IN THE SUPREME COURT OF THE STATE OF NEVADA

ERRYS DEE DAVIS, A MINOR, THROUGH HER PARENTS TRACI PARKS AND ERRICK DAVIS; THOMAS ZIEGLER; FREDERICK BICKHAM; AND JANE NELSON,

Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; THE HONORABLE SUSAN H. JOHNSON, DISTRICT JUDGE; AND THE HONORABLE VERONICA BARISICH, DISTRICT JUDGE,

Respondents,

and

STEPHANIE A. JONES, D.O.; DANIEL M. KIRGAN, M.D.; IRA MICHAEL SCHNEIER, M.D.; MUHAMMAD SAEED SABIR, M.D.; AND JAYSON AGATON, APRN,

Real Parties in Interest.

No. 83306

Electronically Filed
Oct 07 2021 07:01 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

AMICUS CURIAE BRIEF OF THE NEVADA JUSTICE ASSOCIATION

(In Support of Petitioners)

Micah S. Echols, Esq.
Nevada Bar No. 8437
Jennifer Morales, Esq.
Nevada Bar No. 8829
Shirley Blazich, Esq.
Nevada Bar No. 8378

Shannon Wise, Esq.
Nevada Bar No. 14509
CLAGGETT & SYKES LAW FIRM
4101 Meadows Lane, Suite 100, Las Vegas, Nevada 89107
Telephone: (702) 655-2346
micah@claggettlaw.com
jmorales@claggettlaw.com
shirley@claggettlaw.com
swise@claggettlaw.com
Attorneys for Amicus Curiae, Nevada Justice Association

NRAP 26.1 CORPORATE DISCLOSURE STATEMENT

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

The Nevada Justice Association ("NJA"), an amicus curiae, is a non-profit organization of independent lawyers in the State of Nevada. NJA is represented in this matter by Micah S. Echols, Esq., Jennifer Morales, Esq., Shirley Blazich, Esq., and Shannon Wise, Esq.

NJA and its counsel did not appear in the District Court in this matter. NJA submits this brief along with its Motion for Leave, pursuant to an Order of the Nevada Supreme Court filed on September 7, 2021.

DATED this 7th day of October 2021.

CLAGGETT & SYKES LAW FIRM

By /s/ Micah S. Echols
Micah S. Echols, Esq.
Jennifer Morales, Esq.
Shirley Blazich, Esq.
Shannon Wise, Esq.
Attorneys for Amicus Curiae, Nevada Justice Association

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AMICUS INTEREST AND AUTHORITY TO FILE

NJA is a non-profit organization of independent lawyers in the State of Nevada who represent consumers and share the common goal of improving the civil justice system. NJA seeks to ensure that access to the courts by Nevadans is not diminished. NJA also works to advance the science of jurisprudence, to promote the administration of justice for the public good, and to uphold the honor and dignity of the legal profession.

Amicus intervention is appropriate where "the amicus has unique information or perspective that can help the Court beyond the help that the lawyers for the parties are able to provide." *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997); *see also Miller-Wohl Co. v. Comm'r of Labor & Indus.*, 694 F.2d 203, 204 (9th Cir. 1982) (indicating that the classic role of an *amicus curiae* is to assist in cases of general public interest and to supplement the efforts of counsel by drawing the Court's attention to law that may have escaped consideration).

NJA files this brief with an accompanying motion pursuant to NRAP 29(c). Through this proposed brief, NJA seeks to provide this

Court with broader context that NRS Chapter 41A does not provide an exclusive remedy for patients filing lawsuits against providers of healthcare. The outcome of this matter will reach far beyond the parties and the dispute here, as defendants in professional negligence actions are repeatedly taking the position that when there are additional and/or alternative causes of action, defendants generally argue that such alternative claims are "subsumed" within that plaintiff's single professional negligence cause of action. This defense argument persists, despite the fact that NRCP 8 clearly states that additional and/or alternative causes of action are allowable, and no technical form for pleadings is required.

The independent attorneys who are members of NJA represent plaintiffs who have been the victims of professional negligence (aka "medical malpractice"). Thus, NJA has a vested interest in the issues presented in this appeal. That is, NJA presents this amicus brief to have its perspective presented, as well as additional authorities beyond the current briefing. Thus, the Court should consider NJA's perspective in this litigation.

I. INTRODUCTION

The legal issue presented herein is whether a patient's exclusive remedy against a provider of health care is one for "professional negligence" under NRS Chapter 41A or whether other additional, or even alternate causes of action, may still be pleaded by a patient against a provider of health care. Can a patient plead multiple causes of action in his or her underlying cases, or must these claims be dismissed for failure to state a claim under NRCP 12(b)(5) and "subsumed" into only one cause of action for professional negligence? Even if these additional and/or alternate causes of action depend on the "medical diagnosis, judgment, or treatment" of the defendants, these additional and/or alternative causes of action are valid causes of action under Nevada law and must not be dismissed by Nevada District Courts. There is no legal authority that all causes of action that might be brought against a physician are "subsumed" into NRS Chapter 41A and that a single cause of action for professional negligence is the exclusive remedy available to a patient in a lawsuit against a provider of healthcare.

II. LEGAL ARGUMENT

A. PROFESSIONAL NEGLIGENCE PLAINTIFFS IN NEVADA ARE PERMITTED TO PLEAD MULTIPLE CAUSES OF ACTION.

In Nevada, NRCP 8 governs the general rules of pleading. NRCP 8(a) requires that a complaint "contain a short and plain statement of the claim showing that the pleader is entitled to relief." *See* NRCP 8(a); *see also Crucil v. Carson City*, 95 Nev. 583, 585, 600 P.2d 216, 217 (1979) (quoting NRCP 8(a)). A complaint need *only* "set forth sufficient facts to establish all necessary elements of a claim for relief so that the adverse party has adequate notice of the nature of the claim and relief sought." *Hay v. Hay*, 100 Nev. 196, 198, 678 P.2d 672, 674 (1984) (internal citations omitted).

The pleading of a conclusion, either of law or fact, is sufficient so long as the pleading gives fair notice of the nature and basis of the claim. *Crucil*, 95 Nev. at 585, 600 P.2d at 217 (1979) (citing *Taylor v. State of Nevada and Univ. of Nevada*, 73 Nev. 151, 152, 311 P.2d 733, 734 (1957)). "Because Nevada is a notice-pleading jurisdiction, [its] courts liberally construe pleadings to place into issue matters which are fairly noticed to the adverse party." *Hay*, 100 Nev. at 198, 678 P.2d at 674 (citing *Chavez*

v. Robberson Steel Co., 94 Nev. 597, 599, 584 P.2d 159, 160 (1978)). Each allegation must be *simple, concise, and direct*. *See* NRCP 8. No technical form is required. *Id.* A party may state as many separate claims or defenses as it has. *Id.* Pleadings must be construed so as to do justice. *Id.*

A professional negligence plaintiff, like any plaintiff, is not limited to bringing only one cause of action, as long as the facts of the case support additional, or alternative, causes of action. As such, a professional negligence plaintiff may also bring causes of action such as, but not limited to, Negligent Hiring, Training, Supervision, and Retention; and/or Wrongful Death. Regardless of whether the "gravamen" of Plaintiff's claims sounds in professional negligence or ordinary negligence, additional and/or alternative causes of action still must be allowed to remain as part of a professional negligence case. There is no basis in Nevada law for an outright dismissal of these additional and/or alternative causes of action where they meet Nevada notice pleading requirements, the claims are filed within the 1-year statute of limitations pursuant to NRS 41A.097, and they have the expert support required by NRS 41A.071, if necessary.

Defendants in professional negligence actions are repeatedly taking the position that, (1) when additional and/or alternative causes of action are based upon some or all of the same factual allegations as are contained in a plaintiff's cause of action for professional negligence, those additional and/or alternative causes of action must be dismissed for failure to state a claim upon which relief can be granted, and "subsumed" within that plaintiff's single professional negligence cause of action and (2) that where the same injury is alleged in multiple causes of action in a professional negligence plaintiff's complaint, all but the professional negligence cause of action must be dismissed because the additional and/or alternative causes of action are "subsumed" into a single cause of action for professional negligence.

However, NRCP 8 clearly states that additional and/or alternative causes of action are allowable and no technical form for pleadings is required. Plaintiffs may state as many separate claims as they have, and pleadings must be construed so as to do justice. NRCP 8(e). There is no rule that some or all factual allegations cannot be repeated within different causes of action, and there is certainly no basis to dismiss a plaintiff's causes of action merely because they mirror and/or repeat some

or all of the same factual allegations also found in other parts of the operative complaint. There is also no requirement that each and every cause of action in a plaintiff's complaint be based upon a separate and distinct injury and that additional or alternative causes of action for the same injury must be dismissed.

Dismissal under either of these two circumstances is improper. "A district court order granting a motion to dismiss is 'rigorously reviewed.'" *Kahn v. Dodds* (*In re AMERCO Derivative Litig.*), 252 P.3d 681, 692 (Nev. 2011) (quoting *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 634-35, 137 P.3d 1171, 1180 (2006)); *see also Holcomb Condo. Homeowners' Ass'n v. Stewart Venture, LLC*, 300 P.3d 124, 128 (Nev. 2013) (stating that the standard for dismissal under NRCP 12(b)(5) "is a rigorous standard"). To survive a motion to dismiss under NRCP 12(b)(5), a complaint must contain *some* "set of facts which, if true, would entitle the plaintiff to relief." *Buzz Stew, LLC v. City of North Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008). When reviewing an NRCP 12(b)(5) motion, all factual allegations in the complaint must be regarded as true. *Hampe v. Foote*, 118 Nev. 405, 408, 47 P.3d 438, 439 (2002). In fact, the court "must accept as true the complaint's allegations and draw all reasonable

inferences in [plaintiff's] favor." *Shoen*, 122 Nev. at 635, 137 P.3d at 1180; *Simpson v. Mars, Inc.*, 113 Nev. 188, 190, 929 P.2d 966, 967 (1997) (holding that the court must construe the pleadings liberally and draw every fair inference in favor of the non-moving party); *Squires v. Sierra Nevada Educ. Found.*, 107 Nev. 902, 905, 823 P.2d 256, 257 (1991) (stating that the court must construe the pleadings liberally and draw every fair inference in favor of the non-moving party). Therefore, dismissal is not proper unless it appears beyond a reasonable doubt that the plaintiff could prove no set of facts, which, if true, would entitle him to relief." *Hampe*, 118 Nev. at 408, 47 P.3d at 439. A district court's failure to recognize a viable cause of action is plain error warranting reversal. *Tahoe Village Homeowners Ass'n v. Douglas Cty.*, 106 Nev. 660, 799 P.2d 556 (1990).

A cause of action that meets the requirements of NRS 41A.071, NRS 41A.097, and NRCP 8 cannot simply be dismissed upon the premise that it is somehow "subsumed" within the cause of action for professional negligence and that one single cause of action for professional negligence is the sole and exclusive remedy of a patient filing suit against a provider of healthcare.

B. SEPARATE FACTUAL ALLEGATIONS AND SEPARATE INJURIES FOR EACH AND EVERY CAUSE OF ACTION ARE NOT REQUIRED.

A plaintiff is permitted to plead as many viable claims and causes of action as the facts of the case allow. Claims can be duplicative, and even contradictory, in an initial pleading. NRCP 8 does not limit or require any certain form of pleading. There is certainly no requirement that each and every cause of action be based upon a separate and distinct injury.

1. This Court in *Curtis* did not require the plaintiff to demonstrate separate facts or separate injuries for each cause of action pled.

In *Estate of Mary Curtis v. South Las Vegas Medical Inv'rs., LLC., d/b/a Life Care Ctr. of South Las Vegas*, 466 P.3d 1263 (Nev. 2020), the plaintiff alleged (1) that a nurse had mistakenly administered 120 milligrams of morphine to Curtis, which was not prescribed to her but, rather, was prescribed to another patient; and (2) that Life Care Center failed to monitor Curtis and send her to the hospital timely. Curtis later died, and her death certificate listed morphine intoxication as the cause of death. *Id.* at 1265. The facts supporting each of plaintiff's causes of

action were the same or similar. The result of giving Curtis the wrong medication was death. The result of failing to monitor Curtis and send her to the hospital timely was death. The injury, death, was the same under multiple causes of action and theories of liability. However, the Court in *Curtis* did not dedicate any part of its written opinion to a discussion about the fact that the alleged injury was the same under multiple causes of action or the fact that some or all of the facts were the same. Instead, the issue in *Curtis* was whether or not the plaintiffs' claims fell within the "common knowledge" exception to the expert affidavit requirement in NRS 41A.071. *Id.* at 1264.

With regard to the claim for negligent hiring, training and supervision, the *Curtis* Court found that this claim was "inextricably linked to the underlying negligence," and if the underlying negligence is professional negligence, the Estate's Complaint was subject to NRS 41A.071's affidavit requirement. *Id.* at 1266-67.

Nowhere in *Curtis* does the Court require that the claim for negligent hiring training and supervision be dismissed or "subsumed."

Defendants seek to over-simplify the issue and contend that because there is an allegation of professional negligence in a plaintiff's

complaint, then all of the other causes of action must be inextricably intertwined with the professional negligence claim and, therefore, must be dismissed and subsumed because NRS Chapter 41A is the alleged exclusive remedy in professional negligence actions. But *Curtis* contemplates a situation where there is *more than just a single claim for* professional negligence side by side in the same lawsuit, with the same basic facts and the same injury—death. Defendants would have us believe that this is never allowed as the ordinary negligence claim is subsumed within the professional negligence one. But this is exactly where the Court must be diligent and, at the initial pleading stage, draw every reasonable inference in favor of the plaintiff.

There was no separate factual basis alleged in *Curtis*, for the Negligent Hiring, Training, and Supervision claim. Therefore, if that claim were to sound in professional negligence, then it too would be subject to the affidavit requirement in NRS 41A.071 and needed to be dismissed due to a complete lack of any expert affidavit in that case. If, on the other hand, the claim sounded in ordinary negligence, then it would be permitted to survive as it did not require an expert affidavit. However, the fact that the same factual allegations and same injuries

(death) were at issue was not any factor in this Court's decision making or ruling in *Curtis*.

2. **This Court in *Zhang* did not require the plaintiff to demonstrate separate facts or separate injuries for each cause of action pled.**

The *Zhang v. Barnes*, 2016 Nev. LEXIS 2921, 382 P.3d 878 Court concluded, pertaining to plaintiffs' claims for negligent hiring, training, and supervision, that there would have been "no injury in the case and no basis for plaintiffs' lawsuit, without the negligent rendering of professional medical treatment." *Id.* at *21. The Court in *Zhang*, however, was addressing an entirely separate issue, namely, whether a claim whose "gravamen" sounded in professional negligence could be used as a basis to circumvent the non-economic damages caps found in NRS 41A.035. If a claim for negligent hiring, training, and supervision is based upon the underlying negligence only, without any independent bases which does not sound in professional negligence, then it, too, is a claim for professional negligence. It is not a basis to circumvent the caps found at NRS 41A.035. This is not the same thing as saying the claim should be dismissed or subsumed, and the *Zhang* Court did not dismiss the claim for negligent hiring, training, and supervision. The Court

merely stated that it was also a claim for professional negligence and, therefore, subject to the caps. Notably, a claim for professional negligence and a claim for negligent hiring, training, and supervision were both allowed to remain in the case. *Id.* at *22-23.

3. This Court in *Szymborski* did not require the plaintiff to demonstrate separate facts or separate injuries for each cause of action pled.

This Court in *Szymborski v. Spring Mountain Treatment Ctr.*, 133 Nev. 638, 641, 403 P.3d 1280, 1284 (2017), concluded that "when a hospital performs nonmedical services, it can be liable under principles of ordinary negligence." *Id.* (citing *DeBoer v. Senior Bridges of Sparkes Family Hosp.*, 128 Nev. 406, 282 P.3d 727 (2012)). A healthcare-based corporation's status as a medical facility cannot shield it from other forms of tort liability when it acts outside the scope of medicine." *Id.* When a plaintiff's claim is for injuries resulting from negligent acts that did not affect the medical treatment of a patient, the claim sounds in ordinary negligence. *Id.* (citing *Gunter v. Lab Corp of Am.*, 121 S.W.3d 636, 640 (Tenn. 2003)). If the reasonableness of the healthcare provider's actions can be evaluated by jurors on the basis of their common knowledge and experience, then the claim is likely based in ordinary negligence. *Id.* at

642, 403 P.3d at 1285 (citing *Bryant v. Oakpointe Villa Nursing Ctr., Inc.*, 684 N.W.2d 864, 872 (Mich. 2004)).

The Court in *Szymborski* pointed out that identifying the distinction between ordinary negligence and professional negligence is not an easy feat because the distinction may be subtle in some cases, and parties may incorrectly invoke language that designates a claim as either medical malpractice or ordinary negligence when the opposite is in fact true. *Id.* at 642, 403 P.3d at 1285 (citation omitted). Given the subtle distinction, a single set of circumstances may sound in both ordinary negligence and professional negligence, and an inartful complaint will likely use terms that invoke both causes of action. *Id.* The designations given to the claims by the plaintiff or defendant are not determinative, and a single complaint may be founded upon both ordinary negligence principles and the medical malpractice statute. *Id.* Therefore, Nevada courts must look to the gravamen or "substantial point or essence" of each claim rather than its form to see whether each individual claim is for medical malpractice or ordinary negligence. *Id.* at 643, 403 P.3d at 1285.

This Court determined that the underlying facts of Mr. Szymborski's negligence claim *could* involve medical judgment,

treatment, or diagnosis. *Id.* at 647, 403 P.3d at 1288. Regardless, "at this stage of the proceedings this court must determine whether there is ***any set of facts*** that, if true, would entitle Mr. Szymborski to relief and not whether there is a set of facts that would not provide Mr. Szymborski relief." *Id.* at 644, 403 P.3d at 1286.

Ultimately, this Court determined that Mr. Szymborski sought a remedy for the actions of various social workers, case managers, and medical assistants for not finding his son Sean suitable accommodations and transportation after he was medically discharged despite accepting, or appearing to accept, the responsibility of doing so. *Id.* at 648, 403 P.3d at 1288. Therefore, this Court, drawing every reasonable inference in favor of Mr. Szymborski, held that these claims did not sound in medical malpractice and therefore, did not need to meet the requirements of NRS 41A.071. *Id.*

Interestingly, Mr. Szymborski's claim for "malpractice, gross negligence and negligence per se" which uses terms like "medical care" and "medical treatment" in the description of the duty of care owned, the gravamen of this claim… is not based on medical judgment. *Id.* A social worker, or perhaps the Division of Public and Behavioral Health, rather

than a ***medical expert***, would be required to aid the jury in determining the applicable standard of care for these claims. *Id.* As such, these claims were determined to be based in ordinary negligence and no expert affidavit was required.

Notably, the "injury" in *Szymborski* was the $20,000 in damages Sean caused to his father's home upon discharge. *Id.* at 640, 403 P.3d at 1283. There were not separate injuries alleged in support of each cause of action because separate injuries are not necessary. Rather, there must only be factual allegations which sound in ordinary negligence, and which caused or contributed to the plaintiff's injuries. Regardless of how the causes of action are pled, the Court must allow these claims to proceed if there is ***any set of facts*** that, if true, would entitle Plaintiffs to relief. *Id.* at 644, 403 P.3d at 1286.

4. The plaintiff in a professional negligence action also alleging wrongful death is not required to demonstrate separate facts or separate injuries.

Pursuant to Nevada's wrongful death statute, NRS 41.085, the decedent's heirs and/or representatives can maintain an action for wrongful death. *Alsenz v. Clark County School Dist.*, 109 Nev. 1062, 1064, 864 P.2d 285, 286 (1993). Specifically, the statute provides that

"[w]hen the death of any person, whether or not a minor, is caused by the wrongful act or neglect of another, the heirs of the decedent and the personal representatives of the decedent may each maintain an action for damages against the person who caused the death." NRS 41.085(2). "NRS 41.085(4) further explains that the heirs may recover damages for grief and sorrow, loss of probable support, companionship, and the pain and suffering of the decedent, which may not be used to pay the decedent's debt, while NRS 41.085(5) explains that the estate may recover special damages, including those for medical and funeral expenses, and any penalties that the decedent would have been able to recover, which are liable to pay the decedent's debt." *Alcantara v. Wal-Mart Stores, Inc.*, 130 Nev. 252, 257, 321 P.3d. 912, 915 (2014).

A plaintiff may properly plead a claim for wrongful death under NRS 41.085, as a wrongful death claim may be raised by the representative of the estate or by the heirs. *Id.* at 256, 321 P.3d at 914 (citing *Alsenz v. Clark Cnty. Sch. Dist.*, 109 Nev. 1062, 1064, 864 P.2d 285, 286 (1993)). Because different remedies are available to the heirs of a decedent and the estate of a decedent, a cause of action for wrongful death is not duplicative of a claim for professional negligence. As such, a

claim for wrongful death cannot be dismissed and "subsumed" into a single cause of action for professional negligence.

A professional negligence plaintiff pleading a cause of action for professional negligence also has the right to bring additional and/or alternative causes of action which may carry different burdens of proof, entitle the plaintiff to different elements of damages, different jury instructions, different discovery, or different remedies. These rights cannot be arbitrarily dismissed or "subsumed" within a single cause of action for professional negligence.

III. CONCLUSION

In summary, the Court should issue a decision affirmatively stating that NRS Chapter 41A is not the exclusive remedy for professional negligence plaintiff in a case against a provider of healthcare. Additional, or even alternative, causes of action must be allowed as long they comply with Nevada's NRCP 8 notice pleading requirement and the requirements of NRS 41A.097 and NRS 41A.071 when the "gravamen" of the claim sounds in professional negligence.

For all the reasons presented in the writ petition and this amicus brief, the Court should grant the requested relief to petitioner.

DATED this 7th day of October 2021.

CLAGGETT & SYKES LAW FIRM

By /s/ Micah S. Echols
Micah S. Echols, Esq.
Jennifer Morales, Esq.
Shirley Blazich, Esq.
Shannon Wise, Esq.
Attorneys for Amicus Curiae, Nevada Justice Association

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this amicus curiae brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the typestyle requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

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:

☒ proportionally spaced, has a typeface of 14 points or more and contains 3,302 words: or

☐ does not exceed _____ pages.

3. Finally, I hereby certify that I have read this amicus curiae 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 7th day of October 2021.

CLAGGETT & SYKES LAW FIRM

By /s/ Micah S. Echols
Micah S. Echols, Esq.
Jennifer Morales, Esq.
Shirley Blazich, Esq.
Shannon Wise, Esq.
Attorneys for Amicus Curiae,
Nevada Justice Association

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **AMICUS BRIEF OF THE NEVADA JUSTICE ASSOCIATION (In Support of Petitioners)** was filed electronically with the Nevada Supreme Court on the 7th day of October 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Adam J. Breeden (Breeden & Associates, PLLC)
Robert L. Eisenberg (Lemons, Grundy & Eisenberg)
Anthony D. Lauria (Lauria Tokunaga Gates & Linn, LLP/Las Vegas)
Laura J. Ginnett (Hall Prangle & Schoonveld, LLC/Chicago)
Ian M. Houston (Hall Prangle & Schoonveld, LLC/Las Vegas)
Zachary J. Thompson (Hall Prangle & Schoonveld, LLC/Las Vegas)
Sean M. Kelly (McBride Hall)
Robert C McBride (McBride Hall)

I further certify that the foregoing document was emailed to the following:

The Honorable Susan H. Johnson, District Judge
Eighth Judicial District Court, Department 22
200 Lewis Avenue
Las Vegas, Nevada 89101
Dept22LC@clarkcountycourts.us

The Honorable Veronica Barisich, District Judge
Eighth Judicial District Court, Department 5
330 S. 3rd St.
Las Vegas, Nevada 89101
Dept05LC@clarkcountycourts.us

/s/ Anna Gresl

Anna Gresl, an employee of
CLAGGETT & SYKES LAW FIRM