

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

CASIANO R. FLAVIANO, M.D.,

Petitioner,

v.

THE EIGHTH JUDICIAL DISTRICT  
COURT OF THE STATE OF NEVADA  
ex rel. THE COUNTY OF CLARK, AND  
THE HONORABLE JUDGE BITA  
YEAGER,

Respondent,

and

ARLIS NEASON, as Heir of the Estate of  
JEFFREY NEASON,

Real Party in Interest,

and

DIGNITY HEALTH MEDICAL GROUP,  
NEVADA, LLC, a domestic limited-  
liability company; SUSHIL R. PATEL,  
M.D.; DOES I through X; and ROE  
BUSINESS ENTITIES I through X;  
inclusive,

Additional Parties in Interest.

Supreme Court No.:

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Nov 22 2021 01:15 p.m.

District Court No. A-20-824585-C  
Elizabeth A. Brown  
Clerk of Supreme Court

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**PETITION FOR WRIT OF MANDAMUS**

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## **NRAP 26.1 DISCLOSURE**

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.

1. All parent corporations and publicly-held companies owning 10 percent or more of the party's stock: None
2. Names of all law firms whose attorneys have appeared for the party or amicus in this case (including proceedings in the district court or before an administrative agency) or are expected to appear in this court: Lewis Brisbois Bisgaard & Smith LLP; Greenman Goldberg Raby & Martinez; Arntz Associates; McBride Hall; Gordon Rees Scully Mansukhani LLP.
3. If litigant is using a pseudonym, the litigant's true name: N/A

Dated this 22<sup>nd</sup> day of November 2021.

LEWIS BRISBOIS BISGAARD & SMITH LLP

/s/ Katherine Gordon

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## **I. RELIEF SOUGHT**

Petitioner Casiano R. Flaviano, M.D. respectfully requests that this Court issue a Writ of Mandamus pursuant to Nev. Rev. Stat. § 34.150 et seq., Nev. R. App. P. 21 and Nev. Const. art. VI, § 4, directing Respondent to grant Petitioner's Motion to Dismiss based on Real Party in Interest Arlis Neason's ("Plaintiff") failure to fulfill the requirements of N.R.S. 41A.071. Respondent improperly found that Plaintiff's proffered medical expert, who specializes in the area of General Surgery, is qualified to render standard of care and causation opinions regarding the actions of Petitioner who specializes in the area of Physical Medicine and Rehabilitation ("PMR").

## **II. ROUTING STATEMENT**

This matter is presumptively retained by the Nevada Supreme Court pursuant NRAP 17(a)(12). The Petition raises as a principal issue a question of statewide public importance.

## **III. ISSUE PRESENTED**

Should Respondent have dismissed Plaintiff's professional negligence claim against Petitioner based on a violation of N.R.S. 41A.071 when Plaintiff's medical expert affidavit was authored by a general surgeon who does not practice, and has never practiced, in an area that is substantially similar to the type of practice engaged by Petitioner (Physical Medicine and Rehabilitation) at the time of the alleged professional negligence?

## **IV. INTRODUCTION**

### **A. Relevant Procedural History**

Petitioner is a Defendant in the underlying matter. The initial Complaint was filed on November 11, 2020<sup>1</sup> and an Amended Complaint was filed January 14, 2021.<sup>2</sup> Plaintiff alleged the following causes of action against Petitioner: (1) medical negligence, and (2) negligent hiring, retention, and supervision.

On January 20, 2021, Petitioner filed his Motion to Dismiss Plaintiff's First Amended Complaint on the basis Plaintiff failed to fulfill the requirements of N.R.S. 41A.071, and additionally for dismissal of the negligent hiring, supervision, and training cause of action and Plaintiff's request for punitive damages.<sup>3</sup> On January 25, 2021, Defendant Sushil R. Patel, M.D. filed his Joinder to Petitioner's Motion to Dismiss.<sup>4</sup> Plaintiff filed her Opposition to Petitioner's Motion to Dismiss and to Dr. Patel's Joinder on February 8, 2021.<sup>5</sup> On February 16, 2021, Petitioner filed his Reply in Support of his Motion to Dismiss.<sup>6</sup> Dr. Patel filed his Joinder to the Reply

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<sup>1</sup> Petitioner's Appendix, Vol. 1, Exhibit 1, pp. 2-20.

<sup>2</sup> Petitioner's Appendix, Vol. 1, Exhibit 2, pp. 22-41.

<sup>3</sup> Petitioner's Appendix, Vol. 1, Exhibit 3, pp. 43-58.

<sup>4</sup> Petitioner's Appendix, Vol. 1, Exhibit 4, pp. 60-62.

<sup>5</sup> Petitioner's Appendix, Vol. 1, Exhibit 5, pp. 64-93.

<sup>6</sup> Petitioner's Appendix, Vol. 1, Exhibit 6, pp. 95-105.



the same day.<sup>7</sup>

The initial hearing on Petitioner's Motion was held on February 23, 2021. At that time, the matter was pending in Department 31 before the Honorable Joanna S. Kushner. Judge Kushner granted dismissal of Plaintiff's negligent hiring, retention, and supervision claim and dismissed Plaintiff's request for punitive damages.<sup>8</sup> Judge Kushner deferred a ruling on the requested dismissal pursuant to N.R.S. 41A.071 and allowed the parties to conduct limited discovery on the issue of whether Plaintiff's proffered medical expert, Michael Davoren, M.D., fulfilled the requirements of N.R.S. 41A.071.<sup>9</sup> Judge Kushner instructed the parties to file supplemental points and authorities regarding the Motion to Dismiss following the limited discovery.<sup>10</sup>

On April 5, 2021, Defendant Dignity Health Medical Group ("Dignity") filed a Limited Joinder to Petitioner's Motion to Dismiss.<sup>11</sup> Dignity filed a separate Motion to Dismiss Plaintiff's First Amended Complaint on April 30, 2021.<sup>12</sup>

On May 28, 2021, Petitioner filed Supplemental Memorandum of Points and

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<sup>7</sup> Petitioner's Appendix, Vol. 1, Exhibit 7, pp. 107-109.

<sup>8</sup> Petitioner's Appendix, Vol. 1, Exhibit 8, p. 112, ¶2.

<sup>9</sup> *Id.* at ¶3.

<sup>10</sup> *Id.* at pp. 112-113, ¶8.

<sup>11</sup> Petitioner's Appendix, Vol. 1, Exhibit 9, pp. 120-124.

<sup>12</sup> Petitioner's Appendix, Vol. 1, Exhibit 10, pp. 126-134.

Authorities in Support of the Motion to Dismiss.<sup>13</sup> On June 1, 2021, Dr. Patel filed a Substantive Joinder to the Supplemental Memorandum of Points and Authorities.<sup>14</sup> On June 2, 2021, Dignity filed its Joinder to the Supplemental Memorandum of Points and Authorities.<sup>15</sup> Plaintiff filed her Supplemental Opposition to Petitioner's Motion to Dismiss and to Dr. Patel's Joinder on June 9, 2021.<sup>16</sup> On July 29, 2021, Plaintiff filed his Opposition to Dignity's separately filed Motion to Dismiss Plaintiff's First Amended Complaint.<sup>17</sup>

The continued court hearing on Petitioner's Motion to Dismiss, and Joinders thereto, was rescheduled on numerous occasions before Judge Kushner to allow the Court to hear the entirety of Motions (including Dignity's) at the same time. The matter was then re-assigned from Judge Kushner to Department 1 (the Honorable Bitá Yeager) on September 9, 2021.<sup>18</sup> The continued hearing was finally held before Judge Yeager (Respondent) on September 23, 2021. Respondent verbally denied Petitioner's Motion to Dismiss Plaintiff's claims premised on a failure to fulfill the

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<sup>13</sup> Petitioner's Appendix, Vol. 1, Exhibit 12, pp. 177-227.

<sup>14</sup> Petitioner's Appendix, Vol. 1, Exhibit 13, pp. 228-230.

<sup>15</sup> Petitioner's Appendix, Vol. 1, Exhibit 14, pp. 232-234.

<sup>16</sup> Petitioner's Appendix, Vol. 2, Exhibit 15, pp. 236-285.

<sup>17</sup> Petitioner's Appendix, Vol. 2, Exhibit 16, pp. 286-308.

<sup>18</sup> Petitioner's Appendix, Vol. 2, Exhibit 17, p. 310.

requirements of N.R.S. 41.071.<sup>19</sup> Respondent further denied all Joinders to the Motion to Dismiss.

A written Order denying Petitioner’s Motion to Dismiss, and all Joinders, was issued on October 11, 2021.<sup>20</sup> In the absence of any detail—provided verbally during the court hearing or in the written order—Respondent found that Plaintiff’s medical expert affidavit was “sufficient and meets the standards of NRS 41A.071.”<sup>21</sup> The Order inherently found that Plaintiff’s General Surgery expert possessed sufficient knowledge of the standard of care applicable to a Physical Medicine and Rehabilitation specialist in a rehabilitation care and treatment setting. Respondent issued this finding despite the lack of claims involving surgery of any sort, and despite the expert’s admission to a complete absence of background, training, and experience in Physical Medicine and Rehabilitation.

**B. Statement of Relevant Facts**

Jeffrey Neason was an inpatient at Defendant Dignity Rehabilitation for five days, from November 8, 2019 to November 13, 2019.<sup>22</sup> He was transferred to

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<sup>19</sup> Respondent also initially denied the requested dismissal of Plaintiff’s negligent hiring, retention, and supervision claims not knowing the claims were previously denied by Judge Kishner.

<sup>20</sup> Petitioner’s Appendix, Vol. 2, Exhibit 18, pp. 314-330.

<sup>21</sup> Petitioner’s Appendix, Vol. 2, Exhibit 18, p. 317.

<sup>22</sup> Petitioner’s Appendix, Vol. 1, Exhibit 2, pp. 26-27, ¶¶25-41.

Dignity Rehabilitation following a hospital admission at St. Rose Dominican – Siena Campus from November 3, 2019 to November 8, 2019.<sup>23</sup> At St. Rose, Mr. Neason was treated for complaints of chest and back pain and a recent diagnosis of a left jugular vein thrombosis.<sup>24</sup> The St. Rose staff also noted that Mr. Neason’s medical history included a motor vehicle accident four months earlier.<sup>25</sup>

During his first day of hospitalization at St. Rose, Mr. Neason suffered a non-ST segment elevation myocardial infarction (a heart attack).<sup>26</sup> The family declined the recommended heart catheterization procedure.<sup>27</sup> Mr. Neason remained on Eliquis, an anticoagulation medication, which had been prescribed prior to his hospitalization.<sup>28</sup> The following day, a CT of the head was ordered to evaluate Mr. Neason’s new onset of visual changes and mild gait ataxia.<sup>29</sup> The CT was suspicious for acute ischemia/infarct (a stroke).<sup>30</sup> Additional testing was ordered and it was determined that Mr. Neason was not a candidate for tPA (tissue plasminogen

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<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at p. 25, ¶¶14-15.

<sup>25</sup> *Id.* at p. 36, ¶12.

<sup>26</sup> *Id.* at p. 38, ¶19.

<sup>27</sup> *Id.* at pp. 36-37, ¶12.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at p. 37, ¶13.

<sup>30</sup> *Id.*

activator used to treat an acute ischemic strokes).<sup>31</sup> Two days later, on November 6, 2019, Mr. Neason was wheezing and had shortness of breath.<sup>32</sup> He was diagnosed with multilobar pneumonia.<sup>33</sup>

On November 8, 2019, Mr. Neason was transferred to Dignity Rehabilitation for medical supervision due to encephalopathy and multiple complex medical conditions worsened by numerous comorbidities.<sup>34</sup> In his capacity as a Physical Medicine and Rehabilitation specialist, Dr. Flaviano (Petitioner) undertook the supervision of care and treatment provided for all 21 of Mr. Neason's significant medical problems. Importantly, one significant medical condition was the presence of a left jugular vein thrombosis for which Mr. Neason was placed on Eliquis, coupled with stroke-like symptoms that occurred at St. Rose Dominican Hospital just prior to his transfer to Dignity Rehabilitation.<sup>35</sup> In light of Mr. Neason's significant underlying conditions, Dr. Flaviano was tasked with using his specialized medical knowledge and judgment in treating an existing jugular thrombosis for a patient who also suffers from abdominal conditions that could result in a

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<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at p. 37, ¶14.

<sup>33</sup> *Id.*

<sup>34</sup> *See Id.* at pp. 25-26, ¶¶18-25.

<sup>35</sup> *Id.* at ¶¶16-20.

gastrointestinal bleed. As part of this coordinated care, Dr. Flaviano was understandably concerned about discontinuing Mr. Neason's anticoagulant medication which result in another stroke.

On November 9, 2019, Dr. Flaviano evaluated Mr. Neason.<sup>36</sup> A rehabilitation and medical plan was put into place, including a follow-up consultation with Defendant Sushil Patel, M.D., an Internal Medicine specialist. Dr. Flaviano saw Mr. Neason again on November 11, 2019. A review of Mr. Neason's lab results from November 10, 2019 revealed hemoglobin levels of 9.8 g/dL.<sup>37</sup> Dr. Patel conducted a consultation on November 11, 2019 and the November 10, 2019 hemoglobin count of 9.8 g/dL.<sup>38</sup> Dr. Patel continued Mr. Neason's Eliquis and included an order to monitor the hemoglobin while taking Eliquis and also monitor for a GI bleed.<sup>39</sup>

On November 12, 2019, Mr. Neason's hemoglobin levels continued to drop.<sup>40</sup> Dr. Flaviano discontinued the Eliquis.<sup>41</sup> On November 13, 2019, Mr. Neason was in a kneeling position on the bathroom floor with black stool residue on his pants.<sup>42</sup>

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<sup>36</sup> *Id.* at p. 26, ¶28.

<sup>37</sup> *Id.* at ¶31.

<sup>38</sup> *Id.* at pp. 27, ¶¶ 32-34.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at ¶35.

<sup>41</sup> *Id.* at ¶ 37.

<sup>42</sup> *Id.* at ¶ 38.

Dr. Flaviano, Dr. Patel, and Mr. Neason’s mother were informed, and Mr. Neason was transferred to the St. Rose Hospital – Siena Campus emergency room via community transport.<sup>43</sup> After arriving in the emergency room, Mr. Neason passed away with his cause of death listed as “Complications for Colon Cancer” which was a prior diagnosis that was not communicated to Dr. Flaviano or anyone at Dignity Rehabilitation.<sup>44</sup>

Seven days prior to expiration of the statute of limitations, Plaintiff (Mr. Neason’s mother) filed the current lawsuit against Dignity Rehabilitation, Dr. Flaviano, and Dr. Patel. Plaintiff alleged that all Defendants failed to order sufficient repeat hemoglobin testing, failed to discontinue the Eliquis, failed to order adequate workup for possible gastrointestinal bleeding, and should have transferred Decedent to an acute care facility sooner.<sup>45</sup> The entirety of Plaintiff’s allegations were supported by the declaration of Michael Davoren, M.D., a general surgeon.<sup>46</sup>

Neither Plaintiff’s Amended Complaint nor the corresponding declaration of Dr. Davoren provided detailed information regarding the care rendered by Dr. Flaviano and how his specific actions fell below the applicable standard of care.

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<sup>43</sup> *Id.* at ¶ 41.

<sup>44</sup> *Id.*

<sup>45</sup> Petitioner’s Appendix, Vol. 1, Exhibit 1, p. 20.

<sup>46</sup> Petitioner’s Appendix, Vol. 1, Exhibit 1, pp. 13-20.

Alternatively, the Amended Complaint and declaration generally referenced two occasions wherein Dr. Flaviano evaluated Mr. Neason at Dignity Rehabilitation. The first occasion is undated and merely stated that Dr. Flaviano evaluated Mr. Neason, reduced the amount of Eliquis, and recorded Mr. Neason's hemoglobin test result of 11.4.<sup>47</sup> The second occasion occurred on November 12, 2019 at approximately 4:30 p.m. wherein Dr. Flaviano noted Mr. Neason's elevated white blood cell count and that the Eliquis had been discontinued.<sup>48</sup>

Earlier on November 12, 2019, Mr. Neason's hemoglobin level was noted to have decreased to 7.0 (at approximately 4:00 a.m.) and then to 6.8 approximately eight hours later.<sup>49</sup> Dr. Patel saw Mr. Neason that morning and planned to discontinue the Eliquis if the blood draw scheduled for 12:20 p.m. also revealed low hemoglobin.<sup>50</sup> Dr. Patel also ordered monitoring for a gastrointestinal bleed and iron studies.<sup>51</sup> There is no further reference in the Amended Complaint to care and treatment provided by Drs. Flaviano and Patel between November 8, 2019 and November 13, 2019.

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<sup>47</sup> Petitioner's Appendix, Vol. 1, Exhibit 3, p. 47.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*



According to the Amended Complaint, and reiterated in the declaration of Dr. Davoren, when Mr. Neason's hemoglobin decreased from 11.4 to 9.8 on November 10, 2019, an occult fecal blood test and serial hemoglobin tests should have been ordered.<sup>52</sup> The Amended Complaint did not identify which Defendant(s) evaluated Mr. Neason on this date and should have ordered these tests. The Amended Complaint also alleged Mr. Neason should have been transferred to an acute care facility on November 12, 2019 when his hemoglobin decreased to 7.0 at 3:58 a.m.<sup>53</sup> No particular Defendant was identified as being responsible for Mr. Neason's care at that time who allegedly should have ordered the transfer.

Alternatively, Dr. Davoren's declaration opined generally that "on several occasions the staff and doctors Patel and Flaviano at Dignity failed to order timely, appropriate testing for diagnosing Jeffrey's gastrointestinal hemorrhage and failed to diagnose his GI bleed until 11/13/19" and that "[t]hese failures to diagnose and treat were below the standard of care and directly resulted in the death of Jeffery Neason."<sup>54</sup>

In addition to the unspecific allegations of malpractice, Dr. Davoren does not practice, and has not practiced, in an area of medicine substantially similar to the

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<sup>52</sup> Petitioner's Appendix, Vol. 1, Exhibit 3, p. 48.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

type engaged in by Dr. Flaviano at the time of the alleged professional negligence, *i.e.* Physical Medicine and Rehabilitation. Alternatively, Dr. Davoren specialty is General Surgery. Dr. Davoren's declaration states in pertinent part:

I am a full-time licensed general surgeon. In 1989, I completed a bachelor's degree in Biology / pre-medicine at College of Holy Cross. In 1993, I completed my Doctor of Medicine at the University of Oklahoma. From 1994 to 1997 I was a General Medical Officer for the United States Army. In 2002, I completed my Residency in General Surgery at the University of Kansas. In 2004, I became a Board-Certified General Surgeon. My additional qualification and training are further set forth in my curriculum vitae, which is attached. Based upon my training, background, knowledge, and experience, I am familiar with the applicable standards of care for treatment of patients demonstrating the symptoms and conditions that Jeffrey Neason presented to Dignity Healthy Rehabilitation Hospital.<sup>55</sup>

Dr. Davoren's curriculum vitae was attached to his declaration and outlines his area of specialty and experience which is limited to general surgery. Nowhere in his declaration or his CV is there any indication that Dr. Davoren possesses the background, knowledge, or experience to opine as to the standard of care applicable to a Physical Medicine and Rehabilitation specialist and his/her role in the care and treatment of a patient in a non-surgical/rehabilitation setting.

Based on the glaring differences in the specialty areas of Dr. Flaviano and Plaintiff's proffered medical expert, Dr. Flaviano filed a Motion to Dismiss

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<sup>55</sup> Petitioner's Appendix, Vol. 1, Exhibit 2, p. 35.

Plaintiff's Amended Complaint Based on a Violation of N.R.S. 41A.071. Plaintiff opposed the Motion and simply echoed the assertion in Dr. Davoren's affidavit that he is qualified to render standard of care opinions for all the defendant health care providers (including a Physical Medicine and Rehabilitation specialists, an Internal Medicine specialist (Dr. Patel), and each unidentified member of the Dignity Rehabilitation medical staff). Plaintiff failed to support this statement with any specific information regarding Dr. Davoren's experience or work history. No information was provided to support a finding that Dr. Davoren's present or former practice reasonably relates to Dr. Flaviano's practice area, or that Dr. Davoren has ever worked in a rehabilitation facility and been responsible as a physician for the overall day-to-day care and monitoring of rehabilitation patients (especially those with a complex constellation of comorbidities such as Mr. Neason). Plaintiff's Opposition stated merely that it would be an "absurd result" to deny Dr. Davoren the ability to present an affidavit under N.R.S. 41A.071.<sup>56</sup>

During the first court hearing on Petitioner's Motion to Dismiss, Judge Kishner deferred a ruling on the issue of whether Dr. Davoren fulfilled the requirements of N.R.S. 41A.071 and allowed the parties to engage in limited discovery to determine the extent of Dr. Davoren's background, knowledge, and experience. Judge Kishner instructed the parties to submit supplemental briefing on

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<sup>56</sup> Petitioner's Appendix, Vol. 1, Exhibit 5, p. 74.

the Motion to Dismiss at the conclusion of the discovery.

Dr. Davoren's deposition on this issue was taken on May 18, 2021.

During his deposition, Dr. Davoren admitted the following:

1. He is employed by Olathe Medical Center in Olathe, Kansas as a General Surgeon<sup>57</sup>;
2. He is not Board Certified in Physical Medicine and Rehabilitation<sup>58</sup>;
3. He has never practiced in the specialty area of Physical Medicine and Rehabilitation<sup>59</sup>;
4. He did not complete an internship in Physical Medicine and Rehabilitation<sup>60</sup>;
5. He did not complete a residency in Physical Medicine and Rehabilitation<sup>61</sup>;
6. He has never taught classes in Physical Medicine and Rehabilitation<sup>62</sup>;
7. He has never acted as a consultant physician in Physical Medicine and Rehabilitation<sup>63</sup>;
8. He has referred his patients to Physical Medicine and Rehabilitation

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<sup>57</sup> Petitioner's Appendix, Vol. 1, Exhibit 11, p. 149:4-6.

<sup>58</sup> *Id.* at p. 153:14-16.

<sup>59</sup> *Id.* at 17-19.

<sup>60</sup> *Id.* at 20-22.

<sup>61</sup> *Id.* at 23-25.

<sup>62</sup> *Id.* at p. 154:1-3.

<sup>63</sup> *Id.* at 4-6.

specialists<sup>64</sup>;

9. When he refers patients to Physical Medicine and Rehabilitation specialists the circumstances involve patients with musculoskeletal or injury deficits that require a care plan<sup>65</sup>;
10. He has never acted as a hospitalist at Olathe Medical Center<sup>66</sup>;
11. In November 2019 (the time of the alleged malpractice in this matter), he did not hold any privileges at a hospital or facility to perform the services of a Physical Medicine and Rehabilitation physician<sup>67</sup>;
12. During the five years before November 2019, he did not take any continuing medical education courses that were dedicated to the practice of Physical Medicine and Rehabilitation medicine<sup>68</sup>;
13. He did not review the prevailing standards of practice for Physical Medicine and Rehabilitation physicians before he signed his Affidavit in this case<sup>69</sup>;
14. He is not listed as a Physical Medicine and Rehabilitation physician at Olathe Medical Center because the facility requires board certification for that specialty and he “would be lacking that in numerous ways”<sup>70</sup>; and
15. He does not contend to be a Physical Medicine and Rehabilitation

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<sup>64</sup> *Id.* at 8-10.

<sup>65</sup> *Id.* at 16-20.

<sup>66</sup> *Id.* at 21:23-25.

<sup>67</sup> *Id.* at p.156:6-9.

<sup>68</sup> *Id.* at p.158:10-13.

<sup>69</sup> *Id.* at 14-18.

<sup>70</sup> *Id.* at 21-23.

physician.<sup>71</sup>

Based on the foregoing admissions by Dr. Davoren, it was abundantly clear that he did not fulfill the requirements of N.R.S. 41A.071 as he did not practice, and had never practiced, in an area substantially similar to Physical Medicine and Rehabilitation. Dr. Flaviano filed Supplemental Points and Authorities in Support of his Motion to Dismiss which Dr. Patel joined. Plaintiff filed a supplement to her opposition to the Motion to Dismiss and a continued court hearing was rescheduled on numerous occasions to allow the court to hear the entirety of pending motions, including Dignity Rehabilitation's separate Motion to Dismiss, at the same time.

Before the continued hearing took place, the matter was reassigned to Department 1 before the Honorable Bitia Yeager. Judge Yeager heard the continued matter on September 23, 2021. Following arguments from Petitioner and Plaintiff, Judge Yeager denied the Motion to Dismiss and ruled generally that Plaintiff's medical expert affidavit was sufficient and met the standards of N.R.S. 41A.071. No specific reasoning or rationale for the ruling was provided either during the court hearing or within the subsequent written order.

## **V. STATEMENT OF REASONS THE WRIT SHOULD ISSUE**

### **A. Standard for Writ of Mandamus**

A writ of mandamus is an extraordinary remedy that may be issued to compel

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<sup>71</sup> *Id.* at p.170:10-11.

an act that the law requires. *Cote H. v. Eighth Judicial Dist. Court*, 175 P.3d 906, 907-08, 124 (Nev. 2008). It is available to compel the performance of an act that the law requires...or to control an arbitrary or capricious exercise of discretion. *Int'l Game Tech., Inc. v. Second Judicial Dist. Ct.*, 124 Nev. 193, 179 P.3d 556, 558 (2008); *see also* N.R.S. 34.160. In that regard, this Court looks to whether the district court misinterpreted or misapplied a law or otherwise reached a decision that was founded on prejudice or contrary to the evidence or rule of law. *State v. Eighth Judicial Dist. Ct. (Armstrong)*, 127 Nev. 927, 267 P.3d 777, 779 (2011). The determination of whether to consider a petition is solely within this Court's discretion. *Smith*, 818 P.2d at 851.

Although this Court generally declines to entertain writ petitions challenging the denial of a motion to dismiss, it may nevertheless review such an order when: “(1) no factual dispute exists and the district court is obligated to dismiss an action pursuant to clear authority under a statute or rule; or (2) an important issue of law needs clarification and considerations of sound judicial economy and administration militate in favor of granting the petition.” *State v. Eighth Judicial Dist. Ct. (Anzalone)*, 118 Nev. 140, 42 P.3d 233, 238 (2002). Both scenarios are present in the instant matter. There are no factual disputes, the legal issue is dispositive, and Respondent was obligated to dismiss Plaintiff's claims based on clear statutory authority.

No factual dispute exists that Dr. Davoren does not practice, and has never

practiced, in a substantially similar area to the type engaged in by Petitioner at the time of the alleged professional negligence. Dr. Davoren admitted to these facts during deposition. It is also undisputed that Plaintiff's claims do not involve Dr. Davoren's area of specialty: general surgery. Conversely, the entirety of care at issue involves treatment at a non-surgical rehabilitation facility. Under these circumstances, Respondent was obligated to dismiss the action in its entirety against Dr. Flaviano.

This Petition also addresses a recurring and important issue of the statutory scheme regarding professional negligence actions as well as pressing public policy issues regarding the protection of medical providers in this state. "We have previously stated that where an important issue of law needs clarification and public policy is served by this court's invocation of its original jurisdiction, our consideration of a petition for extraordinary relief may be justified." *Lowe Enters. Residential Ptnrs., L.P. v. Eighth Judicial Dist. Court*, 118 Nev. 92, 97 (2002). Petitioner also has no plain, speedy, and adequate remedy in the ordinary course of law, necessitating this Court's intervention to prevent continued prejudice to Petitioner. *See* N.R.S. 34.170; *see also Smith v. Eighth Judicial Dist. Ct.*, 107 Nev. 674, 818 P.2d 849, 851 (1991).

**B. Respondent Manifestly Abused its Discretion by Denying Petitioner's Motion to Dismiss Based on Plaintiff's Failure to Comply with N.R.S. 41A.071**

**1. A substantial similarity in practice areas is required by**



### **N.R.S. 41A.071**

The requirements for expert medical affidavits in a professional negligence matter are set forth in N.R.S. 41A.071. The statute mandates a court must dismiss a complaint if the affidavit does not meet its specific requirements. The requirements are set forth as follows:

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 that:**

1. Supports the allegations contained in the action;
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;**
3. Identifies by name, or describes by conduct, each provider of health care who is alleged to be negligent; and
4. Sets forth factually a specific act or acts of alleged negligence separately as to each defendant in simple, concise and direct terms.

N.R.S. 41A.071 (emph. added).

The submission of a sufficient expert affidavit is a prerequisite for maintaining an action for medical malpractice in Nevada, and is a condition precedent to ensure the “parties file malpractice claims in good faith, i.e. to prevent the filing of frivolous lawsuits,” and to ensure that the case is meritorious. *Washoe Medical Center v. Second Judicial District Court*, 122 Nev. 1298, 148 P.3d 790, 794 (2006); *Borger v. Eighth Judicial District Court*, 120 Nev. 1021, 102 P.3d 600, 604 (2004). “A

complaint that does not comply with N.R.S. 41A.071 is void and must be dismissed; no amendment is permitted.” *Washoe Medical Center*, 148 P.3d at 794. “Because in Nevada, noncompliance with N.R.S. 41A.071’s affidavit requirement renders a complaint void *ab initio*,” and “amendment is not permitted and dismissal is required.” *Id.* at 795.

**2. Plaintiff’s medical expert does not practice in a substantially similar area of medicine as Petitioner**

Dr. Flaviano is a Board Certified Physical Medicine and Rehabilitation specialist. His specialty focuses on the designing of comprehensive, patient-centered treatment plans. Indeed, this is the specific reason Mr. Neason was transferred to Dignity Rehabilitation under the care of Dr. Flaviano. At the time of Mr. Neason’s transfer to Dignity Rehabilitation, he was suffering from a complex and complicated number of underlying medical conditions. In response to the multifaceted nature of Mr. Neason’s rehabilitation needs, Dr. Flaviano prepared a comprehensive treatment plan that involved several therapeutic modalities to treat Mr. Neason’s severe developmental disorders, cardiac conditions, impaired cognition, Crohn’s disease, and an existing left jugular vein thrombosis.

As a Physical Medicine and Rehabilitation physician, Dr. Flaviano addressed Mr. Neason’s caregiving, mobility, educational and vocational therapies, and activities of daily living such as dressing, bathing and eating. It certainly cannot be said that Mr. Neason’s presentation to the rehabilitation facility included a simple

need to be monitored for a potential gastrointestinal bleed.

In light the specific nature of Dr. Flaviano's practice, the Legislature placed requirements on the scope of practice of expert witnesses proffered by medical malpractice plaintiffs to support the allegations in their complaints. *See* N.R.S. 41A.071. In the current matter, Plaintiff was required to support her allegations against Dr. Flaviano by an expert who practices, or has practiced, in the area of Physical Medicine and Rehabilitation. Plaintiff failed to fulfill this requirement.

Plaintiff's First Amended Complaint was supported by the declaration of Michael Davoren, M.D., a general surgeon in Olathe, Kansas. The entirety of information provided by Dr. Davoren regarding his training, background, knowledge, and experience is limited to general surgery. By contrast, Petitioner Dr. Flaviano is *not* a general surgeon and was not engaged in the practice of general surgery at the time of the alleged professional negligence.

Dr. Flaviano contested the legal sufficiency of Plaintiff's expert medical declaration in a Motion to Dismiss. In response, Plaintiff argued it would be "absurd" to find that a general surgeon cannot opine as to the standard of care applicable to a Physical Medicine and Rehabilitation specialist. However, Plaintiff did not explain *why* this finding would be absurd; she failed to provide any specific information upon which Respondent could deny the Motion. Plaintiff expected that Respondent would simply assume Dr. Davoren possesses the degree of knowledge and experience to opine as to the standard of care applicable to Dr. Flaviano.

Unfortunately, Plaintiff's expectation proved correct, and Respondent denied the Motion in the absence of any factual or legal basis.

Dr. Flaviano's Motion to Dismiss provided Plaintiff the opportunity to establish for Respondent the reason Dr. Davoren qualifies as an expert under N.R.S. 41A.071 (as such were not apparent in his affidavit). Plaintiff failed to do so and instead proffered a diminished and essentially meaningless interpretation of N.R.S. 41A.071 whereby any physician can render standard of care and causations opinions, regardless of experience, background and training which is antithetical to the purpose of the affidavit requirement. While the inquiry does not necessarily turn on the classification of the proposed expert, the expert must be qualified to perform or render the medical procedure or treatment being challenged as negligent. *See Carnes v. Wairimu*, 2011 Nev. Unpub. LEXIS 504, at \*7.<sup>72</sup>

Judge Kishner provided Plaintiff with an additional opportunity to establish that Dr. Davoren was qualified under N.R.S. 41A.071 by deferring her ruling on the Motion to Dismiss pending limited discovery on the issue. Petitioner took Dr. Davoren's deposition during which Dr. Davoren admitted, as set forth specifically above, to a complete absence of experience in the area of Physical Medicine and Rehabilitation. Dr. Davoren testified in pertinent part that: (1) he does not currently

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<sup>72</sup> Per N.R.A.P. 36(c)(2), on or after January 1, 2016, an unpublished decision may be cited for its persuasive value, if any. Supreme Court Rule 123 prohibiting citation to unpublished decisions was repealed on November 12, 2015.

practice in the area of Physical Medicine and Rehabilitation<sup>73</sup>; (2) he has never practiced in the specialty area of Physical Medicine and Rehabilitation<sup>74</sup>; (3) he has never acted as a consultant physician in the area of Physical Medicine and Rehabilitation<sup>75</sup>; (4) he refers his patients to Physical Medicine and Rehabilitation specialists<sup>76</sup>; (5) when he refers patients to Physical Medicine and Rehabilitation specialists the circumstances involve patients with musculoskeletal or injury deficits that require a care plan (similar to Mr. Neason in the current matter)<sup>77</sup>; (6) he did not research the generally accepted opinions or standard of care for the specialty of Physical Medicine and Rehabilitation before signing his declaration in this case<sup>78</sup>; and (7) he does not contend to be a Physical Medicine and rehabilitation physician.

Dr. Davoren also admitted in deposition he is a fellow of the American College of Surgeons and is familiar with Statement issued by the College in April 2011 which states a general surgeon physician should not act as an expert witness unless he/she “is actively involved in clinical practice of the specialty at the time of

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<sup>73</sup> Petitioner’s Appendix, Vol. 1, Exhibit 11, p. 153:17-19.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 154:4-6.

<sup>76</sup> *Id.* at 8-10.

<sup>77</sup> *Id.* 16-20.

<sup>78</sup> *Id.* at 158:14-18.

the alleged occurrence.”<sup>79</sup> Despite his admitted familiarity with this Statement, Dr. Davoren’s involvement in the current case is directly violative of its mandate. He is attempting to act as an expert witness without being actively involved in clinical practice within Dr. Flaviano’s specialty.

Practicing specialists are required to exercise that degree of care and skill expected of a reasonably competent practitioner in his specialty acting in the same or similar circumstances; *i.e.* the applicable “standard of care”. However, Dr. Davoren admitted in deposition he did not even attempt to research the applicable standard of care or standard practices of Physical Medicine and Rehabilitation specialists before he signed his Affidavit in this case.<sup>80</sup>

Dr. Davoren is not qualified to challenge the sufficiency of care and treatment provided by a Physical Medicine and Rehabilitation specialist. Similarly, Dr. Flaviano is not qualified to challenge the sufficiency of care provided by a General Surgeon. Moreover, there are no general surgeon defendants in this matter, and no allegations in the Complaint that concern surgery—of any kind—that occurred before, during or after Mr. Neason’s admission at Dignity Rehabilitation. The allegations against Dr. Flaviano are limited to care and treatment administered by a rehabilitation specialist in a rehabilitation facility.

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<sup>79</sup> Petitioner’s Appendix, Vol. 1, Exhibit 11, p.160:24-161:3. *See also* Petitioner’s Appendix, Vol. 1, Exhibit 12, p. 225.

<sup>80</sup> Petitioner’s Appendix, Vol. 1, Exhibit 11, p. 158:14-18.

Plaintiff appears to view this case as involving the treatment of one single medical condition: a potential gastrointestinal bleed. Under this limited view, and as stated by Dr. Davoren in deposition, anyone who completes medical school is qualified to criticize the acts of Dr. Flaviano because Mr. Neason's hemoglobin counts decreased during his admission at Dignity Rehabilitation. This position is improperly narrow, self-serving, and precisely highlights the importance of the requirements set forth in N.R.S. 41A.071.

As a Physical Medicine and Rehabilitation specialist, Dr. Flaviano undertook the supervision of care and treatment provided for all 21 of Mr. Neason's significant medical problems. Importantly, one significant medical condition was the presence of a left jugular vein thrombosis for which Mr. Neason was placed on Eliquis, coupled with stroke-like symptoms that occurred at St. Rose Dominican Hospital just prior to his transfer to Dignity Rehabilitation. In light of these significant underlying conditions, Dr. Flaviano was tasked with using his specialized medical knowledge and judgment in treating the entire constellation of Mr. Neason's conditions, including the delicate balance of treating an existing jugular thrombosis in a patient who also suffers from abdominal conditions that could result in a gastrointestinal bleed. This balance included a heightened concern about abruptly discontinuing Mr. Neason's anticoagulant medication (Eliquis).

Dr. Davoren's declaration failed to address or consider the multitude of Mr. Neason's underlying medical conditions, and Dr. Flaviano's overarching task of

coordinating treatment for each, in opining that Dr. Flaviano breached the standard of care. To the contrary, Dr. Davoren focused solely on Mr. Neason's lowering hemoglobin values and opined that *all* Defendants in the case, regardless of specialty or individual actions, should have conducted additional testing and transferred Mr. Neason to the hospital at an earlier time. Dr. Davoren revealed his limited ability to appreciate the entirety of factors involved in the care and treatment provided by a Physical Medicine and Rehabilitation specialist (especially to a patient with 21 significant medical conditions) when he testified the case involved "basic medicine that we learned during our third year of medical school."<sup>81</sup>

A potential expert witness must have the degree of skill, education and experience to evaluate the actions of a defendant/physician under the *entirety* of circumstances. It is improper for Plaintiff, and her general surgeon expert, to extrapolate a single thread from the complex network of Mr. Neason's medical care in an effort to dilute it down to an issue that any physician, regardless of specialty, is capable of addressing. There is no exception in N.R.S. 41A.071(2) for cases that allegedly involve simplistic matters of medical care and treatment.

"To qualify an expert to express an opinion on what the standard of care is for the defendant medical personnel, plaintiff must show that the expert has 'more than a casual familiarity with the specialty of the defendant physician.'" *Cunningham v.*

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<sup>81</sup> Petitioner's Appendix, Vol. 1, Exhibit 11, p.168:24-169:2.



*Arizona*, 2013 U.S. Dist LEXIS 92752; 2013 WL 3335190 (D. Ariz. 2013).

This Court's decision in *Borger v. Eighth Judicial Dist. Ct.*, 120 Nev. 1021, 102 P.3d 600 (2004) is instructive where it was held: "[T]he legislation allows medical experts to testify in medical malpractice cases where their present or former practice reasonably relates to that engaged in by the defendant at the time of the alleged professional negligence." *Id.* at 1028. This Court further held whether an area of practice is substantially similar to that of the named physician depends on whether the diagnosis and treatment rendered by the named physician implicates the area of expertise of the plaintiff's proffered expert. *Id.*

In the instant matter, Plaintiff failed to demonstrate that Dr. Davoren has more than a casual familiarity with Dr. Flaviano's specialty. Dr. Davoren's declaration makes no showing that he is qualified to challenge the sufficiency of care and treatment provided by a Physical Medicine and Rehabilitation specialist in a rehabilitation setting. Plaintiff failed to obtain supportive testimony from an expert who practices, or has practiced, in Dr. Flaviano's area of medicine. Because Plaintiff's Amended Complaint did not fulfill the requirements of N.R.S. 41A.071, it is void and should have been dismissed by Respondent. *Washoe Medical Center*, 148 P.3d at 794.

## **VI. CONCLUSION**

In accordance with the above, Petitioner respectfully requests that this Court grant its Petition for Writ of Mandamus and order the Respondent to grant

Petitioner's Motion to Dismiss.

Dated this 22<sup>nd</sup> day of November 2021.

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**AFFIDAVIT AND VERIFICATION IN SUPPORT OF PETITION FOR  
WRIT OF MANDAMUS**

STATE OF NEVADA     )  
                                      ) ss:  
COUNTY OF CLARK    )

Katherine Gordon, Esq., duly sworn, deposes and says:

1. I am an attorney of record for Petitioner and make this declaration pursuant to Nev. R. App. P. 21(a)(5).
2. The facts and procedural history contained in the foregoing Petition for Writ of Mandamus are based upon personal knowledge as counsel for Petitioner. This declaration is not made by Petitioner personally because the salient issues involve procedural developments and legal analysis.
3. The contents of the foregoing Petition for Writ of Mandamus and are true and based upon my personal knowledge, except as to those matters stated on information and belief.
4. All documents contained in the Petitioner's Appendix, filed herewith, are true and correct copies of the pleadings and documents they are represented to be in the foregoing Writ of Mandamus.

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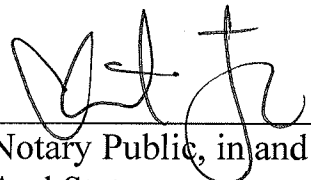
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5. This Petition complies with Nev. R. App. P. 21(a)(5), 21(d) and 32(c)(2).

FURTHER AFFIANT SAYETH NAUGHT.

Subscribed and sworn before me  
this 22<sup>nd</sup> day of November 2021.

  
\_\_\_\_\_  
Notary Public, in and for said County  
And State

  
\_\_\_\_\_  
KATHERINE J. GORDON, 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 Microsoft Word 2010 in Times New Roman 14-point type.

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 brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 5,860 words.

3. 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, and that it complies with all applicable Nevada Rules of Appellate Procedure.

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4. I understand that I may be subject to sanctions if the accompanying Petition is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 22<sup>nd</sup> day of November 2021.

LEWIS BRISBOIS BISGAARD & SMITH LLP

By /s/ Katherine J. Gordon

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## CERTIFICATE OF MAILING

I hereby certify that on this 22<sup>nd</sup> day of November 2021, I served the foregoing **PETITION FOR WRIT OF MANDAMUS** upon the following parties by placing a true and correct copy thereof in the United States Mail in Las Vegas, Nevada with first class postage fully prepaid:

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