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IN THE SUPREME COURT OF THE STATE OF NEVADA

CHOLOE GREEN,

Petitioner,

v.

EIGHTH JUDICIAL DISTRICT COURT, DEPARTMENT IX, THE HONORABLE CRISTINA SILVA, and DEPARTMENT XXXIII, THE HONORABLE JASMIN LILLY-SPELLS,

Respondent,

and

FRANK J. DELEE, M.D.; FRANK J. DELEE, P.C.; SUNRISE HOSPITAL AND MEDICAL CENTER, LLC; ALI KIA, M.D. and NEVADA HOSPITALIST GROUP, LLP
_____/

Case No.
Dist. Ct. Case No. A-17-757722-C

PETITION FOR WRIT OF MANDAMUS

I. NRAP 26.1 DISCLOSURE

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

1. Parent Corporations and/or any publically-held company that owns 10% or more of the party's stock

   NONE

2. Law Firms that have represented Petitioner Choloe Green

   Law Office of Daniel Marks, Daniel Marks, Esq., and Nicole M. Young, Esq.

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IV. ROUTING STATEMENT

This petition should be heard by the Supreme Court because it raises an issue of first impression and statewide public importance. NRAP 17(a)(11-12). The issue involves whether a district court may summarily dismiss the ostensible agency theory of liability to prove professional negligence against a hospital when the hospital is on notice of the theory, and the court previously found a genuine issue of material fact exists to allow the issue to go before a jury.

This case involves an unusual situation that can arise with judicial reassignments. Judge Doug Smith heard the original motion for partial summary judgment regarding ostensible agency and found there was a genuine issue of material fact. (APP1-0007; APP1-0179-83.) Shortly after he made that decision, he retired, and Judge Cristina Silva was assigned to this case. (APP1-0008.)

Approximately one year after Judge Smith made that decision, Judge Silva invited Sunrise Hospital to renew its motion for partial summary judgment on ostensible agency. (APP2-0261.) She then dismissed that theory of liability solely based on the affidavit attached to Choloe's complaint, finding the affidavit was insufficient to pursue ostensible agency liability against Sunrise Hospital. (APP2-0448-50.) She did not consider the actual evidence of the case, as her predecessor, Judge Smith, had done.

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This petition raises the unique issue of how NRS 41A.071 applies to a case over two years after the case was filed and extensive discovery completed. This petition raises whether NRS 41A.071 may be used to shield a hospital from liability when the affidavit submitted shows the plaintiff is pursuing the professional negligence claim in good faith.

V. STATEMENT OF RELIEF SOUGHT

Petitioner Choloe Green ("Choloe") requests this Court issue a writ of mandamus compelling the district court to (1) deny Sunrise Hospital's renewed partial summary judgment motion on ostensible agency, and (2) grant Choloe's motion to amend her complaint to add ostensible agency and corporate negligence/ negligent supervision as theories of liability for professional negligence against Sunrise Hospital.

VI. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the district court act in excess of its discretion when it granted a partial motion for summary judgment regarding Sunrise Hospital's ostensible agency relationships in defiance of the prior judge's order that a genuine issue of material fact exists for the issue to go to the jury?

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2. Did the district court act in excess of its discretion when it refused to grant Choloe leave to amend her complaint to add ostensible agency and corporate negligence/negligent supervision as theories of liability for professional negligence based on an incorrect interpretation of NRCP 16 and the court's narrow interpretation of NRS 41A.071's affidavit requirement in violation of the statute's liberal construction?

VII. STATEMENT OF FACTS

A. Factual Background

On July 9, 2016, Frank Delee, M.D. ("Delee"), performed a cesarean section on Choloe at Sunrise Hospital. Choloe is an African-American female, who was about to turn 30 years old. She was discharged home on "post-operative day one" even though the standard of care for "a routine cesarean is a 3-4 night stay in the hospital." The standard of care was also breached relating to the first discharge because Choloe "had not even attempted to tolerate clear liquids and she had not passed flatus when she was released on post-operative day number one." (APP1-0034.)

On July 14, 2016, Choloe presented at Sunrise Hospital's emergency room because she was in extreme pain. She was admitted into Sunrise Hospital's "medical/surgical unit because of the diagnosis of sepsis." She was five days post-partum and experiencing "severe abdominal pain and reports of nausea,

vomiting, fever, and chills." (APP1-0034.) She had various conversations with doctors arranged by Sunrise Hospital. Ali Kia, M.D. (“Kia”), was assigned to provide Choloe care. She had never met him before and did not know who he was. She was treated by various nurses and other doctors, as well. (APP1-0103.)

Choloe was discharged two days later, on July 16, 2016. Choloe's discharge was discussed between Delee and the doctors treating her at Sunrise Hospital. (APP1-0034.)

This discharge violated the standard of care because "[1] she was not able to tolerate a regular diet[,] . . . [2] her KUB showed multiple dilated loops of bowel, thought to be related to a small bowel obstruction, . . . [and] [3] [a]n intraperitoneal abscess was suspected on a CT scan." Despite these issues, both Sunrise Hospital, through Kia, and Delee agreed to discharge Choloe home. (APP1-0034.)

One day after her second discharge from Sunrise Hospital, July 17, 2016, Choloe was admitted into Centennial Hills Hospital ("Centennial"), again in severe pain and with no real bowel movement. The imaging studies at Centennial showed her condition had worsened in the one day since her discharge from Sunrise Hospital. (APP1-0035.) Choloe remained hospitalized at Centennial through September 2, 2016. (APP1-0030.) She was then discharged to a rehabilitation facility. (APP1-0035.)

Dr. Karamardian opined that based on the above breaches to the standard of care by Delee and Sunrise Hospital, Choloe's "hospital course was protracted with multiple complications and . . . [then] discharged to a step down facility once her antibiotic course was felt to be completed, still on a feeding tube and in need of rehabilitation." (APP1-0035.)

Choloe turned 30 years old during her second admission at Sunrise Hospital. (APP2-0316.) After she was discharged from Centennial and then the rehabilitation facility, she had to undergo a huge change of lifestyle, especially for a 30-year-old, single woman with four children. During her time at Centennial and the rehabilitation facility, she was diagnosed with chronic obstructive pulmonary disease ("COPD") and now requires constant, 24-hour use of oxygen tanks. She also suffers other health issues related to COPD. (APP2-0318.) These health issues caused by Delee and Sunrise Hospital burden the State of Nevada through Medicaid, her insurance provider. (APP2-0317.) These health issues also prevent Choloe from obtaining meaningful employment to care for her family. (APP2-0322-23.)

B. Procedural History

On January 15, 2019, Sunrise Hospital filed its original partial motion for summary judgment on the issue of ostensible agency. (APP1-0049-96.) The district court denied that motion because it found there was a genuine issue of material fact

regarding the ostensible agency relationship between Sunrise Hospital and Kia. (APP1-0179-83.) Judge Smith decided the original motion for partial summary judgment, which was heard on March 12, 2019. (APP1-0007.) He then retired from the bench, and this case was assigned to Judge Silva on April 29, 2019. (APP1-0008.)

After Judge Smith denied the partial motion for summary judgment, Sunrise Hospital sought leave to add Kia and Nevada Hospitalist Group ("NHG"), Kia's "employer", to a third-party complaint for indemnity, which was granted by the district court. (APP1-0119-50.) Sunrise Hospital's third-party complaint was filed on June 14, 2019. (APP1-0151-56.) Kia filed his answer to that complaint on August 2, 2019. (APP1-0157-71.) NHG did not file its answer until December 27, 2019. (APP1-0172-78.) It is unknown why NHG took so long to file any responsive pleading.

The order regarding Judge Smith's denial of Sunrise Hospital's motion for summary judgment was entered on March 6, 2020, almost one year after the hearing on that motion. (APP1-0179-83.)

NHG filed a motion for judgment on the pleadings on March 25, 2020, which Kia joined. (APP1-0184-91 & APP2-0248-51.) When Judge Silva granted that motion, she invited reconsideration of the ostensible agency relationship issue

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in her minute order. (APP2-0261.) Sunrise Hospital then renewed its motion for partial summary judgment regarding ostensible agency on May 20, 2020. (APP2-0262-78.)

Choloe opposed that motion and also filed a motion seeking leave to amend her complaint to add ostensible agency and corporate negligence/negligent supervision theories of liability. (APP2-0279-334 & APP2-0335-52.)

Judge Silva granted Sunrise Hospital's renewed motion for partial summary judgment on the issue of ostensible agency and denied Choloe leave to amend her complaint to add ostensible agency and corporate negligence/negligent supervision to her complaint. (APP2-0441-43 & APP2-0444-64.)

Choloe sought reconsideration of that order and also filed a new motion for leave to amend her complaint to add Kia and NHG back into the case. (APP2-0465-74 & APP2-0475-97.) Judge Silva denied reconsideration but granted leave to add Kia and NHG back into the case. (APP3-0611-22 & APP3-0623-31.)

At the time of this filing, both Kia and NHG have accepted service of Choloe's Amended Complaint, and their responsive pleadings are forthcoming. In addition, this case was reassigned to Judge Jasmin Lilly-Spells on January 4, 2021. (APP1-0027.)

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VIII. LEGAL ARGUMENT

The original jurisdiction to issue a writ of mandamus lies with this Court. *Segovia v. Eighth Jud. Dist. Ct.*, 133 Nev. 910, 911, 407 P.3d 783, 785 (2017). "A writ of mandamus is available to compel the performance of an act which the law requires as a duty resulting from an office, trust or station, or to control a manifest abuse or an arbitrary and capricious exercise of discretion." *Id*. at 912.

Extraordinary writ relief is available when there is no "plain, speedy and adequate remedy in the ordinary course of law." *Id*. Even if such circumstances do not exist, writ relief may be granted "where the circumstances reveal urgency and strong necessity." *Id*. This Court may also grant writ relief when "an important area of law needs clarification and judicial economy is served." *Renown Reg'l Med. v. Second Jud. Dist. Ct.*, 130 Nev. 824, 828, 335 P.3d 199, 202 (2014). Writ relief is also appropriate when there is an issue of "first impression that may be dispositive in the particular case." *Humboldt Gen. Hosp. v. Sixth Jud. Dist. Ct.*, 132 Nev. 544, 547, 376 P.3d 167, 170 (2016).

Here, Choloe requests this Court reverse the district court's order granting summary judgment against her on the issue of ostensible agency in Sunrise Hospital's favor and denying her leave to amend her complaint to add the additional claim of corporate negligence/negligent supervision against Sunrise Hospital.

If this petition is not granted, then Choloe will be forced to go to trial without the ability to have her case heard on the merits because Sunrise Hospital's ostensible agency liability will not go before the jury. Post-trial appellate review of this issue would waste judicial resources because if Choloe won a post-trial appeal of this issue, a new trial would have to take place. This is a complicated case that has multiple defendants and will potentially require numerous medical experts.

Judicial economy is further served with this Court's consideration of the instant petition because of the jury trial delays COVID-19 has caused in the Eighth Judicial District Court. While this case technically has a firm trial setting, it is unknown, due to the pandemic, whether that setting will remain. (APP1-0028.)

A. Summary dismissal of the ostensible agency theory, despite fair notice and a declaration of a genuine issue of material fact by the prior judge, defies Nevada law.

Once a motion is "heard and disposed of" it may not be "renewed in the same cause, nor may the same matters therein embraced be reheard, unless by leave of the court granted upon motion." EDCR 2.24(a). Reconsideration of a prior ruling must be requested within 14 days of notice of entry of the order. EDCR 2.24(b). *Res judicata* prevents litigants who are dissatisfied with a decision from filing "serial motions until the right circumstances or the right judge allows them to achieve a different result, based on essentially the same facts." *Ellis v. Carucci*, 123 Nev. 145, 151, 161 P.3d 239, 243 (2007).

Here, Judge Smith found a genuine issue of material fact exists regarding ostensible agency. (APP1-0182.) While he made that decision before he left the bench on April 12, 2019, the order regarding that decision was not filed and entered with the court until March 6, 2020. (APP1-0179-83.) The last day to request reconsideration of that order was March 20, 2020. Sunrise Hospital never sought reconsideration of that order. Instead, Judge Silva invited Sunrise Hospital to renew its motion. (APp2-0261.) *Res judicata* is meant to prevent this exact situation because it only delays the resolution of the case. This case is now on its third judge. (APP1-0027.) The new judge in this case could take issue with Judge Silva's orders, like Judge Silva did with Judge Smith's. Due process and the administration of justice are not served when judges are permitted to second guess each other in this way.

By granting the instant petition, this Court will ensure this case is properly heard on the merits.

1. *A district court may not grant summary judgment when a genuine issue of material fact exists.*

An order granting summary judgment is reviewed *de novo*. *Droge v. AAAA Two Star Towing, Inc.*, 136 Nev. Adv. Op. 33, 465 P.3d 862, 870 (Nev. App. 2020). Under NRCP 56(c), summary judgment may not be granted "if the

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pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits," show that there is a "genuine issue as to any material fact." *Ozawa v. Vision Airlines, Inc*., 125 Nev. 556, 216 P.3d 788, 791 (2009).

A genuine issue of material fact exists when "the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Posadas v. City of Reno,* 109 Nev. 448, 452, 851 P.2d 438 (1993). On summary judgment, all evidence, "and any reasonable inferences drawn from it, must be viewed in the light most favorable to the non-moving party." *Woods v. Safeway, Inc*., 121 Nev. 724, 729, 121 P.3d 1026 (2005). Because the Nevada Rules of Civil Procedure are modeled after the federal rules, "cases interpreting the federal rules are strongly persuasive." *FCHI v. Rodriguez,* 130 Nev. 425, 433, 335 P.3d 183, 189 (2014).

"[C]redibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge... the evidence of the non-movant is to be believed and all justifiable inferences are to be drawn in [her] favor." *Anderson v. Liberty Lobby*, 477 U.S. 242, 255, 106 S.Ct. 2505 (1986); *see Pegasus v. Reno Newspaper, Inc*., 118 Nev. 706, 714, 57 P.3d 82 (2002). Further, "a judge's function at summary judgment is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Tolan v. Cotton*, 572 U.S. 650, 656 134 S.Ct. 1861, 1866 (2014) (internal quotations omitted).

In Nevada, courts are reluctant to grant summary judgment in negligence actions because whether a defendant is liable for negligence is generally a question of fact for the jury to decide. *Foster v. Costco Wholesale Corp.,* 128 Nev. 773, 291 P.3d 150, 153 (2012).

McCrosky v. Carson Tahoe Reg. Med. Ctr., considers the independent contractor relationship between a hospital and the doctors it grants privileges. 133 Nev. 930, 408 P.3d 149 (2017). In *McCrosky*, the Court reversed the district court's erroneous finding of no vicarious liability or ostensible agency stating those issues may only be determined by a jury. *Id*. at 936.

Vicarious liability, *McCrosky* holds, is "[l]iability that a supervisory party ... bears for the actionable conduct of a subordinate ...based on the relationship between the two parties." *Id.* at 932-33. The Court held the "supervisory party need not be directly at fault to be liable, because the subordinate's negligence is imputed to the supervisor." *Id*. at 933 (citing Restatement (Third) of Torts: Apportionment of Liability § 13 (Am. Law Inst. 2000)). The Court reasoned that because "NRS 41A.045 is silent regarding vicarious liability, it leaves vicarious liability intact," and survives the several liability issue created by NRS 41A.045. *Id*.

While the general rule is that a hospital is not liable for the negligence of an independent contractor, "an exception exists if the hospital selects the doctor and it is reasonable for the patient to assume that the doctor is an agent of the hospital."

Id. at 934 (internal quotations omitted). In such a scenario, it is reasonable for a patient to assume "the doctor has apparent authority to bind the hospital, making the hospital vicariously liable for the doctor's actions under the doctrine of ostensible agency." *Id*. (internal quotations omitted).

The *McCrosky* court held that "whether an ostensible agency relationship exists is generally a question of fact for the jury if the facts showing the existence of agency are disputed, or if conflicting inferences can be drawn from the facts." *Id*. (internal quotations omitted). The questions of fact for the jury include:

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

Id. When the plaintiff asserts sufficient facts as to each of these factors, the district court must make the "affirmative finding" agency exists to send this factual issue to a jury. *See Schlotfeldt v. Charter Hosp. of Las Vegas*, 112 Nev. 42, FN 3, 910 P.2d 271 (1996).

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The hospital, in *McCrosky,* used a Conditions of Admission ("COA") signed by the patient to argue the patient knew that all physicians are independent contractors and are not employees or agents of the hospital. *Id*. at 931. *McCrosky* held it was "debatable whether a typical patient would understand that statement to mean that the hospital is not liable for the physician's negligence." *Id.* at 935.

Here, Choloe presented sufficient facts for a jury determination of ostensible agency. (APP1-0182.) First, Choloe entrusted herself to Sunrise Hospital when she presented at its emergency room. (APP1-0103.) Second, after Choloe sought care from Sunrise Hospital, Kia was assigned to provide her care. (APP1-0103.) Third, it was reasonable for Choloe to believe Sunrise Hospital selected Kia because she believed all healthcare professionals that provided her care were employed by Sunrise Hospital. (APP1-0103.) Fourth, she was never told Kia was not employed by Sunrise Hospital. (APP1-0103.) The COA Choloe signed is unclear regarding the employment status of physicians. (APP1-0086-92.)

The COA signed by Choloe states, "Most or all of the physicians performing service in the hospital are independent and are not hospital agents or employees". (APP1-0086.) Additionally, that section of the COA defines "Provider" as:

> the hospital and may include healthcare professionals on the hospital's staff and/or hospital-based physicians, which include but are not limited to emergency department physicians, pathologists,

> radiologists, anesthesiologists, hospitalists, certain other licensed independent practitioner and any authorized agents, contractors, successors or assignees acting on their behalf.

(APP1-0086.) Kia testified that a hospitalist oversees "inpatient services and management including patient care and also [has a] very close association with the medical staff and administration of the facility to see that we follow the hospital guidelines." (APP1-0109.) It was based on the COA language and Choloe's affidavit that Judge Smith originally found ostensible agency is an issue of fact.

The COA language, which includes healthcare professionals on the hospital's staff and/or hospital-based physicians, including hospitalists like Kia, is more favorable to Choloe than the language at issue in *McCrosky*.

When Choloe was admitted to Sunrise Hospital, they ran various tests. She had various conversations with doctors, none of whom she chose, and whom she thought were employed by Sunrise Hospital. (APP1-0103.) Choloe did not choose Kia to be her doctor. (APP1-0108-9.) Kia admits he was assigned to Choloe through Sunrise Hospital's emergency department. (APP1-0108-10.) The decision to discharge Choloe, while signed by Kia, is based on all the medical activity over her three (3) day admission. While Sunrise Hospital is liable for Kia's actions under an ostensible agency theory, Sunrise Hospital is also liable for the act of discharging Choloe from the hospital with sepsis, a suspected small bowel

obstruction, and without actually treating Choloe for that illness. (APP1-0030 & APP1-0034.) This Court must remember she sought care from Sunrise Hospital, not Kia who she had never met prior to her admission on July 14th.

These facts are sufficient to create a genuine issue of material fact for ostensible agency liability against Sunrise Hospital for professional negligence. Judge Smith already found there was sufficient facts for this issue to go to a jury. (APP1-0182.) Even though it was a motion for summary judgment, Judge Silva refused to consider whether there is a genuine issue of material fact and proceeded with dismissal because this legal theory of liability was not included in the expert affidavit attached to Choloe's complaint. (APP2-0441-42 & APP2-0448-50.)

Judge Silva also "failed to set forth the undisputed material facts and legal determinations on which [she] relied in reaching [her] decision to grant summary judgment," as required by NRCP 56(c). *See Droge*, 468 P.3d at 879. Instead, she ignored the evidence of this case and used a narrow construction of NRS 41A.071, in violation of the Supreme Court's holding NRS 41A.071 should be liberally construed under the notice-pleading standard, to grant summary judgment. *See Baxter v. Dignity Health*, 131 Nev. 759, 763, 357 P.3d 927 (2015) (holding "NRS 41A.071 governs the threshold requirements for initial pleadings . . . not the ultimate trial of such matters").

Because Judge Silva did not apply the correct standard for summary judgment, and Judge Smith found a genuine issue of material fact for this issue, this Court should issue a writ of mandamus reversing Judge Silva's dismissal.

2. *Sunrise Hospital was provided fair and adequate notice of Choloe's ostensible agency theory of liability in accordance with NRS 41A.071.*

As a notice-pleading state, Nevada courts must "liberally construe pleadings to place into issue matters [that] are fairly noticed to the adverse party." *Droge*, 468 P.3d at 878. "A plaintiff who fails to use the precise legalese in describing [her] grievance but who sets forth the facts which support [her] complaint thus satisfies the requisites of notice pleading." *Id.* (citing *Liston v. Las Vegas Metro. Police Dept.*, 111 Nev. 1575, 1578, 908 P.2d 720, 723 (1995).) This standard, however, "does not require the legal theory relied upon to be correctly identified." *Liston*, 111 Nev. at 1578. Additionally, the plaintiff is not required "to state the specific legal theory upon which the action is based." *Id*. at 1579. All "notice" requires is "knowledge of facts which would naturally lead a . . . person to make inquiry of everything which such injury pursued in good faith would disclose." *Id.*

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A *de novo* review is required for statutory interpretation questions. *Segovia*, 133 Nev. at 912. The first consideration when interpreting a statute is whether it is ambiguous. *Id*. at 915. If unambiguous and clear, the plain meaning of the statute controls its interpretation. *Id*. Ambiguity is assessed based on whether the language is "capable of more than one reasonable interpretation." *Id*.

The expert affidavit requirement of NRS 41A.071 only requires the affidavit contain the following:

> 1. Supports the allegations contained in the action;
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> 2. Is submitted by a medical expert who practices or has practiced in an area that is substantially similar to the type of practice engaged in at the time of the alleged professional negligence;
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> 3. Identifies by name, **or describes by conduct**, each provider of health care who is alleged to be negligent; and
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> 4. Sets forth factually a specific act or acts of alleged negligence separately as to each defendant in simple, concise and direct terms.

(Emphasis added).

This statute "is a preliminary procedural rule subject to the notice-pleading standard, and thus, it must be liberally construed in a manner consistent with our NRCP 12 jurisprudence." *Zohar v. Zbiegien*, 130 Nev. 733, 739, 334 P.3d 402 (2014). This statute was intended "to lower costs, reduce frivolous lawsuits, and

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ensure that [professional negligence] actions are filed in good faith based upon competent expert medical opinion." *Estate of Curtis v. S. Las Vegas Med. Investors, LLC*, 136 Nev. Adv. Op. 39, 466 P.3d 1263, 1266 (2020).

The legislative purpose behind NRS 41A.071 was not to require theories of liability within the expert affidavit, an issue of law, but rather to ensure a legitimate medical basis to proceed with a professional negligence lawsuit. *Zohar*, 130 Nev. at 737-38. NRS 41A.071 is only a threshold requirement for initial pleadings in professional negligence cases. *Baxter v. Dignity Health*, 131 Nev. 759, 763, 357 P.3d 927 (2015). The statute does not govern "the ultimate trial of such matters." *Id*.

The district court misapplied NRS 41A.071 when it summarily dismissed the ostensible agency theory of liability for professional negligence. In dismissing a theory of liability tied to the professional negligence cause of action, the district court defied Nevada's notice-pleading standard and neglected to apply the *McCrosky* standard for ostensible agency, which the evidence of this case supports.

In *Zohar*, the Court held a professional negligence complaint and supporting affidavit must be read together. 130 Nev. at 735. It held that even if the healthcare provider names are omitted, the notice-pleading requirement is satisfied if the providers' conduct is described. *Id*. at 737-40.

By misconstruing Nevada law, and confusing the applicable standard of review relative to NRS 41A.071, the district court has prevented this case from being heard on the merits. Choloe's complaint and expert witness affidavit confirm Choloe has a doctor-verified complaint for professional negligence based on the conduct of the various individuals providing care at Sunrise. (APP1-0029-35.) In relevant part, Choloe's complaint alleges:

> 8. On July 14, 2016, after still not having a bowel movement post C-section, Choloe went to the emergency room at Sunrise Hospital, with severe abdominal pain and reports of nausea, vomiting, fever, and chills. She was admitted to the medical/surgical unit because of the diagnosis of sepsis. **Sunrise Hospital discharged Choloe on July 16, 2016, despite having a small bowel obstruction**. The discharge was discussed and confirmed by Dr. DeLee.
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> ...
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> 10. That Defendant Dr. DeLee and **Sunrise Hospital breached the standard of care in their treatment of Choloe** and as a direct and proximate result of that breach, Choloe has been damaged.

(APP1-0030.) These allegations are supported by the Affidavit of Dr. Lisa Karamardian, attached to the Complaint as Exhibit 1, which states in relevant part:

> 5. A review of the medical records also reveals that on July 14) 2016, Ms. Green presented again to Sunrise Hospital, now five (5) days post-partum, with severe abdominal pain and reports of nausea, vomiting, fever, and chills. She was admitted to the medical/surgical unit because of the diagnosis of sepsis. **She was discharged on July 16, 2016. The discharge was discussed and confirmed by Dr. DeLee. This discharge**

> **violated the standard of care. Ms. Green was discharged despite the fact that she was not able to tolerate a regular diet. Further, on the day of her discharge, her KUB showed multiple dilated loops of bowel, thought to be related to a small bowel obstruction, yet she was sent home. An intraperitoneal abscess was suspected on a CT scan, yet she was still sent home. This was a violation of the standard of care by Sunrise Hospital** and Dr. De Lee.

(APP0034.)

Reading the relevant allegations with Dr. Karamardian's sworn statement, it is clear the individuals who provided Choloe care at Sunrise Hospital, as properly described by their conduct, sufficiently put Sunrise Hospital on notice of a claim of ostensible agency. Because Sunrise Hospital is a hospital, not an individual, it would be nonsensical and fly in the face of the English language to assume any other liability for the conduct described. That is why Judge Smith originally denied Sunrise Hospital's motion for partial summary judgment. Judge Smith concluded:

> Defendant's motion is DENIED as it relates to Plaintiffs claims against the hospital for any of Dr. Kia's actions under the theory of ostensible agency. As such, Plaintiff may argue that Defendant Sunrise Hospital and Medical Center, LLC, is vicariously liable for Dr. Kia's actions under the doctrine of ostensible agency. "Whether an ostensible agency relationship exists is ... a question of fact for the jury." *McCrosky v. Carson Tahoe Regional Medical Center*, 133 Nev. Adv. Op. 115,408 P.3d 149 (2017).

(APP1-0182.)

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However, Judge Silva on the renewed motion concluded:

> 11. Sunrise Hospital is a statutory provider of healthcare per NRS § 41A.015. As a statutory provider of healthcare, the Hospital is entitled to protections offered per NRS 41A. One of such protections is the requirement that Plaintiff, in pursuing a professional negligence action against the Hospital, comply with NRS § 41A.071. To comply, Plaintiff must have provided an expert affidavit that identifies by name or describes by conduct, each provider of healthcare who is alleged to be negligent, sets forth factually by a specific act or acts, separately, in simple, concise and direct terms. Plaintiff's proposed Amended Complaint with the attached expert affidavit of Lisa Karamardian, M.D., failed to satisfy such requirements with regard to a claim that Dr. Ali Kia is an ostensible agent of Sunrise Hospital.

(APP2-0450.) This conclusion fails to consider that Choloe properly described the conduct at issue, as required by NRS 41A.071. Judge Silva failed to explain why she applied a strict construction of NRS 41A.071, when she acknowledges the statute requires the complaint and affidavit be liberally construed. (APP2-0450.)

Judge Smith's order on this motion correctly applies the liberal construction of NRS 41A.071. Because Judge Silva incorrectly applied NRS 41A.071 to this case and did not set forth the undisputed material facts and legal determinations she relied upon to grant summary judgment, as required by NRCP 56(c), this Court should issue a writ of mandamus to reverse that order.

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B. Choloe should be permitted to amend her complaint to add the ostensible agency and corporate negligence/negligent supervision theories of liability.

Pursuant to NRCP 16, the scheduling order governs various deadlines, including the deadline to amend the pleading and add parties. NRCP 16(b)(3)(A). The schedule may only be modified for good cause. NRCP 16(b)(4). The amendment of a complaint after a responsive pleading is filed is freely granted when justice requires. NRCP 15(a). It is in the sound discretion of the court to grant leave to amend a complaint. *Stephens v. S. Nev. Music Co.*, 89 Nev. 104, 105, 507 P.2d 138, 139 (1973). Absent "any apparent or declared reason- such as undue delay, bad faith or dilatory motive on the part of the movant the leave sought should be freely given." *Id*.

Here, the district court incorrectly found Choloe sought leave to amend her complaint outside the NRCP 16 deadline. In actuality, the last day to amend the pleadings and add parties, under the applicable scheduling order, was September 1, 2020. (APP2-0256.) Choloe did not miss this deadline, as the district court incorrectly concluded. (APP2-0452.) It was based on this incorrect finding the district court subjected Choloe's requested amendment to NRCP 16(b)(4)'s good cause standard, even though she was not required to show good cause.

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Choloe sought leave to amend her complaint to add the theories of ostensible agency and corporate negligence/negligent supervision because Judge Silva invited the untimely reconsideration of Judge Smith's order based on her dismissal of Sunrise Hospital's third-party defendants Kia and NHG. Choloe sought the amendment because she wanted to ensure her case is heard on the merits. She should not be precluded from adding/pursuing those additional theories of liability for her professional negligence claim against Sunrise Hospital. She was diligent in her requested amendment, well-within the operative scheduling order's September 1, 2020, deadline to seek leave to amend.

This Court is well-aware of the substance of the ostensible agency claim, discussed in Section A. For the corporate negligence/negligent supervision claim, Choloe sought to add the following allegations:

> 26. That Defendant Sunrise Hospital was negligent in its hiring, granting and retention of privileges, and supervision of Frank Delee, M.D. and Ali Kia, M.D., two (2) nonemployee doctors, that provided care to Choloe at Sunrise Hospital in July of 2016.
>
> 27. The care/treatment provided by both Dr. Delee and Dr. Kia was within the knowledge of Sunrise Hospital at the time the care/treatment was provided. This knowledge is based on Sunrise Hospital's aid and assistance to those doctors for both hospital stays.
>
> 28. That Defendant Sunrise Hospital was aware of Dr. Delee's extensive history of failing to adhere to the standard of care.

> Prior to July of 2016, he had eight (8) instances of malpractice reported to the Nevada Medical Board. The settlements for those malpractice cases totals almost $3 million. Additionally, on May 13, 2016, two months before the subject incident, Sunrise Hospital was sued because Dr. Delee breached the standard of care when he delivered a baby at Sunrise Hospital while under the influence of alcohol causing permanent damage to the baby. (*See* Complaint, filed on May 13, 2016, in the Eighth Judicial District Court, in *Sims v. Delee*, Case No. A-16-736708-C.) His intoxication while providing medical care was video-recorded where he made statements confirming his intoxication. (*See* Complaint, filed on May 13, 2016, in the Eighth Judicial District Court, in *Sims v. Delee*, Case No. A-16-736708-C, at ¶¶ 15-16.) Sunrise Hospital settled that case on January 5, 2018. (*See* Motion for Good Faith Settlement and Dismissal of Claims Against Sunrise Hospital, filed on August 22, 2018, in the Eighth Judicial District Court, in *Sims v. Delee*, Case No. A-16-736708-C.)
>
> 29. Based on Sunrise Hospital's knowledge that Dr. Delee was providing medical treatment on its premises while under the influence of alcohol, it should have immediately suspended his privileges and/or provided additional supervision of Dr. Delee while caring for patients on its premises.
>
> 30. That Sunrise Hospital, after having held itself out to be competent to render care for patients, negligently failed to provide medical staff competent to diagnose and treat the complications known to occur post-cesarean section to Plaintiff.

(APP2-0346-47.)

Estate of Curtis discusses the intersection between professional negligence and negligent supervision claims. 466 P.3d at 1266. What distinguishes *Estate of Curtis* from this case is the fact that Choloe's original complaint is for professional

negligence and complies with NRS 41A.071. (APP1-0029-35.) She attached the expert affidavit to her original complaint, whereas *Estate of Curtis* did not plead professional negligence, with a supporting expert affidavit, in its original complaint. 466 P.3d at 1265.

Choloe agrees that the ostensible agency and corporate negligence/negligent supervision theories of liability are inextricably tied to her professional negligence claim. Those theories, however, are simply ways for Choloe to prove professional negligence. She is not attempting to avoid the requirements of a professional negligence claim.

Justice requires this case be heard on the merits. These amendments are necessary if this Court believes Choloe's complaint does not sufficiently plead these theories of liability against Sunrise Hospital. Instead of granting her request for leave to amend her complaint, the district court incorrectly concluded leave could not be granted "because the proposed Amended Complaint and affidavit attached to the Motion to Amend failed to comply with NRS 41A.071." (APP2-0453.) It is unknown how the requested amendments do not comply with NRS 41A.071 when the purpose of that statute is simply to ensure professional negligence complaints against healthcare providers are brought in good faith based on a qualified, medical expert's opinion. *See Estate of Curtis*, 466 P.3d at 1266.

That statute does not require legal theories of liability be included in the expert affidavit. Choloe's original affidavit, when read in conjunction with the proposed Amended Complaint, supports her request for leave to amend. (APP2-0342-52.) NRS 41A.071 is not meant to be used as a sword against plaintiffs in this way. The district court's strict reading of that statute does not allow for this case to be heard on the merits when all parties have been on notice, at least since 2019, that the professional negligence claim against Sunrise Hospital involves ostensible agency related to the conduct of individuals providing care at Sunrise Hospital.

The district court incorrectly applies NRS 41A.071 when it requires any complaint and affidavit in a professional negligence case to "identify by name (even as John or Jane Doe/Roe) the healthcare professional who was negligent." (APP2-0453-54.) NRS 41A.071 does not require these individuals be identified by name, identification by conduct is sufficient. *See Zohar*, 130 Nev. at 737-40. It is the conduct requirement that the district court has continually neglected to consider when it utilizes such a strict interpretation.

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Because leave to amend a complaint should be freely given when justice requires, this Court should issue a writ of mandamus directing the district court to grant Choloe leave to add ostensible agency and corporate negligence/negligent supervision to her complaint.

IX. CONCLUSION

Based on the foregoing, this Court should issue a writ of mandamus compelling the district court to reverse its order granting partial summary judgment regarding ostensible agency and granting Choloe's request to amend her complaint to add ostensible agency and corporate negligence/negligent supervision theories of liability for Sunrise Hospital's professional negligence.

DATED this 20 day of January, 2021.

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VERIFICATION

NICOLE M. YOUNG, ESQ., first duly sworn under penalty of perjury under the law of the State of Nevada, deposes and says:

That I am an attorney licensed to practice law in the State of Nevada; that I represent Petitioner Choloe Green in the above-entitled action; that I have read the foregoing **PETITION FOR WRIT OF MANDAMUS**, and have personal knowledge of the contents thereof; that the same are true of my own knowledge, except as to those matters herein contained stated upon information and belief, and as to those matters, I believe them to be true.

DATED this 20 day of January, 2021.

NICOLE M. YOUNG, ESQ.

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 WordPerfect X9 in 14 point font and Times New Roman.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 21(d) because, excluding the parts of the writ exempted by NRAP 32 (a)(7)(c), it is proportionately spaced, has a typeface of 14 points or more and contains 6,131 words.

3. Finally, I hereby certify that I have read this petition, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this petition 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.

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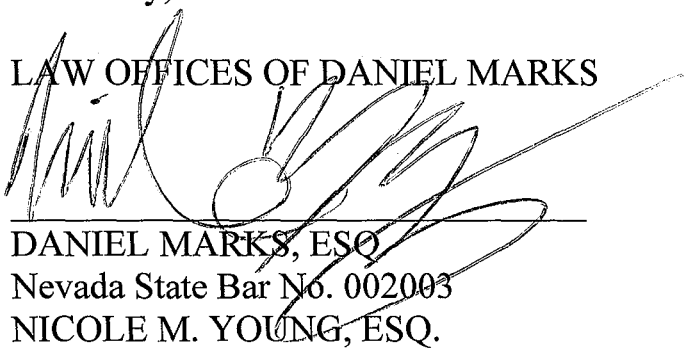
4. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellant Procedure.

DATED this 20 day of January, 2021.

LAW OFFICES OF DANIEL MARKS



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CERTIFICATE OF SERVICE BY ELECTRONIC FILING

I hereby certify that I am an employee of the LAW OFFICE OF DANIEL MARKS, and that on the 21st day of January, 2021, I did serve by way of electronic filing, a true and correct copy of the above and foregoing **PETITION FOR WRIT OF MANDAMUS** on the following:

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I further certify that I did deposit in the U.S. Mail in Las Vegas, Nevada, with first class postage fully prepaid thereon a true and correct copy of the **PETITION FOR WRIT OF MANDAMUS** to the addresses as follows:

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The Honorable Jasmin Lilly-Spells
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/s/ Jessica Flores
_____
An employee of
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