provisions were prospective. SB292 (2) stated that the legislature was amending NRS 41A.017. Therefore, it was an amendatory provision. Accordingly, the amendment adding physician assistants to the definition of NRS 41A.017 can only be applied prospectively.**

The Writ must be denied.

b. The "Effective Date" Of the Change Does Not Help Ms. Segovia

In *Sandpointe Apts., LLC v. Eighth Judicial Dist. Court of State*, 313 P.3d 849, 858 (Nev. 2013) the Court found that language in a statute indicating it "becomes effective upon passage and approval"… "**does not even begin to approach the type**

of express legislative command necessary to rebut the presumption against retroactivity."

Notably, *in addition to Section 11*, SB292 has the **exact** same language: "Sec. 13. This act becomes effective upon passage and approval."

The only "evidence" of clarification is Mr. Cotton's testimony at the Legislature (see Section d, below). But, even that is insufficient to overcome the presumption against retroactivity.

c. The "Circumstances" of the Amendment Provide No Help to Ms. Segovia

Ms. Segovia does not point to <u>any</u> "controversies upon the use of doubtful phraseology"[6] in the identification of who is or who is not a provider of healthcare per NRS 41A.017. Ms. Segovia does not point to <u>any</u> other "physician assistant" cases, any district court controversies, or even any legislative controversies regarding the exclusion of Physician's Assistants.

There is no doubt there has been some confusion in Chapter 41A as to the distinction between professional negligence and medical malpractice, whether a physician's professional corporation is bound under Chapter 41A, and the proper application of the damage cap with multiple plaintiffs and multiple defendants. But, none of those issues are present here. The reason is, if a particular provider is not

[6] See *Badger*, supra.

within the specific definition of “provider of health care” that was in the KODIN[7] initiative, or the subsequent amendments, that provider is not within the statute.

The issue, confused by Ms. Segovia, is limited to physician assistants and whether they are “providers of healthcare”. The record in this matter demonstrates absolutely no controversy as to whether physician assistants were or were not part of NRS 41A.017—they were not listed in the statute. There is nothing ambiguous about this. See *Miller v. Burk*, 124 Nev. 579, 590, 188 P.3d 1112, 1120 (2008) (explaining that when a statute is clear on its face, we will not go beyond its language "to create an ambiguity when none exists").

KODIN drafted the statute in 2004. It could have included additional health care workers in the definition of “provider of health care.” It included some; omitted some. Physician assistants were excluded. This means, they were not included in NRS 41A’s specific definition of “provider of health care.” As we know, “"The preeminent canon of statutory interpretation requires us to 'presume that [the] legislature says in a statute what it means and means in a statute what it says there.'" *BedRoc Limited, LLC v. United States*, 541 U.S. 176, 183, 124 S. Ct. 1587, 158 L. Ed. 2d 338 (2004).” *Bldg. Energetix Corp. v. EHE, LP*, 294 P.3d 1228, 1232, (Nev. 2013).

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[7] Keep Our Doctors In Nevada.

As the years have gone by, there was only one change. Licensed dieticians were added to NRS 41A.017 in 2011 after being excluded in the original statute and voter initiative. See 2011 Nev. AB 289 (Sec. 49). Like physician's assistants, they were not providers of healthcare under Chapter 41A prior to 2011.[8] But, using the Legislative process, licensed dietitians were now part of NRS 41A.

"If a statute is clear and unambiguous, we give effect to the plain meaning of the words, without resort to the rules of construction." *Vanguard Piping Sys. v. Eighth Judicial Dist. Court*, 309 P.3d 1017, 1020, 129 Nev. Adv. Rep. 63 (Nev. 2013). It is plain and unambiguous that the initiative did not include "physician's assistants" in the definition of "provider of healthcare." The statute could have said "persons licensed under NRS 630 or 633" *but it didn't*. It was specific as to "physicians." Hence, only "physicians" who were licensed under NRS 630 or 633 were covered. The statute was specifically limited to "physicians" and <u>not all of the others covered under NRS 630</u>, i.e., physician assistants, medical assistants, perfusionists, or practitioners of respiratory care.

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[8] Interestingly, the Legislature in 2011 also told us that <u>it</u> was prospective: "Sections 1 to 10, inclusive, 12 to 61, inclusive, 63.5 and 64 of this act become effective on July 1, 2011, for the purpose of adopting regulations and carrying out any other administrative tasks, and on January 1, 2012, for all other purposes." 2011 Nev. ALS 273, 2011 Nev. Stat. 273, 2011 Nev. Ch. 273, 2011 Nev. AB 289, 2011 Nev. ALS 273, 2011 Nev. Stat. 273, 2011 Nev. Ch. 273, 2011 Nev. AB 289 (Section 65(2)).

The voter intent was to include physicians and the other specifically listed health care workers. "To determine the voter intent of a law that was enacted by a ballot initiative, this court has considered that ballot's explanation and argument sections." *Piroozi v. Eighth Judicial Dist. Court*, 363 P.3d 1168, 1173(Nev. 2015) (J. Douglas, dissent)(citations omitted). The "argument" sections do not discuss the "provider" issue.

However, the "Explanation" of the KODIN Ballot Question in 2004 defined for the voters who was a "provider of health care":

> "If passed, the proposal would limit the fees an attorney could charge a person seeking damages against a negligent provider of health care in a medical malpractice action. Professional negligence means a negligent act, or omission to act, by a provider of health care that is the proximate cause of a personal injury or wrongful death. A provider of health care means a physician licensed under Chapters 630 and 633 of the Nevada Revised Statutes, a dentist, licensed nurse, dispensing optician, optometrist, registered physical therapist, podiatric physician, licensed psychologist, chiropractor, doctor of Oriental medicine, medical laboratory director or technician, or a licensed hospital and its employees."

See 2004 Ballot Questions at 14.[9] "Physician's Assistants" were not in the definition of "Provider of health care" in either the "Explanation" or the "text"[10] of the statute provided to voters.

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[9] https://www.leg.state.nv.us/Division/Research/VoteNV/BallotQuestions/2004.pdf
[10] Id. at 19.

The omission of physician assistants was an exclusion. See *ARC Ecology v. U.S. Dep't of the Air Force*, 411 F.3d 1092, 1099-1100 (9th Cir. 2005)([T]he doctrine of *expressio unius est exclusio alterius* . . . teaches that omissions are the equivalent of exclusions when a statute affirmatively designates certain persons, things, or manners of operation."); see also 2A Norman J. Singer & J.D. Shambie Singer, Sutherland's Statutes & Statutory Construction § 47:23 (7th ed. 2007) ("Where a statute creates and regulates, and prescribes the mode and names the parties granted right to invoke its provisions, that mode must be followed and none other, and such parties only may act.").

Justice Kozinski of the 9th Circuit has made this a bit more persuasive: “And if a statute expressly excluded golf from its definition of "fun sports," we couldn't hold that golf is a fun sport.” *Pintos v. Pac. Creditors Ass'n*, 605 F.3d 665, 672, (9th Cir. Cal. 2010)(J. Kozinski dissenting).

The Legislature (and KODIN) could have covered anyone they wanted in the definition of provider of health care. KODIN and the Legislature decided to use very specific language in its definition. That was their choice. This Court should not re-Legislate. If a particular provider wishes to be covered under NRS 41A, then the Legislature is there for them—as well as the initiative process. In 2011, licensed dietitians used the Legislature. And, in 2015, so did physician assistants. But, before

2011, licensed dietitians were not covered; and before 2015, physician assistants were not covered.

Any other reading of NRS 41A.017 creates an ambiguity where none exists. The Legislature and KODIN were specific. "Ingenuity to create ambiguity that does not exist" cannot serve to defeat what is plain and clear in NRS 41A.017. *Miller v. Burk*, 188 P.3d 1112, 1121, 124 Nev. 579, 592 (Nev. 2008).

The Ballot Initiative in 2004[11] included NRS 41A.003 with the addition of "and sections 3 and 4 of this act":

> "41A.003 As used in this chapter, unless the context otherwise requires, the words and terms defined in NRS 41A.004 to 41A.013, inclusive, **and sections 3 and 4 of this act** have the meanings ascribed to them in those sections."

Section 4 of the text was the definition of 'provider of health care":

> "Sec. 4. "Provider of health care" means a physician licensed under chapter 630 or 633 of NRS, dentist, licensed nurse, dispensing optician, optometrist, registered physical therapist, podiatric physician, licensed psychologist, chiropractor, doctor of Oriental medicine, medical laboratory director or technician, or a licensed hospital and its employees."

So, the KODIN specific language stated that "provider of health care" had the meanings ascribed to it in Section 4—physician assistants were **not** part of the definition. There is nothing ambiguous about this.

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11 https://www.leg.state.nv.us/Division/Research/VoteNV/BallotQuestions/2004.pdf at 19-20.

Often, this Court has looked to MICRA[12] to see how California has dealt with the situation, for its evaluation. But, when MICRA was instituted it did not use the term “provider of healthcare” –instead using the term "Health care provider" and defining such to include all persons licensed within the various professional codes.[13] In other words, the statute did not parse out certain health care professionals—it specifically included all who were licensed within various codes. KODIN *could* have done that. **But, KODIN didn’t** and, the Nevada Legislature has not seen fit to change this. Instead, in 2011 it added dietitians and in 2015 it added physician assistants. To this day, numerous health care providers are not “providers of health care” as that term is specifically defined in NRS 41A.017.

The circumstances make clear that the 2015 amendment was not a clarification.

The Writ should be denied.

d. The Legislative History Does Not Help Ms. Segovia

So, with no known controversies regarding whether physician assistants were included as providers of healthcare in NRS 41A.017, all of a sudden, in 2015, the statute is amended to include physician assistants. Coincidentally, that is also when

[12] Medical Injury Compensation Reform Act.

[13] "any person licensed or certified pursuant to Division 2 (commencing with Section 500) of the Business and Professions Code." (E.g., Civ. Code, § 3333.2, subd (c)(1); Code Civ. Proc., § 340.5, subd. (1), § 425.13, subd. (b).

Mr. Cotton[14] just happened to represent Ms. Segovia in this matter. Mr. Cotton representing KODIN presented a bill (via KODIN) with Senator Roberson amending NRS 41A.071 to include physician's assistants.

Regarding the addition of persons to NRS 41A.017, on March 26, 2015, Senator Roberson merely explained that "Section 2 revises the definition of 'provider of health care to include physician assistant…" **Senator Roberson did not state that there was any confusion or any reason why a "clarification" of the statute was required**. See Appendix 000556. In fact, Senator Roberson uses the term "revises" and does not use the term "clarify."

Then, Mr. Cotton testified. The original bill listed numerous other providers—but, Mr. Cotton explained the amendment:

> "The proposed amendment was necessary because NRS 630A already has a number of different types of caregivers included. It was not our intent to add additional providers of health care into the bill. Our goal with S.B. 292 was to reiterate and clarify KODIN's intent with Question No. 3 from 2004."
>
> Having said that, we did add clinics, surgery centers or other entities that employ any such person because lawyers are filing actions not only

[14] Ms. Segovia argues that Plaintiffs implicitly suggested that Mr. Cotton provided "false testimony" regarding this. Writ at 14. First, the only suggestion was that Mr. Cotton may have had an appearance of a conflict of interest. The Court will note that Mr. Cotton did not inform the Legislature that one of his clients—a physician's assistant—would benefit from the amendment. Second, Plaintiff's counsel have only the most respect for Mr. Cotton, have been and still consider him a friend, and did not intend to "implicitly suggest" anything. The facts are what they are. Mr. Cotton did not share with the Legislature that one of his current clients would benefit from the Amendment. Of course, he was also never asked.

> against doctors but also against the clinics for which those doctors work or which those doctors operate."

Appendix 000559. Despite Mr. Cotton's testimony wherein he states that all of the NRS 41A changes are "clarifications" (not limiting such to the addition of physician assistants)—**he does not tell anyone why a "clarification" was necessary regarding the addition of physician's assistants, why there has been confusion (if there was), or why there was some ambiguity**. Accordingly, even Mr. Cotton's sole statement using the term clarification does not come close to overcoming the presumption against retroactivity.

Christian Morris of the Nevada Justice Association testified that "Senate Bill 292 is not a clarification of statute but an expansion." App. 000577. Admittedly, though, Ms. Morris was not specifically discussing the "physician assistant" provision.

However, on May 26, 2015, when the bill was in front of the Assembly Committee on Judiciary, Lesley Pittman, a KODIN representative testifying on behalf of KODIN, could not have been clearer that physician's assistants (and others) were being added because there had been changes in the healthcare delivery system over the years:

> "First, section 2 **adds** the following to the definition of provider of health care under *Nevada Revised Statutes* (NRS) 41A.017. It **adds** physician assistant, clinic, surgery center, professional corporation or physicians' group practice that employs any such person and its employees. *This was really designed because the KODIN initiative*

> *captures only physicians and hospitals, but as our health care delivery system has changed and morphed over the years, there are hospitals that have clinics and there are urgent care centers, so this is designed to capture those entities as well*."

Appendix 000609 (emphasis added). So, in the Assembly, KODIN is telling the legislature that it is "adding" physician's assistants to NRS 41A.017—not clarifying anything. And, unlike Mr. Cotton, Ms. Pittman tells us why—the health care delivery system had changed and additional persons needed to be covered. This is *extraordinarily different* than exclaiming that physician assistants were supposed to be covered in the first place or that there was some ambiguity about this. A clarification would not require "changes to the health care delivery system" for a rationale.[15] Ms. Pittman did not state that physician assistants were supposed to be covered and were just forgotten; she did not state that there was some controversy about physician assistants being covered and this would clear up confusion; and Ms. Pittman certainly did not state that this was a clarifying change. Ms. Pittman stated that physician assistants were added because of changes in the healthcare delivery system over the years.

Actually, this is the *opposite* of a clarification because a clarification would mean that the statute should always have said this. "...when an amendment clarifies a pre-existing law, "courts . . . logically conclude that [the] amendment was adopted

[15] Oddly, Ms. Segovia states that Ms. Pittman "was not trying to speak in precise terms about the statute." Writ at 16. But, Mr. Cotton was?

to make plain what the legislation had been all along from the time of the statute's original enactment." 1A Singer & Singer, *Statutes and Statutory Construction*, § 22:31, at 375." *Badger v. Eighth Judicial Dist. Court of Nev*., 132 Nev., Advance Opinion 39 (2016) (J. Pickering, dissenting). Since the amendment was needed because of changes to the health care system, physician assistants weren't in the statute originally because those changes in the health care system had not yet occurred!

Ms. Pittman's testimony, coming from KODIN, does not aid Ms. Segovia's evidence needed to overcome the presumption.

Finally, on May 28, 2015, the Research Division of the Legislative Counsel Bureau provided a discussion of SB292 to the Assembly Committee on Judiciary and stated "The bill also **revises** the definition of "provider of healthcare" to include a broader range of practitioners."[16] The LCB could have used the term "clarifies" but used the term "revises."

The point is, outside of Mr. Cotton's lone statement, the circumstances under which the change was made actually lead one to the conclusion that the changes were not a "clarification" at all but were simply an addition of physician assistants to the definition of "provider of healthcare."

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16 http://www.leg.state.nv.us/Session/78th2015/Exhibits/Assembly/JUD/AJUD1398A.pdf at A-3.

It is noteworthy that there was no evidence presented, nor even statements made, which in any way advised that there was some controversy about whether physician's assistants should have been in the original bill in 2004. Neither Dr. Manthei, Senator Roberson, Mr. Cotton or, Ms. Pittman testified about any controversy regarding physician assistants which would require a clarification. Accordingly, using Justice Pickering's analysis in *Badge*r, *supra*, there was no controversy at all and thus no temporal change with such controversy. In fact, Ms. Pittman's statements actually tell us that there was no clarification.

e. *Zhang* Does Not Support Ms. Segovia

Ms. Segovia argues that the unpublished case of *Zhang v. Barnes*, No. 67219 (Nev. Sept. 12, 2016) supports her. She is mistaken.

First, though the Bar is now allowed to cite unpublished cases, such do not establish mandatory precedent. See NRAP 36. However, they may be persuasive. Id. Here, however, the rationale underlying the statements made in *Zhang* provide no persuasion whatsoever.

Zhang involved the issue of vicarious liability and professional negligence/medical malpractice. Though the Court did state that the 2015 amendment "clarified" the law, it did not state such on a wholesale level—it was particular:

> "In 2015, in fact, the Legislature amended the definition of "provider of healthcare" in NRS 41A.017 to expressly so state. **This amendment**

> **did not change but clarified the law, stating in express statutory terms the result reached on the issue of the interplay between NRS Chapters 40 and 89 in Fierle**. Much as in Tam, 131 Nev. Adv. Rep. 80, 358 P.3d at 240, we view the 2015 amendments to NRS 41A.017 and NRS 41A.035 as confirming our reading of the applicable statutory scheme. We therefore reject Barnes' argument that the 2015 amendment to NRS 41A.017 signified the Legislature's view that, before its amendment, NRS 41A.017 implicitly excluded professional medical corporations from NRS Chapter 41A."

Zhang v. Barnes, No. 67219 (Nev. Sept. 12, 2016). And, the Court's holding makes perfect sense in the vicarious liability arena. But the statement about "clarification" was unnecessary dicta because *Fierle*, infra, already resolved the issue.

Relying on its prior holding in *Fierle v. Perez*, 125 Nev. 728, 219 P.3d 906 (2009), overruled on other grounds by *Egan v. Chambers*, 129 Nev., Adv. Op. 25, 299 P.3d 364, 367 (2013), the court held:

> "Recognizing that professional medical entities were not mentioned in NRS 41A.009's list of persons who could commit medical malpractice protected by NRS 4lA.071's affidavit requirement, *Fierle*, 125 Nev. at 734, 219 P.3d at 910, we nonetheless looked to NRS Chapter 89, addressing professional business associations, and extended NRS Chapter 4lA's affidavit requirement to the doctor's professional medical corporation, equally with the doctor himself. Id. at 735, 219 P.3d at 910-11; see also id. at 741, 744, 219 P.3d at 914, 916 (Pickering, J., concurring and dissenting) (noting cases supporting the extension of medical malpractice protections to a physician's corporate entity as well as the physician where the claim arises out of medical treatment of a patient). In doing so, we stated "NRS Chapters 41A and 89 must be read in harmony" and that, so read, "the provisions of NRS Chapter 41A must be read to include professional medical corporations." Id. at 735, 219 P.3d at 910-11."

Zhang at 14. Unlike the situation in *Fierle*, here there is no other statute relating to "physician assistants" that must be read in harmony with NRS 41A.017. Unlike the defendant provider of health care in *Zhang*, PA Segovia's liability was not vicarious of her co-defendant and therefore the analysis of NRS 41A.017 by the *Zhang* Court does not apply to PA Segovia. *Zhang* did not hold that a physician's professional corporation was entitled to retroactive application of the 2015 amendment because the court upheld *Fierle's* reading of the statute.

The underlying rationale in *Zhang* and *Fierle* is that because the liability was vicarious only, *and not independent*, corporate liability could not exceed that of the doctor. The only liability of the corporation was the doctor's liability. In other words, the doctor's entity should not be required to pay more than the doctor could. But, here, this situation does not apply. Ms. Segovia has independent liability—there is no claim for vicarious liability against the doctor for her actions.[17]

To be clear, the 2015 amendments regarding professional corporations "confirmed" the *Fierle* interpretation of the issue. *Zhang* at No. 67219 (Nev. Sept. 12, 2016). But, it did not analyze the issue regarding prospective or retroactive application—it didn't need to. The Court had already interpreted the law in *Fierle* and in 2015, the legislature confirmed same. Using the *Fierle* and *Zhang* analysis to

[17] In fact, in the Second Amended Complaint, Plaintiff Duda alleged that Ms. Segovia was employed by Dr. Elkanich. App. at 000186. In Ms. Segovia's answer, she specifically denied this. App. At 000397.

find that physician assistants were always a part of the statute (as was done with professional corporations and vicarious liability) would be akin to comparing apples to golf clubs.

Fierle and *Zhang* were decided because the employer of the negligent actor should not be required to pay more than the negligent actor.

Zhang clearly says two things. First, the issue of the applicability of Chapter 41A to a physician's professional corporation was decided by *Fierle*. Second, the 2015 Legislature clarified *Fierle's* explanation of the issue of the applicability of Chapter 41A to a physician's professional corporation by amending NRS 41A.017. That is all that *Zhang* says. Conspicuously absent from the Court's decision is any mention of retroactive application of NRS 41A.017.

There is a legal, rational, and compelling reason why the Court could not, and did not, state that the amendments to NRS 41A.017 were to be applied retroactively—the Legislature had stated otherwise! The Legislature expressly and specifically stated in Section 11 that the amendments were to be applied prospectively. Once the Legislature had unambiguously authorized prospective application of the amendments, this Court was deprived of the authority to allow retroactive application. This is fundamental to the separation of powers doctrine. The legislative branch is responsible for creating laws. The judicial branch is responsible for interpreting laws. The 2015 Nevada Legislature created a law, the

amended version of NRS 41A.017, and expressly stated the law was to take effect upon enactment—prospectively. This Court is bound to interpret that law as written. All of Ms. Segovia's arguments to the contrary, the Legislature has unambiguously spoken—NRS 41A.017 is to be prospectively applied.

Zhang does not apply.

C. <u>Agency Principles Do Not Apply Here</u>

1. <u>This Was Not Argued In The District Court And Should Not Be Considered.</u>

As this Court well knows, mandamus lies to correct clear error or an arbitrary or capricious abuse of discretion by the district court, *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008), a standard that requires adequate presentation of the issue to the district court for decision in the first instance. See *United States v. U.S. Dist. Court*, 384 F.3d 1202, 1205 (9th Cir. 2004) (declining to consider as a basis for mandamus an argument not presented to the district court because a district court's decision cannot be "so egregiously wrong as to constitute clear error where the purported error was never brought to its attention"). Even if the issues are legal (and not factual), the arguments needed to be presented to the District Court first. See *Schuck v. Signature Flight Support of Nev., Inc.*, 126 Nev. 434, 436, 245 P.3d 542, 544 (2010) ("[A] de novo standard of review does not trump the general rule that a point not urged in the trial court ... is deemed waived and will not be considered on appeal." (quotation

omitted)); *cf. Valley Health Sys., LLC v. Eighth Judicial Dist. Court*, 127 Nev. 167, 172–73, 252 P.3d 676, 679–80 (2011) (observing that the above-mentioned general rule applies to situations other than appeals from final judgments because "[a] contrary holding would lead to the inefficient use of judicial resources and allow parties to make an end run around [the lower tribunal]").

This argument should not be considered.[18]

2. Even If the Agency Law Argument Is Considered, It Completely Lacks Merit

The problem with Ms. Segovia's argument is it requires specific factual findings. This is the reason why it was important for this issue to have been considered below (but wasn't argued by Ms. Segovia)—because it requires specific factual findings.[19] The Nevada Administrative Code has already looked at the agency issue—and, *in certain circumstances*, Ms. Segovia may be Dr. Elkanich's agent as a matter of law—**but not in the circumstances herein**. Oddly, *and curiously*, Ms. Segovia cites the first line of NAC 630.375—**yet she neglects to provide this Court with the balance of the regulation** which, just like Section 11 of SB292, weakens her argument.

[18] Ms. Segovia did *mention* NAC 630.375 below—See App. at 000490. But, it was only mentioned and was not even part of the "Law and Argument" section of her brief. The "agency" issue was not argued.

[19] Ms. Segovia argues that her Writ is not "fact-based." Writ at 7. Indeed, it actually is if she is going to argue NAC 630.375.

Ms. Segovia told this Court that NAC 630.375 states "a physician assistant is considered to be and is deemed the agent of his or her supervising physician in the performance of all medical activities." Writ at 17. And, it does. But, **the regulation starts with the words "Except as otherwise provided in this section" and then provides an exception** to the rule Ms. Segovia asks this Court to apply. So, rather than simply provide an excerpt of the Regulation, Plaintiff takes this opportunity to provide what Ms. Segovia has sought to omit[20]:

> "1. **Except as otherwise provided** in this section, a physician assistant is considered to be and is deemed the agent of his or her supervising physician in the performance of all medical activities.
>
> **2. A physician assistant shall not perform medical services without supervision from his or her supervising physician, except in:**
>
> (a) **Life-threatening emergencies**, including, without limitation, at the scene of an accident; or
>
> (b) **Emergency situations**, including, without limitation, human-caused or natural disaster relief efforts.
>
> **3. When a physician assistant performs medical services in a situation described in subsection 2:**
>
> **(a) The physician assistant is not the agent of his or her supervising physician and the supervising physician is not responsible or liable for any medical services provided by the physician assistant.**
>
> (b) The physician assistant shall provide whatever medical services are possible based on the need of the patient and the training, education and experience of the physician assistant.
>
> (c) If a licensed physician is available on-scene, the physician assistant may take direction from the physician.

[20] Though Plaintiff believes in giving counsel the benefit of the doubt, it seems conveniently coincidental that experienced counsel would have missed Section 11 of SB292 ***and*** the exceptions in NAC 630.375.

> (d) The physician assistant shall make a reasonable effort to contact his or her supervising physician, as soon as possible, to advise him or her of the incident and the physician assistant's role in providing medical services."

So, if PA Segovia performed her actions when there was a life threatening emergency, or when there was an emergency situation, as a matter of law in Nevada, she was not Dr. Elkanich's agent. It's no wonder why Ms. Segovia did not provide the entire statute to this Court—the exceptions to her desired rule do not help her as her specific negligence occurred in the middle of the life-threatening emergency with Mary Haase which ultimately led to her death.

If Ms. Segovia wished to argue this issue, the place to argue it was in the District Court. There, both sides could have provided a set of undisputed facts and Judge Leavitt could have done the Rule 56 analysis. However, Ms. Segovia does not get a "mulligan" here in the Supreme Court. She failed to argue the issue.

Even here, in the Supreme Court, Ms. Segovia argues the issue, but fails to provide this Court with the full regulation which Ms. Segovia claims to give her protection as an agent. And, once the full regulation is set forth, one sees that there is a clear exception to Ms. Segovia's argument which requires a factual determination

As this Court has stated:

> "As we have repeatedly noted**, an appellate court is not an appropriate forum in which to resolve disputed questions of fact**. E.g., Sheriff v. Provenza, 97 Nev. 346, 630 P.2d 265 (1981); Buchanan

> v. Buchanan, 90 Nev. 209, 523 P.2d 1 (1974). When disputed factual issues are critical in demonstrating the propriety of a writ of mandamus, the writ should be sought in the district court, with appeal from an adverse judgment to this court. NRS 34.160; 34.220; 34.310. **The discretion of this court to entertain a petition for a writ of mandamus when important public interests are involved, State ex rel. List v. County of Douglas, 90 Nev. 272, 524 P.2d 1271 (1974), will not be exercised unless legal, rather than factual, issues are presented.**"

Round Hill Gen. Improvement Dist. v. Newman, 97 Nev. 601, 604, 637 P.2d 534, 536 (Nev. 1981)(emphasis added).

The Court should deny the Writ.

D. <u>In This Case, Public Policy Should Be Reserved To the Legislature</u>

As a final "Hail Mary", Ms. Segovia argues that as a matter of public policy[21], the Court should allow physician assistants the ability to use physician defenses despite not being covered by NRS 41A until 2015. While the Court stated in *Tam v. Eighth Judicial Dist. Court*, 358 P.3d 234, 239, 131 Nev. Adv. Rep. 80 (Nev. 2015) that <u>NRS 41A.035</u> was "rationally related" to "ensuring that adequate and affordable health care is available to Nevada's citizens," it did so in its analysis of the damage cap—<u>not for who was, or was not, covered under the cap</u>. Though the legislature in 2015 decided that physician assistants should be capped, as noted by Ms. Segovia, at the same time, the legislature decided that numerous other healthcare providers would NOT be placed within NRS 41A.017. See Writ at 19. Using Ms. Segovia's

[21] This was not argued in the District Court either. The Court should not consider it.

logic, despite what the Legislature decided, this Court should also find that practitioners of respiratory care, occupational therapists, licensed marriage and family therapists, licensed clinical counselors, music therapists, athletic trainers and perfusionists should nevertheless be covered within the statute's protections because, well, public policy favors this. And, at the same time, this Court should also find that skilled nursing facilities, assisted living facilities, massage therapists, manicurists, aestheticians, lawyers who represent doctors and lawyers who represent victims of malpractice, and anyone else who has *anything at all to do with health care* should be covered. This is what Ms. Segovia is actually advocating. While physician assistants *may* help to make medical treatment more available, so may also all of the above providers and potential "helpers" of health care. Unless this Court is going to rewrite NRS 41A to cover **anyone** having anything to do with health care, Ms. Segovia's argument must fail.

KODIN authored a voter initiative that only covered certain health care professionals in 2004. It added dietitians in 2011. It added physician assistants in 2015. But, in between 2004 and 2015, physician assistants **were not covered**. It *could* have said all persons licensed per NRS 630 or NRS 633—and then physician assistants would have been covered. **But, KODIN didn't**. And, the Legislature *could* have done so at any time. **But, it didn't**. Even in 2015, it limited the persons covered.

Ms. Segovia ends her Writ asking that she be covered because not allowing her to be covered "would run counter to public policy promoting the use of physician assistants to make medical treatments more readily available and less costly to consumers."[22] In actuality, this is exactly what Ms. Pittman told the Legislature about why KODIN was adding physician assistants—the health care market had changed since 2004. Yet, Ms. Segovia cites an article from 2004 about physician assistants and how they could save money. Maybe that's true—and maybe it's not. But that is for the legislature to decide—not this Court. Physician assistants may increase efficiency and improve access. But, so may practitioners of respiratory care, occupational therapists, licensed marriage and family therapists, licensed clinical counselors, music therapists, athletic trainers and perfusionists—each of which was denied coverage by the Legislature in 2015. By Ms. Segovia's logic each one of these—and every other health care provider who saves money and increases access should be covered under NRS 41A. However, the Legislature disagrees.

Public policy demands that this Court refrain from legislating where the Legislature itself has refrained. In 2004 the electorate was not given a definition of "provider of health care" that included physician assistants. In 2015, the legislature amended the definition of "provider of health care" and added physician assistants. Until then, physician assistants were just like the marriage and family therapists,

[22] Writ at 19.

practitioners of respiratory care, occupational therapists of today—they weren't defined as a provider of health care and thus were not covered under NRS 41A.

Most relevant, the 2015 Legislature provided specific language in the bill stating:

> "The **amendatory provisions** of this act apply to a cause of action **that accrues on or after the effective date of this act**."

Public policy demands that this Court accept that when the Legislature approved Section 11, it did so knowing what it was doing.[23]

The statutory amendments of 2015 of NRS 41A apply **prospectively**.

VI. CONCLUSION

This case is not complex. NRS 41A was amended to include physician assistants. Physician assistants were not covered under the original statute. In 2015 the Legislature amended NRS 41A.017 to include physician assistants. It also stated that the amendatory provisions only applied prospectively. Plaintiff's action accrued in March of 2012 and a lawsuit was then filed. The amendment adding physician assistants does not apply to this cause of action.

//

[23] *Williams v. Clark County Da,* 118 Nev. 473, 487-488, 50 P.3d 536, 545 (Nev. 2002)(the legislature is presumed to know what it is doing and purposefully uses specific language).

Ms. Segovia argues that the amendment was a clarification that would allow for retrospective application. Yet, even if that was the case, she would need to overcome a strong presumption of prospectivity. The first step in the analysis of whether an amended statute is applied prospectively or retrospectively is to look at the law to see if the Legislature has stated when it should apply. Section 11 makes clear the amended statute only applies to actions that accrue after the effective date of enactment—meaning, prospectively. According to the plain language of the Legislature, physician assistants are not included in NRS 41A.017 until after the 2015 amendment. Additionally, the Court looks to whether there was a prior controversy relating to ambiguous language in the statute, and two, the amendment is enacted shortly thereafter. Ms. Segovia presents no evidence of controversies at all.

The lone evidence of "clarification" is Mr. Cotton's statement without reason representing KODIN at the Legislature. But, then, Ms. Pittman (also representing KODIN) stated the complete opposite and provided a rationale for her statement—which Mr. Cotton did not have at all. The reason for the amendment was the change in the health care system. It was not a clarification.

The Legislature has told us that the amendments are prospective. The statute is not ambiguous. Though that should be the end of the inquiry, even the Legislative

history does not provide sufficient evidence to overcome the presumption of prospectively.

Ms. Segovia's "agency" arguments were not raised below, and, require fact finding. They should be ignored.

Finally, Ms. Segovia's "public policy" argument are without merit and would have this Court legislate all health care providers as "providers of health care." The Legislature did not do that and, specifically refrained from such. This Court should as well.

The Writ should be denied.

Dated this 5th day of May, 2017.

Respectfully Submitted,

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VII. CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

[✓] This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Times New Roman Font 14; or

[ ] This brief has been prepared in a monospaced typeface using [state name and version of word-processing program] with [state number of characters per inch and name of type style].

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

[✓] Proportionately spaced, has a typeface of 14 points or more, and contains 9,490 words; or

[ ] Monospaced, has 10.5 or fewer characters per inch, and contains _____ words or _____ lines of text; or

[ ] Does not exceed _____ pages.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada

Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 5th day of May, 2017.

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VIII. CERTIFICATE OF SERVICE

I hereby certify that on May 5, 2017 I electronically filed and served the foregoing Real Party in Interest Madden Duda's Answering Brief using The Supreme Court's Web Based Electronic Filing System (EFlex) in accordance with the Master Service List as Follows:

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