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.:

District Court No.: A-20-824585-C

PETITIONER'S APPENDIX TO PETITION FOR WRIT OF MANDAMUS VOL. 1

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CERTIFICATE OF MAILING

I hereby certify that on this 22nd day of November, 2021, I served the foregoing **PETITIONER'S APPENDIX TO PETITION FOR WRIT OF MANDAMUS VOLUME 1** 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:

The Honorable Judge Yeager
The Eighth Judicial District Court
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By /s/ *Roya Rokni*
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CASE NO: A-20-824585-C
Department 29

DISTRICT COURT

CLARK COUNTY, NEVADA

ARLIS NEASON, as Heir of the Estate of JEFFREY NEASON, Plaintiff, vs. DIGNITY HEALTH MEDICAL GROUP, NEVADA, LLC, a domestic limited-liability company; CASIANO R. FLAVIANO, MD; SUSHIL R. PATEL, MD; DOES I through X; and ROE BUSINESS ENTITIES I through X; inclusive,	CASE NO.: DEPT. NO.: **COMPLAINT** **(Arbitration Exemption Claimed Medical Malpractice)**

Defendants.

COMES NOW, Plaintiff, Arlis Neason, as Heir of the Estate of Jeffrey Neason, by and through her attorneys of record, of GREENMAN GOLDBERG RABY & MARTINEZ, hereby associates as co-counsel for Plaintiff, BREEN ARNTZ, ESQ. of ARNTZ ASSOCIATES, and complains and alleges as follows:

I.

GENERAL ALLEGATIONS

1. That at all times relevant to this action, Plaintiff, ARLIS NEASON (herein after, "Plaintiff"), was and is a resident of the County of Clark, State of Nevada.

2. That at all times relevant to this action, Plaintiff's now deceased son, JEFFREY NEASON (hereafter, "Jeffrey Neason"), was a resident of the County of Clark, State of Nevada.

3. The actions and omissions of Defendants, and each of them, herein alleged, all occurred within the County of Clark, State of Nevada.

4. That at all times relevant to this action, Defendant, Dignity Health Medical Group, Nevada LLC, (herein after "Dignity") was and is, a domestic limited-liability company authorized to do business in the County of Clark, State of Nevada

5. Plaintiff is informed and believes and thereon alleges that at all times relevant herein, Defendant, Casiano R. Flaviano, MD (hereinafter "Dr. Flaviano"), was and is a resident of Clark County, Nevada. Upon further information and belief, Dr. Flaviano was and is a physician licensed to practice medicine in the State of Nevada pursuant to NRS Chapters 630 and 449. Upon information and belief, Dr. Flaviano provided care and treatment to Jeffrey Neason during his admission at Saint Rose / Dignity Health Medical Group.

6. Plaintiff is informed and believes and thereon alleges that at all times relevant herein, Defendant, Sushil Patel, MD (hereinafter "Dr. Patel"), was and is a resident of Clark County, Nevada. Upon further information and belief, Dr. Patel was and is a physician licensed to practice medicine in the State of Nevada pursuant to NRS Chapters 630 and 449. Upon

information and belief, Dr. Patel provided care and treatment to Jeffrey Neason during his admission at Saint Rose / Dignity Health Medical Group.

7. Defendants DOES I-X, ROE CORPORATIONS I-X, inclusive, DIGNITY, negligently hired, trained, supervised, selected, managed, and oversaw the activities of employees or agents all causing injury and damage to Plaintiff. That DIGNITY knew or should have known that other agents and employees lacked the requisite skill and learning to competently perform their obligations in their area of stated expertise and required job functions, and Plaintiff was injured as a result.

8. DOES I-X and ROE CORPORATIONS I-X, inclusive, at all times relevant herein were and are, residents and/or doing business in the County of Clark, State of Nevada. These Defendants, at all times herein mentioned, were working within the course and scope of their employ with each other and/or with said entities, were the agents, joint venturers, and/or held another legal relationship with DIGNITY and engaged in providing medical care to the Plaintiff.

9. DOES I-X, ROE CORPORATIONS I-X, inclusive, were and are, individuals and/or entities, hospitals, physicians, or other medical care providers duly admitted and authorized to practice medicine in the State of Nevada and/or were providers or transmitters of medical care and/or information, and all of whom were involved in the medical care of Plaintiff.

10. That Defendants, DOES I-X and ROE CORPORATIONS I-X, are sued herein by their fictitious names for the reason that their respective true names are unknown to Plaintiff at this time. Plaintiff is informed and believes and thereon alleges that each of the Defendants designated herein as a DOE and/or a ROE CORPORATION are either individuals or entities responsible for and caused damages proximately to Plaintiff as alleged herein, and were providers of medical care, employers or employees of the named Defendants, agents, partnerships, joint-venturers, corporations, nurses, physicians, technicians, assistants, hospitals, surgical centers, and/or other staff or medical personnel who undertook the obligation of providing medical care to the Plaintiff, or other entities related to the named Defendants or who were engaged in joint

ventures, or other relationships with Defendants and are legally responsible for the events herein. Plaintiff will ask leave of Court to amend the Complaint to insert the true names and capacities of DOES I-X and ROE CORPORATIONS I-X, inclusive, when the same have been ascertained, and to join such other Defendants in this action.

11. Defendants, and each of them, are the agents, employees, employers, joint venturers, owners, principals, and/or other affiliated entities of each other, such that the actions of one Defendant can be held to be the actions of each and every other Defendant. At all times mentioned herein, Defendants, and each of them, were acting within the scope and course of their said agency, employment and/or joint venture, with the knowledge and permission of all other Defendants, and are vicariously liable for the negligent acts of Defendants, and are further liable for negligent supervision, negligent hiring, and negligent retention.

II.

FIRST CAUSES OF ACTION

(Medical Negligence)

12. Plaintiff repeats and re-alleges each and every allegation contained in Paragraphs1 through 11 of this Complaint and incorporates them herein by reference.

13. On October 30, 2019, Jeffrey Neason was seen at the Genesis Health Clinic to be treated for a history of pain and swelling in his left neck and chest.

14. Ultrasound examinations revealed a thrombosis of the left internal jugular vein.

15. Jeffrey Neason was prescribed a blood thinner, Eliquis.

16. On October 31, 2019, Jeffrey Neason was seen by Dr. Ratnasabapathy who agreed with the Eliquis prescription and instructed Jeffrey Neason to seek treatment at a hospital should he experience chest, pains, shortness of breath, or bleeding symptoms.

17. On November 3, 2019, Jeffrey Neason presented to the emergency room at St. Rose Dominican Hospital – Sienna Campus, with complaints of chest and back pain.

18. While a patient at the hospital, Jeffrey Neason's troponin level was elevated at 7, and Plaintiff was subsequently diagnosed with a NSTEMI (non-ST segment elevation myocardial infarction) cardiac event.

19. While a patient at the hospital, Jeffrey Neason's CT angiogram confirmed the left internal jugular vein thrombosis.

20. On November 4, 2019, Jeffrey Neason reported visual changes and mild gait ataxia. A non-contrast CT of the head was interpreted as suspicious for acute ischemia/infarct.

21. An additional CT angiogram of the head showed normal results and the cerebral perfusion scan was normal as well.

22. On November 6, 2019, Jeffrey Neason was noted to have wheezing and shortness of breath.

23. Jeffrey Neason's chest x-ray revealed multilobar pneumonia.

24. On November 8, 2019, Jeffrey Neason was discharged to Dignity Health Rehabilitation Facility (hereafter, "Dignity Health").

25. On this date, Jeffrey Neason's hemoglobin level was recorded as 11.4

26. Jeffrey Neason's prescriptions at the time of admission to Dignity Health Rehabilitation Facility included Eliquis, 81mg Aspirin, and prednisone.

27. Upon admission to Dignity Health, Jeffrey Neason was evaluated by Dr. Casiano Flaviano.

28. Upon admission to Dignity Health, Jeffrey Neason's medications were continued as in the hospital.

29. Jeffrey Neason was to receive 10mg of Eliquis twice daily, with the dosage to eventually reduce to 5mg.

30. On November 11, 2019, Jeffrey Neason's hemoglobin level was recorded as 9.8.

31. On this date, Jeffrey Neason could not confirm to the treating provider, Dr. Patel, if he had observed blood in his stool.

32. Jeffrey Neason's treating provider, Dr. Patel, noted that Jeffrey Neason's hemoglobin levels needed to be monitored, specifically while Jeffrey Neason was on Eliquis.

33. Dr. Patel noted that Jeffrey Neason needed to be monitored for evidence of a gastrointestinal bleed.

34. On November 12, 2019, Jeffrey Neason's hemoglobin level continued to drop, eventually recorded as 6.8.

35. Dr. Patel noted that he planned to discontinue Eliquis.

36. Dr. Flaviano noted an elevated white blood count, and discontinued the Eliquis.

37. At approximately 8:30 p.m. that evening, a nurse noted that Jeffrey's parent had observed dark black stool residue on Jeffrey's pants.

38. On November 13, 2019, Jeffrey Neason's hemoglobin was noted to be 4.5.

39. At 10:54 a.m. that same morning, Jeffrey was noted to have been found on the floor of the bathroom with a large amount of black, tarry stool.

40. Jeffrey Neason was transported to St. Rose's emergency room that same morning, where he ultimately passed away.

41. The cause of death on Jeffrey Neason's death certificate was listed as "Complications for Colon Cancer."

42. Dignity Health Rehabilitation Center, as a licensed medical facility, has a responsibility to uphold the treatment standards that its facility is specifically designed to perform.

43. Dignity's negligence includes, but is no limited to:

a. "When the hemoglobin level on 11/10/19 showed a decrease to 9.8 from 11.4, this was a clear indication of occult blood loss and simply monitoring for evidence of gastrointestinal bleeding and rechecking lab was insufficient in an anticoagulated patient. A simple occult fecal

blood test should at minimum been performed and serial hemoglobins ordered to monitor for ongoing blood loss in a timely fashion. Also, the Eliquis should have been held as there would be no deleterious effect from holding it for 24 hours until further testing and work-up could be performed."[1]

b. "When Dr. Flaviano performed his consultation on Jeffrey two days after it had initially been requested, he noted the anemia as evidenced by the hemoglobin of 9.8 from 11/10/19. However, both he and Dr. Patel failed to order a repeat hemoglobin for 11/11/19. Dr. Flaviano and Dr Patel also failed on 11/11/19 to order any type of workup for possible gastrointestinal bleeding or to hold the Eliquis."[2]

c. "Finally, on 11/12/19, a repeat blood test showed that the hemoglobin had decreased to a critical level of 7.0. Rather than immediately hold the Eliquis which was the proper thing to do, only a repeat hemoglobin was ordered which meant that Jeffrey received another dose of Eliquis further delaying any possible ability for him to stop actively bleeding. After the repeat hemoglobin showed an even further decrease, the only intervention was to hold the Eliquis and order repeat testing for the following day. By this time Jeffrey's hemoglobin had decreased by almost 50% from his levels at St. Rose where he was 12.6 initially. By this time, it was obvious

[1] See Dr. Michael Davoren Affidavit attached as Exhibit 1, page 6.
[2] *Id.*

that significant ongoing bleeding was occurring in an anticoagulated patient whose anticoagulation could not be reversed. Jeffrey should have immediately been transferred to an acute care facility for blood transfusions, fluid resuscitation and an endoscopic work-up for the source of his bleeding. Further, when the patient's parent notified nursing staff of black tarry stool being present on Jeffrey's pants, transfer was still not initiated for work-up of the obvious GI bleed."[3]

d. "When the hemoglobin on 11/13/19 was resulted at 4.5 which indicated a greater than 50% blood loss since his admission, an immediate transfer was still not initiated. A hemoglobin of 4.5 in a normal healthy adult is clearly life threatening and demands immediate intervention. In a patient with a history of a recent NSTEMI cardiac event and an anticoagulated status, this blood level without immediate treatment was lethal. Transfer to St. Rose did not occur until 5 hours later after Jeffrey's condition had declined to the point that he was found down on the floor of the bathroom with a large melanotic stool and unstable vital signs."[4]

44. As a direct and proximate cause of Defendants' negligence, Jeffrey Neason lost his life, and Plaintiff Arlis Neason lost her son.

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[3] Id at 7.
[4] Id. at 7-8.

III.

SECOND CAUSE OF ACTION

(Negligent Hiring, Retention, Supervision – All Defendants)

45. Plaintiff repeats and re-alleges each and every allegation contained in this Complaint and incorporates them herein by reference.

46. Dignity provides medical treatment to its patients.

47. Dignity breached its duty to its patient, Jeffrey Neason, in the followings ways:

a. By choosing not to implement proper reporting techniques regarding changes to patient's condition.

b. By choosing not to implement policies and procedures that ensure that its employees are providing treatment that conforms to the standard of care, including patients such as Jeffrey Neason.

30. Defendants should have been aware prior to the treatment of Jeffrey Neason that Defendants had a process in place which presented an unnecessary risk of injury to patients such as Jeffrey Neason, and failed to take reasonable steps to prevent forseeable injury, or even death.

31. The substandard practice of Dignity employees should have been known to all Defendants and they should have taken reasonable precautions and actions to prevent further injury to patients such as Jeffrey Neason. Said failures, acts and omissions resulted in injury and damage to Jeffrey Neason.

V.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, prays for judgment against Defendants, and each of them, as follows:

1. For general, special, and punitive damages in a sum in excess of $15,000.00;
2. Hospital and medical expenses according to proof;
3. For attorney's fees as provided by law;

4. For legal pre judgment interest at the highest rate allowable;

5. For costs of suit herein; and

6. For such other and further relief as the Court may deem just and proper under the circumstances.

DATED this 11th day of November, 2020.

GREENMAN GOLBERG RABY & MARTINEZ

/s/ Taylor J. Smith

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DISTRICT COURT

CLARK COUNTY, NEVADA

ARLIS NEASON, as Heir of the Estate of JEFFREY NEASON, Plaintiff, vs. DIGNITY HEALTH MEDICAL GROUP, NEVADA, LLC, a domestic limited-liability company; DOES I through X; and ROE BUSINESS ENTITIES I through X; inclusive, Defendants.	CASE NO.: DEPT. NO.: **NRS 41A.071 Affidavit of Dr. Michael Davoren**

Olathe, Kansas

Johnson County

I, Dr. Michael Davoren, do state under oath and penalty of perjury as follows:

1. I am a full-time licensed general surgeon.
2. In 1989, I completed a bachelor's degree in Biology / pre-medicine at College of Holy Cross.
3. In 1993, I completed my Doctor of Medicine at the University of Oklahoma.
4. From 1994 to 1997 I was a General Medical Officer for the United States Army.
5. In 2002, I completed my Residency in General Surgery at the University of Kansas.
6. In 2004, I became a Board-Certified General Surgeon.
7. My additional qualification and training are further set forth in my curriculum vitae, which is attached.
8. 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.
9. I have reviewed Jeffrey Neason's Medical Records from the following providers:
    a. Jackson Physical Therapy
    b. Pueblo Medical Imaging
    c. Green Valley Chiropractic and Wellness
    d. Genesis Medical Group

e. Comprehensive Cancer Center of Nevada

f. Henderson Fire Department

g. St. Rose Hospital

h. Dignity Health rehabilitation Hospital

i. Community Ambulance

j. Death Certificate

k. Clark County Coroner Investigation Report 11/13/19

l. Case Preparation Report, Embalmer Phuong Le 11/20/19

10. On October 30, 2019, Jeffrey was seen at the Genesis Health clinic by Dr. Lubna Khan for a one-week history of pain and swelling of his left neck and chest. An ultrasound of the neck revealed thrombosis of the left internal jugular vein and Jeffrey was started on a blood thinner, Eliquis.

11. On October 31, 2019, Jeffrey was seen by Dr. Ratnasabapathy who agreed with the Eliquis therapy and also ordered CT's of the neck and chest. Jeffrey was instructed to present to the hospital for any chest pains, shortness of breath or bleeding symptoms.

12. On November 3, 2019, Jeffrey was seen in the emergency room at St. Rose Dominican Siena campus with complaints of chest and back pain. Jeffrey was noted to have a significant history of a rear-end restrained MVA as a rear seat passenger on 7/30/19 and a recent diagnosis of left internal jugular vein thrombosis on Eliquis 10 mg twice daily. A troponin level was noted to be elevated at 7 and cardiology was consulted subsequently diagnosing a NSTEMI cardiac event. CT angiogram of

the chest confirmed the left internal jugular vein thrombosis but no pneumonia, pulmonary emboli or effusions were noted. Echocardiogram was noted to show preserved left ventricular function and family declined heart catheterization electing continued treatment with Eliquis.

13. On November 4, 2019, a medical response team alert was called due to new onset visual changes and mild gait ataxia. A non-contrast CT of the head was interpreted as suspicious for acute ischemia/ infarct. Jeffrey was placed in the stroke care pathway with a neurology consult ordered. CT angiogram of the head was normal and a cerebral perfusion scan was also normal. Neurology did not feel that Jeffrey was a candidate for TPA and subsequently cleared him for discharge to a post-acute care facility.
14. On November 6, 2019, Jeffrey was noted to have wheezing and shortness of breath. A chest x-ray showed multilobar pneumonia and Lasix, antibiotics and additional steroids were ordered. Neurologic symptoms were stable.
15. On November 8, 2019, Jeffrey was discharged to Dignity Health Rehabilitation Facility on Eliquis, 81mg aspirin, and prednisone among other medications.
16. At Dignity Jeffrey, was evaluated by Dr. Casiano Flaviano. An Internal Medicine consult was ordered and medications were continued as in the hospital with the Eliquis being given at a loading dose of 10mg twice daily to be reduced to 5mg twice daily on November 13, 2019. Dr. Flaviano recorded the hemoglobin of 11.4 in his admission assessment.

17. On November 12, 2019, Jeffrey's hemoglobin was noted to have decreased to 7.0 at 0358 and to 6.8 at 1220. Dr. Patel noted the decrease and noted that Jeffrey said "he still may be darker but not sure". Patel documented that he planned to discontinue the Eliquis if the hemoglobin was noted to be low on the 1220 lab draw. Monitoring for a GI bleed was to done as well as checking iron studies. Dr. Flaviano saw the patient at 1627 and noted that the white blood cell count was elevated and that the Eliquis was discontinued. No additional orders were given except to repeat the labs in the morning. At 2030, nurse Cunanan documented that Jeffrey's parent had noted dark black stool residue on Jeffrey's pants.

18. On November 13, 2019, at 0550, the hemoglobin was noted to be 4.5. At 1054, Jeffrey was noted to have been found on the floor of the bathroom with a large amount of black, tarry stool. The EMS report shows that nursing noted a blood pressure of 82/52 with a pulse of 127. Jeffrey was emergently transferred to the St. Rose Hospital ER. Jeffrey died at St. Rose on 11/13/19 with the cause of death on the death certificate being listed as "Complications of Colon Cancer".

19. Jeffrey was noted to have a thrombosed left internal jugular vein after presenting to his primary care physician for evaluation of left neck and chest pain and swelling. Standard treatment for thrombosis is anticoagulation and Eliquis was appropriately prescribed. On 11/3/19, Jeffrey was admitted to St. Rose Hospital and during the course of his admission he was diagnosed with a stroke and also an NSTEMI cardiac event. Jeffrey was medically stable when he was transferred to Dignity Health Rehabilitation Hospital with a hemoglobin level of 11.4.

20. Jeffrey had a number of risk factors for development of significant intestinal bleeding including Crohn's disease, steroid and aspirin use and anticoagulation with Eliquis. These multiple conditions warranted a heightened level of caution and mandated close observation for any signs of bleeding. Any signs of bleeding demanded that investigative studies be quickly done and that medication discontinuation should be considered due to the fact that Eliquis has non known reversal agent and its effects last at least two half-lives or 24 hours. The medical care rendered at Dignity fell below the standard of care in a number of aspects as follows:

    a. When the hemoglobin level on 11/10/19 showed a decrease to 9.8 from 11.4, this was a clear indication of occult blood loss and simply monitoring for evidence of gastrointestinal bleeding and rechecking lab was insufficient in an anticoagulated patient. A simple occult fecal blood test should at minimum been performed and serial hemoglobins ordered to monitor for ongoing blood loss in a timely fashion. Also, the Eliquis should have been held as there would be no deleterious effect from holding it for 24 hours until further testing and work-up could be performed.

    b. When Dr. Flaviano performed his consultation on Jeffrey two days after it had initially been requested, he noted the anemia as evidenced by the hemoglobin of 9.8 from 11/10/19. However, both he and Dr. Patel failed to order a repeat hemoglobin for 11/11/19. Dr. Flaviano and Dr Patel also failed on 11/11/19 to order any type of workup for possible gastrointestinal bleeding or to hold the Eliquis.

c. Finally, on 11/12/19, a repeat blood test showed that the hemoglobin had decreased to a critical level of 7.0. Rather than immediately hold the Eliquis which was the proper thing to do, only a repeat hemoglobin was ordered which meant that Jeffrey received another dose of Eliquis further delaying any possible ability for him to stop actively bleeding. After the repeat hemoglobin showed an even further decrease, the only intervention was to hold the Eliquis and order repeat testing for the following day. By this time Jeffrey's hemoglobin had decreased by almost 50% from his levels at St. Rose where he was 12.6 initially. By this time, it was obvious that significant ongoing bleeding was occurring in an anticoagulated patient whose anticoagulation could not be reversed. Jeffrey should have immediately been transferred to an acute care facility for blood transfusions, fluid resuscitation and an endoscopic work-up for the source of his bleeding. Further, when the patient's parent notified nursing staff of black tarry stool being present on Jeffrey's pants, transfer was still not initiated for work-up of the obvious GI bleed.

d. When the hemoglobin on 11/13/19 was resulted at 4.5 which indicated a greater than 50% blood loss since his admission, an immediate transfer was still not initiated. A hemoglobin of 4.5 in a normal healthy adult is clearly life threatening and demands immediate intervention. In a patient with a history of a recent NSTEMI cardiac event and an anticoagulated status, this blood level without immediate treatment was lethal. Transfer to St. Rose did

did not occur until 5 hours later after Jeffrey's condition had declined to the point that he was found down on the floor of the bathroom with a large melanotic stool and unstable vital signs.

21. In summary, on numerous 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. In addition, multiple opportunities to intervene by stopping the Eliquis and/or transferring Jeffrey back to an acute care facility for endoscopic evaluation, transfusion and resuscitation were missed by the staff and doctors at Dignity. These failures to diagnose and treat were below the standard of care and directly resulted in the death of Jeffrey Neason.

22. All opinions are to a reasonable degree of medical certainty based on the information available to me. If there are further exhibits or records that anyone in this matter wishes me to review, I would be happy to do so and I reserve the right to amend my opinions if necessary.

23. I can make myself available for elaboration should the Court desire further explanation or analysis.

Dr. Michael Davoren, MD

SUBSCRIBED and SWORN to before me
BY Michael Davoren, MD on
this 10th day of November, 2020
Melody A. Brownfield
NOTARY PUBLIC in and for said County and State

MELODY A. BROWNFIELD
Notary Public, State of Kansas
My Appt. Expires
05/28/2021

EXHIBIT 2

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and

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Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

ARLIS NEASON, as Heir of the Estate of JEFFREY NEASON, Plaintiff, vs. DIGNITY SELECT NEVADA, LLC, a foreign limited-liability company; CASIANO R. FLAVIANO, MD; SUSHIL R. PATEL, MD; DOES I through X; and ROE BUSINESS ENTITIES I through X; inclusive, Defendants.	CASE NO.: A-20-824585-C DEPT. NO.: XXIX **PLAINTIFF'S FIRST AMENDED COMPLAINT**

COMES NOW, Plaintiff, Arlis Neason, as Heir of the Estate of Jeffrey Neason, by and

through her attorneys of record, GGRM LAW FIRM, hereby associates as co-counsel for Plaintiff, BREEN ARNTZ, ESQ. of ARNTZ ASSOCIATES, and complains and alleges as follows:

I.

GENERAL ALLEGATIONS

1. That at all times relevant to this action, Plaintiff, ARLIS NEASON (herein after, "Plaintiff"), was and is a resident of the County of Clark, State of Nevada.

2. That at all times relevant to this action, Plaintiff's now deceased son, JEFFREY NEASON (hereafter, "Jeffrey Neason"), was a resident of the County of Clark, State of Nevada.

3. The actions and omissions of Defendants, and each of them, herein alleged, all occurred within the County of Clark, State of Nevada.

4. That at all times relevant to this action, Defendant, Dignity Select, Nevada, LLC (herein after "Dignity") was and is, a foreign limited-liability company authorized to do business in the County of Clark, State of Nevada

5. Plaintiffs are informed and believe and thereon allege that at all times relevant herein, Defendant, Casiano R. Flaviano, MD (hereinafter "Dr. Flaviano"), was and is a resident of Clark County, Nevada. Upon further information and belief, Dr. Flaviano was and is a physician licensed to practice medicine in the State of Nevada pursuant to NRS Chapters 630 and 449. Upon information and belief, Dr. Flaviano provided care and treatment to Jeffrey Neason during her admission at Saint Rose / Dignity Health Medical Group.

6. Plaintiffs are informed and believe and thereon allege that at all times relevant herein, Defendant, Sushil Patel, MD (hereinafter "Dr. Patel"), was and is a resident of Clark County, Nevada. Upon further information and belief, Dr. Patel was and is a physician licensed to practice medicine in the State of Nevada pursuant to NRS Chapters 630 and 449. Upon information and belief, Dr. Patel provided care and treatment to Jeffrey Neason during her admission at Saint Rose / Dignity Health Medical Group.

7. Defendants DOES I-X, ROE CORPORATIONS I-X, inclusive, DIGNITY,

negligently hired, trained, supervised, selected, managed, and oversaw the activities of employees or agents all causing injury and damage to Plaintiff. That DIGNITY knew or should have known that other agents and employees lacked the requisite skill and learning to competently perform their obligations in their area of stated expertise and required job functions, and Plaintiff was injured as a result.

8. DOES I-X and ROE CORPORATIONS I-X, inclusive, at all times relevant herein were and are, residents and/or doing business in the County of Clark, State of Nevada. These Defendants, at all times herein mentioned, were working within the course and scope of their employ with each other and/or with said entities, were the agents, joint venturers, and/or held another legal relationship with DIGNITY and engaged in providing medical care to the Plaintiff.

9. DOES I-X, ROE CORPORATIONS I-X, inclusive, were and are, individuals and/or entities, hospitals, physicians, or other medical care providers duly admitted and authorized to practice medicine in the State of Nevada and/or were providers or transmitters of medical care and/or information, and all of whom were involved in the medical care of Plaintiff.

10. That Defendants, DOES I-X and ROE CORPORATIONS I-X, are sued herein by their fictitious names for the reason that their respective true names are unknown to Plaintiff at this time. Plaintiff is informed and believes and thereon alleges that each of the Defendants designated herein as a DOE and/or a ROE CORPORATION are either individuals or entities responsible for and caused damages proximately to Plaintiff as alleged herein, and were providers of medical care, employers or employees of the named Defendants, agents, partnerships, joint-venturers, corporations, nurses, physicians, technicians, assistants, hospitals, surgical centers, and/or other staff or medical personnel who undertook the obligation of providing medical care to the Plaintiff, or other entities related to the named Defendants or who were engaged in joint ventures, or other relationships with Defendants and are legally responsible for the events herein. Plaintiff will ask leave of Court to amend the Complaint to insert the true names and capacities of

DOES I-X and ROE CORPORATIONS I-X, inclusive, when the same have been ascertained, and to join such other Defendants in this action.

11. Defendants, and each of them, are the agents, employees, employers, joint venturers, owners, principals, and/or other affiliated entities of each other, such that the actions of one Defendant can be held to be the actions of each and every other Defendant. At all times mentioned herein, Defendants, and each of them, were acting within the scope and course of their said agency, employment and/or joint venture, with the knowledge and permission of all other Defendants, and are vicariously liable for the negligent acts of Defendants, and are further liable for negligent supervision, negligent hiring, and negligent retention.

12. This court has jurisdiction over this matter pursuant to Nev. Const. art. VI, § 6, as this Court has original jurisdiction in all cases not assigned to the justices' courts. Furthermore, the damages claimed exceeds $15,000.00

II.

FIRST CAUSES OF ACTION

(Medical Negligence)

13. Plaintiff repeats and re-alleges each and every allegation contained in Paragraphs1 through 11 of this Complaint and incorporates them herein by reference.

14. On October 30, 2019, Jeffrey Neason was seen at the Genesis Health Clinic to be treated for a history of pain and swelling in his left neck and chest.

15. Ultrasound examinations revealed a thrombosis of the left internal jugular vein.

16. Jeffrey Neason was prescribed a blood thinner, Eliquis.

17. On October 31, 2019, Jeffrey Neason was seen by Dr. Ratnasabapathy who agreed with the Eliquis prescription and instructed Jeffrey Neason to seek treatment at a hospital should he experience chest, pains, shortness of breath, or bleeding symptoms.

18. On November 3, 2019, Jeffrey Neason presented to the emergency room at St. Rose Dominican Hospital – Sienna Campus, with complaints of chest and back pain.

19. While a patient at the hospital, Jeffrey Neason's troponin level was elevated at 7, and Plaintiff was subsequently diagnosed with a NSTEMI (non-ST segment elevation myocardial infarction) cardiac event.

20. While a patient at the hospital, Jeffrey Neason's CT angiogram confirmed the left internal jugular vein thrombosis.

21. On November 4, 2019, Jeffrey Neason reported visual changes and mild gait ataxia. A non-contrast CT of the head was interpreted as suspicious for acute ischemia/infarct.

22. An additional CT angiogram of the head showed normal results and the cerebral perfusion scan was normal as well.

23. On November 6, 2019, Jeffrey Neason was noted to have wheezing and shortness of breath.

24. Jeffrey Neason's chest x-ray revealed multilobar pneumonia.

25. On November 8, 2019, Jeffrey Neason was discharged to Dignity Health Rehabilitation Facility (hereafter, "Dignity Health").

26. On this date, Jeffrey Neason's hemoglobin level was recorded as 11.4

27. Jeffrey Neason's prescriptions at the time of admission to Dignity Health Rehabilitation Facility included Eliquis, 81mg Aspirin, and prednisone.

28. Upon admission to Dignity Health, Jeffrey Neason was evaluated by Dr. Casiano Flaviano.

29. Upon admission to Dignity Health, Jeffrey Neason's medications were continued as in the hospital.

30. Jeffrey Neason was to receive 10mg of Eliquis twice daily, with the dosage to eventually reduce to 5mg.

31. On November 11, 2019, Jeffrey Neason's hemoglobin level was recorded as 9.8.

32. On this date, Jeffrey Neason could not confirm to the treating provider, Dr. Patel, if he had observed blood in his stool.

33. Jeffrey Neason's treating provider, Dr. Patel, noted that Jeffrey Neason's hemoglobin levels needed to be monitored, specifically while Jeffrey Neason was on Eliquis.

34. Dr. Patel noted that Jeffrey Neason needed to be monitored for evidence of a gastrointestinal bleed.

35. On November 12, 2019, Jeffrey Neason's hemoglobin level continued to drop, eventually recorded as 6.8.

36. Dr. Patel noted that he planned to discontinue Eliquis.

37. Dr. Flaviano noted an elevated white blood count, and discontinued the Eliquis.

38. At approximately 8:30 p.m. that evening, a nurse noted that Jeffrey's parent had observed dark black stool residue on Jeffrey's pants.

39. On November 13, 2019, Jeffrey Neason's hemoglobin was noted to be 4.5.

40. At 10:54 a.m. that same morning, Jeffrey was noted to have been found on the floor of the bathroom with a large amount of black, tarry stool.

41. Jeffrey Neason was transported to St. Rose's emergency room that same morning, where he ultimately passed away.

42. The cause of death on Jeffrey Neason's death certificate was listed as "Complications for Colon Cancer."

43. Dignity Health Rehabilitation Center, as a licensed medical facility, has a responsibility to uphold the treatment standards that its facility is specifically designed to perform.

44. Dignity's negligence includes, but is no limited to:

a. "When the hemoglobin level on 11/10/19 showed a decrease to 9.8 from 11.4, this was a clear indication of occult blood loss and simply monitoring for evidence of gastrointestinal bleeding and rechecking lab was insufficient in an anticoagulated patient. A simple occult fecal

blood test should at minimum been performed and serial hemoglobins ordered to monitor for ongoing blood loss in a timely fashion. Also, the Eliquis should have been held as there would be no deleterious effect from holding it for 24 hours until further testing and work-up could be performed."[1]

b. "When Dr. Flaviano performed his consultation on Jeffrey two days after it had initially been requested, he noted the anemia as evidenced by the hemoglobin of 9.8 from 11/10/19. However, both he and Dr. Patel failed to order a repeat hemoglobin for 11/11/19. Dr. Flaviano and Dr Patel also failed on 11/11/19 to order any type of workup for possible gastrointestinal bleeding or to hold the Eliquis."[2]

c. "Finally, on 11/12/19, a repeat blood test showed that the hemoglobin had decreased to a critical level of 7.0. Rather than immediately hold the Eliquis which was the proper thing to do, only a repeat hemoglobin was ordered which meant that Jeffrey received another dose of Eliquis further delaying any possible ability for him to stop actively bleeding. After the repeat hemoglobin showed an even further decrease, the only intervention was to hold the Eliquis and order repeat testing for the following day. By this time Jeffrey's hemoglobin had decreased by almost 50% from his levels at St. Rose where he was 12.6 initially. By this time, it was obvious

[1] See Dr. Michael Davoren Affidavit attached as Exhibit 1, page 6.
[2] Id.

that significant ongoing bleeding was occurring in an anticoagulated patient whose anticoagulation could not be reversed. Jeffrey should have immediately been transferred to an acute care facility for blood transfusions, fluid resuscitation and an endoscopic work-up for the source of his bleeding. Further, when the patient's parent notified nursing staff of black tarry stool being present on Jeffrey's pants, transfer was still not initiated for work-up of the obvious GI bleed."[3]

d. "When the hemoglobin on 11/13/19 was resulted at 4.5 which indicated a greater than 50% blood loss since his admission, an immediate transfer was still not initiated. A hemoglobin of 4.5 in a normal healthy adult is clearly life threatening and demands immediate intervention. In a patient with a history of a recent NSTEMI cardiac event and an anticoagulated status, this blood level without immediate treatment was lethal. Transfer to St. Rose did not occur until 5 hours later after Jeffrey's condition had declined to the point that he was found down on the floor of the bathroom with a large melanotic stool and unstable vital signs."[4]

45. As a direct and proximate cause of Defendants' negligence, Jeffrey Neason lost his life, and Plaintiff Arlis Neason lost her son.

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///

[3] Id at 7.
[4] Id. at 7-8.

III.

SECOND CAUSE OF ACTION

(Negligent Hiring, Retention, Supervision – All Defendants)

46. Plaintiff repeats and re-alleges each and every allegation contained in this Complaint and incorporates them herein by reference.

47. Dignity provides medical treatment to its patients.

48. Dignity breached its duty to its patient, Jeffrey Neason, in the followings ways:

a. By choosing not to implement proper reporting techniques regarding changes to patient's condition.

b. By choosing not to implement policies and procedures that ensure that its employees are providing treatment that conforms to the standard of care, including patients such as Jeffrey Neason.

30. Defendants should have been aware prior to the treatment of Jeffrey Neason that Defendants had a process in place which presented an unnecessary risk of injury to patients such as Jeffrey Neason, and failed to take reasonable steps to prevent forseeable injury, or even death.

31. The substandard practice of Dignity employees should have been known to all Defendants and they should have taken reasonable precautions and actions to prevent further injury to patients such as Jeffrey Neason. Said failures, acts and omissions resulted in injury and damage to Jeffrey Neason.

V.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, prays for judgment against Defendants, and each of them, as follows:

1. For general, special, and punitive damages in a sum in excess of $15,000.00;
2. Hospital and medical expenses according to proof;
3. For attorney's fees as provided by law;

4. For legal pre judgment interest at the highest rate allowable;

5. For costs of suit herein; and

6. For such other and further relief as the Court may deem just and proper under the circumstances.

DATED this 14th day of January, 2021.

GGRM LAW FIRM

/s/ Taylor J. Smith

_____

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and

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Phone: 702-595-4800 – Fax: 702-446-8164

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of GGRM LAW FIRM, and that on the 14th day of January, 2021, I caused the foregoing document entitled **PLAINTIFF'S FIRST AMENDED COMPLAINT** to be served upon those persons designated by the parties in the E-service Master List for the above-referenced matter in the Eighth Judicial Court E-filing System in accordance with the mandatory electronic service requirements of Administrative Order 14-2 and the Nevada Electronic Filing and Conversion Rules, to wit:

/s/ Michael Madden

_____

An Employee of GREENMAN, GOLDBERG, RABY & MARTINEZ

EXHIBIT 1

AFF
GABRIEL A. MARTINEZ, ESQ.
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Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

ARLIS NEASON, as Heir of the Estate of JEFFREY NEASON, Plaintiff, vs. DIGNITY HEALTH MEDICAL GROUP, NEVADA, LLC, a domestic limited-liability company; DOES I through X; and ROE BUSINESS ENTITIES I through X; inclusive, Defendants.	CASE NO.: DEPT. NO.: **NRS 41A.071 Affidavit of Dr. Michael Davoren**

Olathe, Kansas

Johnson County

I, Dr. Michael Davoren, do state under oath and penalty of perjury as follows:

1. I am a full-time licensed general surgeon.
2. In 1989, I completed a bachelor's degree in Biology / pre-medicine at College of Holy Cross.
3. In 1993, I completed my Doctor of Medicine at the University of Oklahoma.
4. From 1994 to 1997 I was a General Medical Officer for the United States Army.
5. In 2002, I completed my Residency in General Surgery at the University of Kansas.
6. In 2004, I became a Board-Certified General Surgeon.
7. My additional qualification and training are further set forth in my curriculum vitae, which is attached.
8. 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.
9. I have reviewed Jeffrey Neason's Medical Records from the following providers:
    a. Jackson Physical Therapy
    b. Pueblo Medical Imaging
    c. Green Valley Chiropractic and Wellness
    d. Genesis Medical Group

e. Comprehensive Cancer Center of Nevada

f. Henderson Fire Department

g. St. Rose Hospital

h. Dignity Health rehabilitation Hospital

i. Community Ambulance

j. Death Certificate

k. Clark County Coroner Investigation Report 11/13/19

l. Case Preparation Report, Embalmer Phuong Le 11/20/19

10. On October 30, 2019, Jeffrey was seen at the Genesis Health clinic by Dr. Lubna Khan for a one-week history of pain and swelling of his left neck and chest. An ultrasound of the neck revealed thrombosis of the left internal jugular vein and Jeffrey was started on a blood thinner, Eliquis.

11. On October 31, 2019, Jeffrey was seen by Dr. Ratnasabapathy who agreed with the Eliquis therapy and also ordered CT's of the neck and chest. Jeffrey was instructed to present to the hospital for any chest pains, shortness of breath or bleeding symptoms.

12. On November 3, 2019, Jeffrey was seen in the emergency room at St. Rose Dominican Siena campus with complaints of chest and back pain. Jeffrey was noted to have a significant history of a rear-end restrained MVA as a rear seat passenger on 7/30/19 and a recent diagnosis of left internal jugular vein thrombosis on Eliquis 10 mg twice daily. A troponin level was noted to be elevated at 7 and cardiology was consulted subsequently diagnosing a NSTEMI cardiac event. CT angiogram of

the chest confirmed the left internal jugular vein thrombosis but no pneumonia, pulmonary emboli or effusions were noted. Echocardiogram was noted to show preserved left ventricular function and family declined heart catheterization electing continued treatment with Eliquis.

13. On November 4, 2019, a medical response team alert was called due to new onset visual changes and mild gait ataxia. A non-contrast CT of the head was interpreted as suspicious for acute ischemia/ infarct. Jeffrey was placed in the stroke care pathway with a neurology consult ordered. CT angiogram of the head was normal and a cerebral perfusion scan was also normal. Neurology did not feel that Jeffrey was a candidate for TPA and subsequently cleared him for discharge to a post-acute care facility.
14. On November 6, 2019, Jeffrey was noted to have wheezing and shortness of breath. A chest x-ray showed multilobar pneumonia and Lasix, antibiotics and additional steroids were ordered. Neurologic symptoms were stable.
15. On November 8, 2019, Jeffrey was discharged to Dignity Health Rehabilitation Facility on Eliquis, 81mg aspirin, and prednisone among other medications.
16. At Dignity Jeffrey, was evaluated by Dr. Casiano Flaviano. An Internal Medicine consult was ordered and medications were continued as in the hospital with the Eliquis being given at a loading dose of 10mg twice daily to be reduced to 5mg twice daily on November 13, 2019. Dr. Flaviano recorded the hemoglobin of 11.4 in his admission assessment.

17. On November 12, 2019, Jeffrey's hemoglobin was noted to have decreased to 7.0 at 0358 and to 6.8 at 1220. Dr. Patel noted the decrease and noted that Jeffrey said "he still may be darker but not sure". Patel documented that he planned to discontinue the Eliquis if the hemoglobin was noted to be low on the 1220 lab draw. Monitoring for a GI bleed was to done as well as checking iron studies. Dr. Flaviano saw the patient at 1627 and noted that the white blood cell count was elevated and that the Eliquis was discontinued. No additional orders were given except to repeat the labs in the morning. At 2030, nurse Cunanan documented that Jeffrey's parent had noted dark black stool residue on Jeffrey's pants.

18. On November 13, 2019, at 0550, the hemoglobin was noted to be 4.5. At 1054, Jeffrey was noted to have been found on the floor of the bathroom with a large amount of black, tarry stool. The EMS report shows that nursing noted a blood pressure of 82/52 with a pulse of 127. Jeffrey was emergently transferred to the St. Rose Hospital ER. Jeffrey died at St. Rose on 11/13/19 with the cause of death on the death certificate being listed as "Complications of Colon Cancer".

19. Jeffrey was noted to have a thrombosed left internal jugular vein after presenting to his primary care physician for evaluation of left neck and chest pain and swelling. Standard treatment for thrombosis is anticoagulation and Eliquis was appropriately prescribed. On 11/3/19, Jeffrey was admitted to St. Rose Hospital and during the course of his admission he was diagnosed with a stroke and also an NSTEMI cardiac event. Jeffrey was medically stable when he was transferred to Dignity Health Rehabilitation Hospital with a hemoglobin level of 11.4.

20. Jeffrey had a number of risk factors for development of significant intestinal bleeding including Crohn's disease, steroid and aspirin use and anticoagulation with Eliquis. These multiple conditions warranted a heightened level of caution and mandated close observation for any signs of bleeding. Any signs of bleeding demanded that investigative studies be quickly done and that medication discontinuation should be considered due to the fact that Eliquis has non known reversal agent and its effects last at least two half-lives or 24 hours. The medical care rendered at Dignity fell below the standard of care in a number of aspects as follows:

    a. When the hemoglobin level on 11/10/19 showed a decrease to 9.8 from 11.4, this was a clear indication of occult blood loss and simply monitoring for evidence of gastrointestinal bleeding and rechecking lab was insufficient in an anticoagulated patient. A simple occult fecal blood test should at minimum been performed and serial hemoglobins ordered to monitor for ongoing blood loss in a timely fashion. Also, the Eliquis should have been held as there would be no deleterious effect from holding it for 24 hours until further testing and work-up could be performed.

    b. When Dr. Flaviano performed his consultation on Jeffrey two days after it had initially been requested, he noted the anemia as evidenced by the hemoglobin of 9.8 from 11/10/19. However, both he and Dr. Patel failed to order a repeat hemoglobin for 11/11/19. Dr. Flaviano and Dr Patel also failed on 11/11/19 to order any type of workup for possible gastrointestinal bleeding or to hold the Eliquis.

c. Finally, on 11/12/19, a repeat blood test showed that the hemoglobin had decreased to a critical level of 7.0. Rather than immediately hold the Eliquis which was the proper thing to do, only a repeat hemoglobin was ordered which meant that Jeffrey received another dose of Eliquis further delaying any possible ability for him to stop actively bleeding. After the repeat hemoglobin showed an even further decrease, the only intervention was to hold the Eliquis and order repeat testing for the following day. By this time Jeffrey's hemoglobin had decreased by almost 50% from his levels at St. Rose where he was 12.6 initially. By this time, it was obvious that significant ongoing bleeding was occurring in an anticoagulated patient whose anticoagulation could not be reversed. Jeffrey should have immediately been transferred to an acute care facility for blood transfusions, fluid resuscitation and an endoscopic work-up for the source of his bleeding. Further, when the patient's parent notified nursing staff of black tarry stool being present on Jeffrey's pants, transfer was still not initiated for work-up of the obvious GI bleed.

d. When the hemoglobin on 11/13/19 was resulted at 4.5 which indicated a greater than 50% blood loss since his admission, an immediate transfer was still not initiated. A hemoglobin of 4.5 in a normal healthy adult is clearly life threatening and demands immediate intervention. In a patient with a history of a recent NSTEMI cardiac event and an anticoagulated status, this blood level without immediate treatment was lethal. Transfer to St. Rose did

did not occur until 5 hours later after Jeffrey's condition had declined to the point that he was found down on the floor of the bathroom with a large melanotic stool and unstable vital signs.

21. In summary, on numerous 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. In addition, multiple opportunities to intervene by stopping the Eliquis and/or transferring Jeffrey back to an acute care facility for endoscopic evaluation, transfusion and resuscitation were missed by the staff and doctors at Dignity. These failures to diagnose and treat were below the standard of care and directly resulted in the death of Jeffrey Neason.

22. All opinions are to a reasonable degree of medical certainty based on the information available to me. If there are further exhibits or records that anyone in this matter wishes me to review, I would be happy to do so and I reserve the right to amend my opinions if necessary.

23. I can make myself available for elaboration should the Court desire further explanation or analysis.

Dr. Michael Davoren, MD

SUBSCRIBED and SWORN to before me
BY Michael Davoren, MD on
this 10th day of November, 2020
Melody A. Brownfield
NOTARY PUBLIC in and for said County and State

MELODY A. BROWNFIELD
Notary Public, State of Kansas
My Appt. Expires
05/28/2021

EXHIBIT 3

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Attorneys for Defendant
Casiano Flaviano, M.D.

DISTRICT COURT

CLARK COUNTY, NEVADA

ARLIS NEASON, as Heir of the Estate of JEFFREY NEASON, Plaintiff, vs. DIGNITY HEALTH MEDICAL GROUP, NEVADA, LLC, a domestic limited-liability company; CASIANO R. FLAVIANO, M.D.; SUSHIL R. PATEL, M.D.; DOES I through X; and ROE BUSINESS ENTITIES I through X; inclusive, Defendants.	Case No. A-20-824585-C Dept. No.: XXXI **DEFENDANT CASIANO FLAVIANO, M.D.'S MOTION TO DISMISS PLAINTIFF'S <u>FIRST AMENDED</u> COMPLAINT** HEARING REQUESTED

COMES NOW Defendant Casiano Flaviano, M.D., by and through his counsel of record, S. Brent Vogel and Katherine J. Gordon of LEWIS BRISBOIS BISGAARD & SMITH LLP, and moves this Honorable Court to dismiss Plaintiff's First Amended Complaint pursuant to N.R.C.P. 12(b)(5) as Plaintiff has failed to state a claim against Dr. Flaviano upon which relief can be granted. More specifically, Plaintiff's medical negligence claim fails to comply with the expert affidavit requirement of N.R.S. 41A.07, Plaintiff's negligent hiring, retention and supervision claim lacks plausibility and factual support, and no facts exist to support Plaintiff's request for punitive damages.

This Motion is made and based upon the papers and pleadings on file herein, the Memorandum of Points and Authorities set forth below, and such argument of counsel which may be requested by the Court during the hearing of this matter.

DATED: January 20, 2021.

LEWIS BRISBOIS BISGAARD & SMITH LLP

By */s/ Katherine J. Gordon*

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Las Vegas, Nevada 89118

Attorneys for Defendant Casiano Flaviano, M.D.

MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

This is a medical malpractice matter arising from care and treatment provided to Jeffrey Neason at Dignity Health Rehabilitation Center ("Dignity Rehabilitation") from November 8, 2019 to November 13, 2019. Moving Defendant Casiano Flaviano, M.D. ("Dr. Flaviano") is a Physical Medicine and Rehabilitation specialist who treated Mr. Neason during the Dignity Health admission. According to the First Amended Complaint, Dr. Flaviano and the remaining medical defendants failed to order timely and appropriate testing during Mr. Neason's admission to evaluate a potential gastrointestinal hemorrhage which allegedly resulted in Mr. Neason's death. The First Amended Complaint also alleges "all Defendants" are liable under a theory of negligent hiring, retention and supervision, and requests punitive damages.

In support of the medical malpractice claim, Plaintiff attached an affidavit authored by Michael Davoren, M.D., a general surgeon who practices in Kansas. However, none of the medical defendants, including Dr. Flaviano, are general surgeons and none of the medical malpractice allegations concern surgery. Dr. Davoren does not practice, and has not practiced, in the area of Physical Medicine and Rehabilitation. Therefore, his affidavit fails to fulfill the requirements of N.R.S. 41A.071 and the medical negligence claim is subject to dismissal. The negligent hiring, retention and supervision claim is also subject to dismissal as no facts are alleged against Dr. Flaviano in support of the claim. Finally, Plaintiff's request for punitive damages must be dismissed based on the absence of any legal or factual support.

II.

FACTUAL BACKGROUND

Jeffrey Neason was an inpatient at Dignity Rehabilitation for five days, from November 8, 2019 to November 13, 2019.[1] He was transferred to Dignity Rehabilitation following a hospital

[1] *See* Plaintiff's Complaint, ¶¶ 25-41, attached hereto as Exhibit "A".

admission at St. Rose Dominican – Siena Campus from November 3, 2019 to November 8, 2019.[2] At St. Rose, Mr. Neason was treated for complaints of chest and back pain and a recent diagnosis of a left jugular vein thrombosis.[3] The St. Rose staff also noted that Mr. Neason's medical history included a motor vehicle accident four months earlier.[4]

During his first day of hospitalization at St. Rose, Mr. Neason suffered a non-ST segment elevation myocardial infarction (a heart attack).[5] The family declined the recommended heart catheterization procedure.[6] Mr. Neason remained on Eliquis, an anticoagulation medication, which had been prescribed prior to his hospitalization.[7] The following day, a CT of the head was ordered to evaluate Mr. Neason's new onset of visual changes and mild gait ataxia.[8] The CT was suspicious for acute ischemia/infarct (a stroke).[9] Additional testing was ordered and it was determined that Mr. Neason was not a candidate for tPA (tissue plasminogen activator used to treat an acute ischemic strokes).[10] Two days later, on November 6, 2019, Mr. Neason was wheezing and had shortness of breath.[11] He was diagnosed with multilobar pneumonia.[12]

On November 8, 2019, Mr. Neason was transferred to Dignity Rehabilitation.[13] Unfortunately, neither the Complaint nor Dr. Davoren's affidavit provide detailed information regarding the care and provided to Mr. Neason at Dignity Rehabilitation, including an identification of the specific treatment rendered by Defendant Drs. Flaviano and Patel.

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[2] *Id.*
[3] *Id.* at Exhibit "1" ¶ 12.
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Id.* at ¶ 13.
[9] *Id.*
[10] *Id.*
[11] *Id.* at ¶ 14.
[12] *Id.*
[13] *Id.* at ¶ 15.

Alternatively, the Complaint and affidavit generally reference two occasions during which Dr. Flaviano evaluated Mr. Neason. The first occasion is undated and merely states Dr. Flaviano evaluated Mr. Neason, reduced the amount of Eliquis, and recorded Mr. Neason's hemoglobin test result of 11.4.[14]

The second occasion occurred on November 12, 2019 at approximately 4:30 p.m.[15] During this evaluation, Dr. Flaviano noted Mr. Neason's elevated white blood cell count and that the Eliquis had been discontinued.[16] 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.[17] 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.[18] Dr. Patel also ordered monitoring for a gastrointestinal bleed and iron studies.[19] There is no further reference in the Complaint to care and treatment provided by Drs. Flaviano and Patel between November 8, 2019 and November 13, 2019.

On November 13, 2019, Mr. Neason's hemoglobin decreased to 4.5.[20] Mr. Neason was transferred back to St. Rose hospital that day and passed away.[21] The cause of death on the death certificate is "complications of colon cancer."[22]

According to the Complaint, and reiterated in the affidavit 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.[23] The Complaint does not state which

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[14] *Id.* at ¶ 16.
[15] *Id.* at ¶ 17.
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.* at ¶ 18.
[21] *Id.*
[22] *Id.*
[23] *Id.* at ¶ 20(a).

Defendant(s) evaluated Mr. Neason on this date and should have ordered these tests. The Complaint also alleges 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.[24] The Complaint does not identify a particular health care provider responsible for Mr. Neason's care at that time who allegedly should have ordered the transfer.

Neither the Complaint nor Dr. Davoren's affidavit address Mr. Neason's apparent colon cancer diagnosis and/or its relationship to Mr. Neason's death. Alternatively, the affidavit alleges 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."[25]

Plaintiff filed the current Complaint on November 11, 2020, two days prior to expiration of the statute of limitations. The Complaint contains two causes of action: (1) medical malpractice; and (2) negligent hiring, retention and supervision. Both causes of action appear to be asserted against all Defendants. The Complaint also contains a prayer for punitive damages. Dr. Flaviano was served with the Complaint on December 29, 2020 and filed a Motion to Dismiss [the original Complaint] on January 19, 2021.

Plaintiff filed a First Amended Complaint on January 14, 2021. Dr. Flaviano has not been served with the First Amended Complaint. The allegations against Dr. Flaviano did not change in the amended complaint.

Although the named Defendants consist of unspecified staff from Dignity Rehabilitation, an Internal Medicine Specialist (Sushil Patel, M.D.), and a Physical Medicine and Rehabilitation Specialist (Dr. Flaviano), the medical affidavit submitted with the Complaint in support of the medical malpractice claim was authored by Dr. Davoren, a General Surgeon who practices in

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[24] *Id.* at ¶ 20(c).

[25] *Id.* at ¶ 21.

Kansas. There are no allegations in the Complaint regarding surgery, and no Defendants were engaged in the practice of general surgery at the time of the alleged medical negligence. There is also no information to suggest that Dr. Davoren practices, or has practiced, Dr. Flaviano's area of specialty.

The First Amended Complaint is also devoid of facts to support any required elements of a negligent hiring, retention and supervision claim against Dr. Flaviano. Finally, there are no facts asserted in the First Amended Complaint to support Plaintiff's request for punitive damages. Under these circumstances, the Complaint is deficient as a matter of law and is subject to dismissal pursuant to N.R.C.P. 12(b)(5).

III.

LEGAL ARGUMENT

A. Standard for Motion to Dismiss

Nevada Rule of Civil Procedure 12(b)(5) provides for dismissal of a cause of action for the "failure to state a claim upon which relief can be granted." A motion to dismiss tests the legal sufficiency of the claim set out against the moving party. *See Zalk-Josephs Co. v. Wells-Cargo, Inc.*, 81 Nev. 163, 400 P.2d 621 (1965). Dismissal under Rule 12(b) is appropriate where the allegations of the claim "taken at 'face value' and construed favorably in claimants' behalf, fail to state a cognizable claim for relief." *Morris v. Bank of America,* 110 Nev. 1274, 886 P.2d 454 (1994)(citing *Edgar v. Wagner,* 101 Nev. 226, 699 P.2d 110, 111-12 (1985).

In reviewing a motion to dismiss, all factual allegations in the complaint must be taken as true, and the complaint should be dismissed only if it appears beyond a doubt that the plaintiff could prove no set of facts that, if true, would entitle him to relief. *Buzz Stew, LLC v. City of North Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670 (2008). Nevertheless, the court is not bound to accept as true a plaintiff's legal conclusions, and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)(analyzing the federal counterpart to N.R.C.P. 12).

As set forth below, the facts recited in Plaintiff's Complaint fail to state claims against Dr.

Flaviano for medical negligence and negligent hiring, retention and supervision. Further, Plaintiff's Complaint is void of facts to support a request for punitive damages. Under these circumstances, both claims should be dismissed.

B. Plaintiff's Medical Malpractice Claim Fails to Comply with N.R.S. 41A.071

Plaintiff's first cause of action for medical malpractice/professional negligence is governed by the requirements of N.R.S. Chapter 41A. "Professional Negligence" is defined by N.R.S. 41A.015 as "…the failure of a provider of health care, in rendering services, to use the reasonable care, skill or knowledge ordinarily used under similar circumstances by similarly trained and experienced providers of health care." A "provider of health care" includes professional medical corporations, nurses and physicians. N.R.S. 41A.017. Dr. Flaviano falls within this definition.

Chapter 41A also provides that liability for negligence cannot be imposed upon a provider of health care without expert testimony showing a deviation from the accepted standard of care, and to prove causation for the alleged injury. N.R.S. 41A.100. In furtherance of this requirement, N.R.S. 41A.071 mandates that medical malpractice actions be filed with an expert affidavit supporting the allegations in the complaint. Specifically, the statute provides:

> 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 an 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 negligence; and
>
> (4) Sets forth factually a specific act or acts of alleged negligence separately as to each defendant in simply,

concise and direct terms. (Emphasis added).

The expert affidavit requirement 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).

In *Washoe Medical Center*, the Nevada Supreme Court held that "[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.

The medical affidavit filed with Plaintiff's First Amended Complaint in this matter fails to meet the requirements of N.R.S. 41A.071. It's author, Michael Davoren, M.D., is a General Surgeon currently practicing surgery in Kansas. Although Dr. Davoren's affidavit states his curriculum vitae is attached, it is not.[26] Therefore, the background information provided about Dr. Davoren is limited to his affidavit, which states the following:

1. I am a full-time licensed general surgeon.
2. In 1989, I completed a bachelor's degree in Biology/pre-medicine at College of Holy Cross.
3. In 1993, I completed my Doctor of Medicine at University of Oklahoma.
4. From 1994-1997 I was a General Medical Officer for the United States Army.
5. In 2002, I completed my Residency in General Surgery at the University of Kansas.
6. In 2004, I became a Board-Certified General Surgeon.
7. My additional qualification and training are further set forth in my curriculum

[26] Dr. Davoren's curriculum vitae was not attached to Plaintiff's original Complaint or First Amended Complaint.

vitae, which is attached.

8. Based upon my training, background, knowledge, and experience, I am familiar with the applicable standards of care for treatment of patients demonstrating symptoms and conditions that Jeffrey Neason presented to Dignity Health Rehabilitation Hospital.[27]

The entirety of information regarding Dr. Davoren's "training, background, knowledge, and experience" is limited to general surgery. By contrast, Defendant 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 is a Physical Medicine, Rehabilitation and *Non-Surgical* Sports Medicine specialist.

Dr. Davoren's training and experience, as outlined in his affidavit, also does not include any significant experience in the specialty area of Physical Medicine and Rehabilitation. Despite this fact, Dr. Davoren's proclaims in general terms that he possesses the training, background, knowledge and experience to offer expert testimony regarding the standard of care applicable to any and all health care providers treating a patient with Mr. Neason's symptoms and conditions.[28] In this matter, Dr. Davoren's expansive scope of expertise presumably includes the standard of care applicable to all Defendants, including: (1) various—unidentified—staff employed at Defendant Dignity Rehabilitation; (2) an Internal Medicine specialist (Dr. Patel); and (3) a Physical Medicine and Rehabilitation specialist (Dr. Flaviano). Taken on its face, there is hardly area of medical care or specialty that Dr. Davoren does not feel qualified to testify about concerning the scope of Mr. Neason's treatment at Dignity Rehabilitation. This type of shotgun approach to expert medical testimony is not permissible under Chapter 41A.

At the pleading stage—when the sufficiency of an expert medical affidavit under N.R.S. 41A.071 is determined—it is not yet necessary to evaluate whether the proposed expert is

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[27] *See* Plaintiff's Complaint, Exhibit "1", at ¶¶ 1-7.

[28] *Id.* at ¶ 8.

qualified to testify under an N.R.S. 50.275 analysis (*i.e.* whether the proposed expert's special knowledge, skill, experience, training or education will assist the jury). However, N.R.S. 41A.071 itself provides certain fundamental requirements that, if not met, render the proposed affidavit inherently deficient. The cornerstone of these requirements is that the affidavit must be submitted by a medical expert **who practices or has practiced in an area that is substantially similar to the type of practice engaged in by the defendant at the time of the alleged professional negligence**. Dr. Davoren's affidavit fails to fulfill this essential prerequisite.

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.[29] In the instant matter, Dr. Davoren's affidavit makes no showing that he is qualified to challenge the sufficiency of care and treatment provided by a Physical Medicine and Rehabilitation physician. Moreover, there are no general surgeon defendants in this matter, and no allegations in the First Amended 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.

Dr. Flaviano and Dr. Davoren practice in entirely different areas of medicine and are certified in separate, diverse specialties. Each specialty involves particular educational and residency requirements.

Dr. Flaviano's Background, Training and Experience

- The Nevada State Board of Medical Examiners Physicians lists Dr. Flaviano's scope of practice as Physical Medicine/Rehabilitation and Sports Medicine.
- Dr. Flaviano is certified by the American Board of Physical Medicine and Rehabilitation.

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[29] 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.

- He is also a member of the American Academy of Physical Medicine and Rehabilitation.
- Physical Medicine and Rehabilitation physicians diagnose and treat medical conditions associated with disabilities, and are experts in designing comprehensive, patient-centered treatment plans. The disabilities may include cognitive problems, orthopedic anomalies, mobility concerns, bowel and bladder issues, gait disorders, feeding and swallowing problems, communication difficulties, pain, and muscle stiffness or hypotonia.
- Physical Medicine and Rehabilitation physicians also address caregiving, mobility, educational and vocational therapies, and activities of daily living such as dressing, bathing and eating. They design treatment plans for the patients themselves or in conjunction with a medical team of varying specialties and prescribe braces/splints to improve arm or leg position or function, prosthetics for limb loss, wheelchairs, standers, walkers, bath benches, and lifts.
- To become a Physical Medicine and Rehabilitation physician, individuals must graduate from medical school followed by four additional years of postdoctoral training in a Physical Medicine and Rehabilitation residency. This includes one year developing fundamental clinical skills and three additional years of training in the full scope of the specialty.

<u>Dr. Davoren's Background, Training and Experience</u>

- The Kansas Board of Healing Arts lists Dr. Davoren's practice specialty as General Surgery. There are no other specialty areas listed.
- Dr. Davoren's affidavit states he is a "Board-Certified General Surgeon". In the absence of more particular information, it is assumed Dr. Davoren is referring to certification through the American Board of Surgery.
- According to the American Board of Surgery, common conditions treated by general surgeons include hernias, breast tumors, gallstones, appendicitis,

pancreatitis, bowel obstructions, colon inflammation, and colon cancer.

- In order to qualify for certification through the American Board of Surgery, a physician must first complete five years of general surgery residency after graduating from medical school.

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". For this reason, it is crucial that the author of an expert affidavit—which is proffered in support of medical malpractice allegations—is intimately familiar with the degree of care and skill expected by a specialist, acting under the same or similar circumstances. No information has been provided to suggest Dr. Davoren is qualified to evaluate and criticize the actions of health care providers acting outside his specialty.

Given the differences in their training, experience, and scope of practice, a Physical Medicine and Rehabilitation specialist should not opine as to whether a General Surgeon's actions in the treatment of a patient fell below the standard of care. The inverse is also true. The only exception to this rule occurs if the General Surgeon or Physical Medicine specialist previously practiced in the other specialty; hence the language "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" in N.R.S. 41A.071(2).

From the information provided in the First Amended Complaint and Dr. Davoren's affidavit, Dr. Davoren does not currently practice, and has not practiced, in an area substantially similar to the type engaged in by Dr. Flaviano at the time of the alleged negligence. Because the First Amended Complaint does not comply with N.R.S. 41A.071, it is void and must be dismissed. *Washoe Medical Center*, 148 P.3d at 794.

C. <u>Plaintiff Failed to State a Claim Against Dr. Flaviano for Negligent Hiring, Retention and Supervision</u>

Plaintiff's second cause of action is Negligent Hiring, Retention, and Supervision and is asserted against "all Defendants". However, the individual allegations found within the second

cause of action focus solely on the acts of Dignity Rehabilitation, as opposed to the individual physician Defendants.

In Nevada, the tort of negligent hiring imposes a general duty on an employer to conduct a reasonable background check on a potential employee to ensure that the employee is fit for the position." *Burnett v. C.B.A. Security Service*, 107 Nev. 787, 820 P.2d 750, 752 (1991). An employer breaches this duty when it hires an employee even though the employer knew, or should have known, of that employee's dangerous propensities. *Hall v. SSF, Inc.*, 112 Nev. 1384, 1391, 930 P.2d 94 (1996)(citing *Kelley v. Baker Protective Services, Inc.*, 198 Ga. App. 378, 401 S.E.2d 585, 586 (Ga. Ct. App. 1991). The same general rule is applicable to claims for negligent retention and supervision. As stated in *Hall*, an employer has a duty to use reasonable care in the training, supervision, and retention of his or her employees to make sure that the employees are fit for their positions. *Id.* at 1393.

The First Amended Complaint in this matter fails to identify any facts that could support a claim for negligent hiring, retention and supervision claim against Dr. Flaviano. Plaintiff does not allege that Dr. Flaviano owed a duty of care to Plaintiff related to the hiring, retention or supervision of [unidentified] employees. Plaintiff also fails to allege that Dr. Flaviano breached this duty.

"Dismissal is proper where the allegations are insufficient to establish the elements of a claim for relief." *Murchison v. Howard,* 2014 Nev. Dist. LEXIS 1475, *7 (January 10, 2014)(citing *Stockmeier v. Nevada Dep't of Corrections*, 124 Nev. 313, 183 P.2d 133, 13 (2008)). Plaintiff's second cause of action is deficient as a matter of law against Dr. Flaviano and fails to state a claim upon which relief can be granted. Under these circumstances, the second cause of action much be dismissed pursuant to N.R.C.P. 12(b)(5).

D. <u>No Valid Claim for Exists to Support Punitive Damages</u>

In Nevada, a plaintiff may be entitled to punitive damages "where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud or malice, express or implied". N.R.S. 42.005. Punitive damages are awarded for the sake of example and by way of

punishing the defendant. *Id.* A plaintiff is never entitled to punitive damages as a matter of right. *Dillard Dept. Stores v. Beckwith*, 115 Nev. 372, 380, 711 P.2d 1 (1985). It is well-established that tort liability alone is insufficient to support an aware of punitive damages. *Wichinsky v. Mosa*, 109 Nev. 84, 89, 847 P.2d 727 (1993).

Although Plaintiff's First Amended Complaint includes a prayer for punitive damages, it is devoid of allegations against Dr. Flaviano that he acted with oppression, fraud or malice, express or implied. The allegations against Dr. Flaviano are limited to assertions of untimely, and/or inappropriate medical care. Because these assertions fail to provide a basis for punitive damages (intended to punish a defendant for "despicable behavior"), Plaintiff's request for punitive damages against Dr. Flaviano must be dismissed.

III.

CONCLUSION

For the reasons set forth above, Defendant Casiano Flaviano, M.D. respectfully requests this Honorable Court dismiss Plaintiff's First Amended Complaint.

DATED: January 20, 2021.

LEWIS BRISBOIS BISGAARD & SMITH LLP

By */s/ Katherine J. Gordon*

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of January, 2021, a true and correct copy of **DEFENDANT CASIANO FLAVIANO, M.D.'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT** was served by electronically filing with the Clerk of the Court using the Odyssey E-File & Serve system and serving all parties with an email-address on record, who have agreed to receive electronic service in this action.

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DISTRICT COURT

CLARK COUNTY, NEVADA

ARLIS NEASON, as Heir of the Estate of JEFFREY NEASON; Plaintiff, vs. DIGNITY HEALTH MEDICAL GROUP, NEVADA, LLC, a domestic limited-liability company; CASIANO R. FLAVIANO, M.D.; SUSHIL R. PATEL, M.D.; DOES I through X, and ROE BUSINESS ENTITIES I through X, inclusive, Defendants.	**CASE NO.: A-20-824585-C** **DEPT NO.: 31** **DEFENDANT SUSHIL R. PATEL, MD'S SUBSTANTIVE JOINDER TO CASIANO R. FLAVIONO, MD'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT**

COMES NOW, Defendant, SUSHIL R. PATEL, MD, by and through his counsel of record, ROBERT C. McBRIDE, ESQ. and SEAN M. KELLY, ESQ. of the law firm of McBRIDE HALL, and hereby files this Substantive Joinder to Defendant Casiano R. Flaviano, MD's Motion to Dismiss Plaintiff's First Amended Complaint.

This Substantive Joinder is made and based upon the papers and pleadings on file herein, the Memorandum of Points and Authorities attached hereto, such other documentary evidence as may be presented and any oral arguments at the time of the hearing of this matter. This Defendant

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expressly adopts and incorporates by reference herein all of the Points and Authorities set forth in Defendant Casiano R. Flaviano, MD's Motion to Dismiss Plaintiff's First Amended Complaint.

Specifically, this Defendant, Dr. Patel, is an Internist (Internal Medicine), not a surgeon. Plaintiff's expert, Dr. Davoren (surgeon), is not an internist and, therefore, does not practice in an area of medicine that is substantially similar to Dr. Patel. To become an Internal Medicine physician, one must complete a three-year intensive residency program in internal medicine. Plaintiff's expert, Dr. Davoren is a general surgeon and there is no contention made that he completed such a residency. Accordingly, Plaintiff failed to meet the requirements set forth in NRS 41A.071, and the Court should enter judgment in Dr. Patel's favor based upon the pleadings in this case.

DATED this 25th day of January 2021.

McBRIDE HALL

/s/ *Sean M. Kelly*
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Attorneys for Defendant *Sushil R. Patel, MD*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 25th day of January 2021, I served a true and correct copy of the foregoing DEFENDANT SUSHIL R. PATEL, MD'S SUBSTANTIVE JOINDER TO CASIANO R. FLAVIONO, MD'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT addressed to the following counsel of record at the following address(es):

☒ **VIA ELECTRONIC SERVICE:** by mandatory electronic service (e-service), proof of e-service attached to any copy filed with the Court; or

☐ **VIA U.S. MAIL:** By placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, addressed as indicated on the service list below in the United States mail at Las Vegas, Nevada; or

☐ **VIA FACSIMILE:** By causing a true copy thereof to be telecopied to the number indicated on the service list below.

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiff,

vs.

DIGNITY SELECT NEVADA, LLC, a foreign limited-liability company; CASIANO R. FLAVIANO, MD; SUSHIL R. PATEL, MD; DOES I through X; and ROE BUSINESS ENTITIES I through X; inclusive,

Defendants.

CASE NO.: A-20-824585-C
DEPT. NO.: XXXI

OPPOSITION TO DEFENDANT CASIANO FLAVIANO, M.D.'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT

And

OPPOSITION TO DEFENDANT CASIANO FLAVIANO, M.D.'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

And

OPPOSITION TO DEFENDANT SUHIL R. PATEL, MD'S SUBSTANTIVE JOINDER TO CASIANO R. FLAVIANO'S MOTION TO DISMISS

PLAINTIFF'S FIRST AMENDED COMPLAINT

COMES NOW, Plaintiff, Arlis Neason, as Heir of the Estate of Jeffrey Neason (hereafter, "Plaintiff"), by and through her attorneys of record, GGRM Law Firm and Arntz Associates, hereby files her Opposition to Defendant Casiano Flaviano, M.D.'s Motion to Dismiss Plaintiff's Complaint (filed January 19, 2021) and Opposition to Defendant Casiano Flaviano, M.D.'s Motion to Dismiss Plaintiff's First Amended Complaint (filed January 20, 2021), and Defendant Suhil R. Patel, MD's Substantive Joinder to Casiano R. Flaviano, MD's Motion to Dismiss Plaintiff's First Amended Complaint (filed January 25, 2021).

This Opposition is made and based upon the attached Memorandum of Points and Authorities, all papers and pleadings on file herein, and any oral argument permitted.

Dated this 8th day of February, 2021.

GGRM LAW FIRM

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On January 19, 2021, Defendant Casiano Flaviano, M.D. (hereafter, "Defendant") filed his Motion to Dismiss Plaintiff's Complaint. Rather than filing an errata, on January 20, 2021, Defendant filed his Motion to Dismiss Plaintiff's First Amended Complaint. Defendant's Motion filed on January 20, 2021 is a carbon copy of Defendant's Motion filed on January 19, 2021. Additionally, Defendant Sushil R. Patel, MD filed a Substantive Joinder to Defendant Casiano R. Flaviano's Motions to Dismiss, which incorporated essentially the same arguments. The arguments contained in this Plaintiff's Opposition will address both of Defendant's identical motions and Defendant Sushil Patel's Joinder.

Defendant argues that the expert affidavit used in Plaintiff's Complaint and First Amended Complaint fails to fulfill the requirements of NRS 41A.071. Defendant states that Plaintiff's Complaint includes an Affidavit from Dr. Davoren, who is based in Kansas, and does not practice in the area of physical medicine and rehabilitation. Interestingly enough, Defendant additionally argues that Plaintiff's Complaint fails to point out who was responsible for certain aspects of the treatment that ultimately led to the death of Plaintiff's son. Defendant makes this argument without acknowledging the lack of said information in the decedent's medical records, and the fact that this issue would be cleared up quite quickly through some initial discovery.

Defendant accurately states the standard for a motion to dismiss. Defendant takes issue with the fact that the expert affidavit provided by Dr. Davoren identifies that his experience involved general surgery, but that it does not mention significant experience in physical medicine and rehabilitation. According to Defendant, because Dr. Flaviano is not a general surgeon, then Dr. Davoren's opinions are insufficient. Defendant supports this argument by citing NRS 41A.071 and NRS 50.275. Additionally, Defendant cites to *Carnes v. Wairimu*, 2011 Nev. Unpub. LEXIS 504, at *7.

Defendant then pivots and claims that Plaintiff failed to state a claim against Dr. Flaviano for Negligent Hiring, Retention, and Supervision. As Defendant tries to explain, Dr. Flaviano did not owe a duty of care to his patients or the Plaintiff since Dr. Flaviano is not responsible

for the hiring of employees at the medical facility where the decedent passed. Finally, Defendant concludes stating that Plaintiff is not entitled to punitive damages.

II. FACTS OF THE CASE

Plaintiff attached the affidavit of Dr. Michael Davoren, a general surgeon, to the complaint. Dr. Davoren outlines the facts of the case as follows:

1. On October 30, 2019, Jeffrey was seen at the Genesis Health clinic by Dr. Lubna Khan for a one-week history of pain and swelling of his left neck and chest. An ultrasound of the neck revealed thrombosis of the left internal jugular vein and Jeffrey was started on a blood thinner, Eliquis.
2. On October 31, 2019, Jeffrey was seen by Dr. Ratnasabapathy who agreed with the Eliquis therapy and also ordered CT's of the neck and chest. Jeffrey was instructed to present to the hospital for any chest pains, shortness of breath or bleeding symptoms.
3. On November 3, 2019, Jeffrey was seen in the emergency room at St. Rose Dominican Siena campus with complaints of chest and back pain. Jeffrey was noted to have a significant history of a rear-end restrained MVA as a rear seat passenger on 7/30/19 and a recent diagnosis of left internal jugular vein thrombosis on Eliquis 10 mg twice daily. A troponin level was noted to be elevated at 7 and cardiology was consulted subsequently diagnosing a NSTEMI cardiac event. CT angiogram of the chest confirmed the left internal jugular vein thrombosis but no pneumonia, pulmonary emboli or effusions were noted. Echocardiogram was noted to show preserved left ventricular function and family declined heart catheterization electing continued treatment with Eliquis.
4. On November 4, 2019, a medical response team alert was called due to new onset visual changes and mild gait ataxia. A non-contrast CT of the head was interpreted as suspicious for acute ischemia/ infarct. Jeffrey was placed in the stroke care pathway with a neurology consult ordered. CT angiogram of the head was normal and a cerebral perfusion scan was also normal. Neurology did not feel that Jeffrey

was a candidate for TPA and subsequently cleared him for discharge to a post-acute care facility.

5. On November 6, 2019, Jeffrey was noted to have wheezing and shortness of breath. A chest x-ray showed multilobar pneumonia and Lasix, antibiotics and additional steroids were ordered. Neurologic symptoms were stable.
6. On November 8, 2019, Jeffrey was discharged to Dignity Health Rehabilitation Facility on Eliquis, 81mg aspirin, and prednisone among other medications.
7. At Dignity Jeffrey, was evaluated by Dr. Casiano Flaviano. An Internal Medicine consult was ordered and medications were continued as in the hospital with the Eliquis being given at a loading dose of 10mg twice daily to be reduced to 5mg twice daily on November 13, 2019. Dr. Flaviano recorded the hemoglobin of 11.4 in his admission assessment.
8. On November 12, 2019, Jeffrey's hemoglobin was noted to have decreased to 7.0 at 0358 and to 6.8 at 1220. Dr. Patel noted the decrease and noted that Jeffrey said "he still may be darker but not sure". Patel documented that he planned to discontinue the Eliquis if the hemoglobin was noted to be low on the 1220 lab draw. Monitoring for a GI bleed was to done as well as checking iron studies. Dr. Flaviano saw the patient at 1627 and noted that the white blood cell count was elevated and that the Eliquis was discontinued. No additional orders were given except to repeat the labs in the morning. At 2030, nurse Cunanan documented that Jeffrey's parent had noted dark black stool residue on Jeffrey's pants.
9. On November 13, 2019, at 0550, the hemoglobin was noted to be 4.5. At 1054, Jeffrey was noted to have been found on the floor of the bathroom with a large amount of black, tarry stool. The EMS report shows that nursing noted a blood pressure of 82/52 with a pulse of 127. Jeffrey was emergently transferred to the St. Rose Hospital ER. Jeffrey died at St. Rose on 11/13/19 with the cause of death on the death certificate being listed as "Complications of Colon Cancer".

10. Jeffrey was noted to have a thrombosed left internal jugular vein after presenting to his primary care physician for evaluation of left neck and chest pain and swelling. Standard treatment for thrombosis is anticoagulation and Eliquis was appropriately prescribed. On 11/3/19, Jeffrey was admitted to St. Rose Hospital and during the course of his admission he was diagnosed with a stroke and also an NSTEMI cardiac event. Jeffrey was medically stable when he was transferred to Dignity Health Rehabilitation Hospital with a hemoglobin level of 11.4.(*See* Plaintiff's Complaint, Exhibit 1, filed November 11, 2020. Additionally, Dr. Davoren's CV has been attached to this pleading as Exhibit 2.)

Jeffrey had a number of risk factors for development of significant intestinal bleeding including Crohn's disease, steroid and aspirin use and anticoagulation with Eliquis. These multiple conditions warranted a heightened level of caution and mandated close observation for any signs of bleeding. Any signs of bleeding demanded that investigative studies be quickly done, and that medication discontinuation should be considered due to the fact that Eliquis has no known reversal agent and its effects last at least two half-lives or 24 hours.

Dr. Davoren reviewed all of the medical records associated with Jeffrey's care before giving his opinions outlined as follows:

a. When the hemoglobin level on 11/10/19 showed a decrease to 9.8 from 11.4, this was a clear indication of occult blood loss and simply monitoring for evidence of gastrointestinal bleeding and rechecking lab was insufficient in an anticoagulated patient. A simple occult fecal blood test should at minimum been performed and serial hemoglobins ordered to monitor for ongoing blood loss in a timely fashion. Also, the Eliquis should have been held as there would be no deleterious effect from holding it for 24 hours until further testing and work-up could be performed.

b. When Dr. Flaviano performed his consultation on Jeffrey two days after it had initially been requested, he noted the anemia as evidenced by the hemoglobin of 9.8 from 11/10/19. However, both he and Dr. Patel failed to

order a repeat hemoglobin for 11/11/19. Dr. Flaviano and Dr Patel also failed on 11/11/19 to order any type of workup for possible gastrointestinal bleeding or to hold the Eliquis.

c. Finally, on 11/12/19, a repeat blood test showed that the hemoglobin had decreased to a critical level of 7.0. Rather than immediately hold the Eliquis which was the proper thing to do, only a repeat hemoglobin was ordered which meant that Jeffrey received another dose of Eliquis further delaying any possible ability for him to stop actively bleeding. After the repeat hemoglobin showed an even further decrease, the only intervention was to hold the Eliquis and order repeat testing for the following day. By this time Jeffrey's hemoglobin had decreased by almost 50% from his levels at St. Rose where he was 12.6 initially. By this time, it was obvious that significant ongoing bleeding was occurring in an anticoagulated patient whose anticoagulation could not be reversed. Jeffrey should have immediately been transferred to an acute care facility for blood transfusions, fluid resuscitation and an endoscopic work-up for the source of his bleeding. Further, when the patient's parent notified nursing staff of black tarry stool being present on Jeffrey's pants, transfer was still not initiated for work-up of the obvious GI bleed.

d. When the hemoglobin on 11/13/19 was resulted at 4.5 which indicated a greater than 50% blood loss since his admission, an immediate transfer was still not initiated. A hemoglobin of 4.5 in a normal healthy adult is clearly life threatening and demands immediate intervention. In a patient with a history of a recent NSTEMI cardiac event and an anticoagulated status, this blood level without immediate treatment was lethal. Transfer to St. Rose did not occur until 5 hours later after Jeffrey's condition had declined to the point that he was found down on the floor of the bathroom with a large melanotic stool and unstable vital signs. (*Id.*)

Dr. Davoren summarized his opinion as follows: "In summary, on numerous 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. In addition, multiple opportunities to intervene by stopping the Eliquis and/or transferring Jeffrey back to an acute care facility for endoscopic evaluation, transfusion and resuscitation were missed by the staff and doctors at Dignity. These failures to diagnose and treat were below the standard of care and directly resulted in the death of Jeffrey Neason." *(Id.)*

In addition to having Dr. Davoren review the matter, the plaintiff also asked Dr. David Fish, a physiatrist, to review the records. His declaration and reports with summary of opinions are attached hereto as Exhibit 1. As can be seen by the reports and summary of opinions, Dr. Fish completed his review approximately two months before the one-year anniversary of Jeffrey's death, well in advance of the first potential date that the statute of limitations would run. As Dr. Fish attests, after completing the review for Jeffrey's case, he recommended Dr. Davoren as someone qualified to give an opinion regarding the care given to Jeffrey and whether it breached the standard of care.

III. LEGAL ARGUMENT

A. Dr. Davoren's Affidavit Complies with NRS 41A.071

Dr. Davoren's affidavit complies with NRS 41A.071, which requires that a medical malpractice action must be filed with "an affidavit, supporting the allegations contained in the action." Zohar v. Zbiegien, 334 P.3d 402, 405 (Nev. 2014). The purpose of the expert affidavit requirement in NRS 41A.071 is "to lower costs, reduce frivolous lawsuits, and ensure that medical malpractice actions are filed in good faith based upon competent expert medical opinion." Szydel v. Markman, 121 Nev. 453 (2005). The affidavit requirement "is intended primarily to foreclose frivolous medical malpractice suits at the pleading stage, *not to block meritorious suits on narrow technical grounds*." Ebbing v. Prentice, 225 Ill.App.3d 598, 601 (1992) (emphasis added). NRS 41A.071 provides 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.

NRS 41A does not, however, define the level of detail required to adequately "support" a plaintiff's allegations. Zohar, 334 P.3d at 405. The Nevada Supreme Court held that "reason and public policy dictate that courts should read the complaint and plaintiff's NRS 41A.071 expert affidavit together when determining whether the expert affidavit meets the requirements of NRS 41A.071." *Id.* NRS 41A.071's affidavit requirement is a preliminary procedural rule subject to the notice-pleading standard, and thus, it must be "liberally construe[d]…in a manner that tis consistent with our NRCP 12 jurisprudence." *Id.*

B. Dr. Davoren Practices in the Same or Substantially Similar Type of Practice

Dr. Davoren is qualified to render opinions in the subject case.[1] The Legislature has not provided an explanation or guidance for courts to resolve disputes over whether an affiant practices in an area that is "substantially similar to the type of practice engaged in at the time of the alleged malpractice." Borger v. Dist. Ct., 102 P.3d 600, 605 (Nev. 2004). Nevada turned to Connecticut law that held, "[t]he threshold question of admissibility is governed by the scope of the witness' knowledge and not the artificial classification of the witness by title." *Id.* Thus, NRS 41A "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.* In Borger, a gastroenterologist was qualified to opine as to the medical malpractice of a general surgeon. In Zohar, an emergency physician was qualified to

[1] On February 2, 2016, in Baxter v. Dignity Health, Case No. A-13-687208-C, this District denied an identical motion that sought dismissal of a medical malpractice complaint for failure to comply with the "substantially similar" requirement of NRS 41A.071 where an expert doctor opined as to a nurse's malpractice.

testify as to the malpractice of nurses in the emergency department. Zohar, 334 P.3d at 407 (both Summerlin Hospital and Dr. Zbiegien are parties in this case).

In Borger, the defendant surgeon moved to dismiss the plaintiff's claims against him because the affidavit submitted was executed by a gastroenterologist and not a surgeon. The Nevada Supreme Court found that the affidavit by the gastroenterologist was sufficient, explaining:

> Although [NRS 41A.071] does not allow unrestricted use of medical expert witnesses who testify based upon acquired knowledge outside the witness' area of present or former practice and prohibits testimony based upon knowledge solely obtained for the purpose of litigation, the 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.
>
> …
>
> [T]he statute does not require that the affiant practice in the same area of medicine as the defendant; rather it requires that the affiant practice in an area "substantially similar" to that in which the defendant engaged, giving rise to the malpractice action.
>
> Borger, 102 P.3d at 605 (emphasis added).

Similarly, in Zohar, the physician's affidavit submitted in support of the plaintiffs' medical negligence complaint did not specifically name all of the nurses and physicians who had violated the standard of care. 334 P.3d at 404. For that reason, the trial court dismissed the complaint for failure to comply with NRS 41A.071—a decision the Nevada Supreme Court reversed. The Nevada Supreme Court noted that the legislative history of NRS 41A.071 demonstrated that the statute was enacted to deter baseless medical malpractice litigation, and that it should be interpreted "to ensure that our courts are dismissing only frivolous cases, further, the purposes of our notice-pleading standard, and comport with the Nevada Rules of Civil Procedure. *Id*. at 405-06. The Court emphasized:

> The NRS § 41A.071 affidavit requirement is a preliminary procedural rule subject to the notice-pleading standard, and thus, it must be liberally construed in a manner that is consistent with our NRCP 12 jurisprudence.

Id. at 406.

Finally, the Supreme Court's decision in Baxter v. Dignity Health, 357 P.3d 927 (2015), again emphasized the fact that NRS 41A.071 must be liberally construed "because NRS § 41A.071 governs the threshold requirements for initial pleadings in medical malpractice cases,

not the ultimate trial of such matters." The clear implication is that the threshold requirements are less stringent than the requirements for establishing a violation of the standard of care at trial.

Dr. Davoren is qualified to testify as to the standard of care required by all defendants in the subject case. It would be an absurd result to deny him the ability to present an affidavit under NRS 41A.071. An affidavit is a preliminary procedure and must be construed liberally—as opposed to the strict testifying requirements for trial. Dr. Davoren is qualified to testify as to the standard of care of Dr. Faviano, a nurse or other healthcare providers because the issues in this case involve areas of medicine a general surgeon is trained in. The practices are substantially similar when it comes to treating patients with the issues attendant to Jeffrey. The mere fact that the malpractice occurred at a physical rehabilitation facility does not lead one to the conclusion that only a physiatrist can testify regarding the propriety of the care Jeffrey received.

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IV. CONCLUSION

Based on the foregoing, Plaintiff respectfully requests that Defendant's Motion to Dismiss Plaintiff's Complaint and Defendant's Motion to Dismiss Plaintiff's First Amended Complaint be denied.

Dated this 8th day of February, 2021.

GGRM LAW FIRM

/s/ Breen Arntz

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of GGRM LAW FIRM, and that on the 8th day of February, 2021, I caused the foregoing document entitled **OPPOSITION TO DEFENDANT CASIANO FLAVIANO, M.D.'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT AND OPPOSITION TO DEFENDANT CASIANO FLAVIANO, M.D.'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT AND OPPOSITION TO DEFENDANT SUHIL R. PATEL, MD'S SUBSTANTIVE JOINDER TO CASIANO R. FLAVIANO'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT** to be served upon those persons designated by the parties in the E-service Master List for the above-referenced matter in the Eighth Judicial Court E-filing System in accordance with the mandatory electronic service requirements of Administrative Order 14-2 and the Nevada Electronic Filing and Conversion Rules, to wit:

/s/ Michael Madden

_____

An Employee of GGRM LAW FIRM

EXHIBIT 1

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Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

ARLIS NEASON, as Heir of the Estate of JEFFREY NEASON, Plaintiff, vs. DIGNITY HEALTH MEDICAL GROUP, NEVADA, LLC, a domestic limited-liability company; DOES I through X; and ROE BUSINESS ENTITIES I through X; inclusive, Defendants.	CASE NO.: A-20-824585-C DEPT. NO.: XXXI **NRS 41A.071 Declaration of Dr. David Fish, M.D.**

Los Angeles, California

Los Angeles County

I, Dr. David Fish, do state under oath and penalty of perjury as follows:

1. I am currently a full-time faculty member at UCLA Medical Center. My position is Director of Physiatry and Interventional Pain Management at the UCLA Spine Center. I am board certified in Physiatry and Pain Management.
2. My additional qualifications and training are further set forth in my curriculum vitae, which is attached.
3. I was asked in September of 2020 to review this matter for purposes of expressing opinions as causation and standard of care regarding the life-ending blood condition Jeffrey Neason.
4. 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.
5. I submitted my report with my opinions on September 21, 2020 and spoke with counsel, Taylor Smith Esq., a few days later. At the time we spoke we discussed whether I was the best suited to give opinions on the issues in this case. While I felt that I was qualified to give opinions on standard of care and causation based on a rehabilitation perspective, I referred counsel to contact general surgeon Dr. Michael Davoren. My reports containing my evaluation and opinions is attached hereto.
6. Although the treatment occurred at a physical rehabilitation facility and I am qualified to address most treatment that occurs at a rehab facility, the treatment at issue in this case is not unique to the purview of experience and training of a

physiatrist. In fact, I believed that Dr. Davoren was also qualified and is someone who actively treats patients with the medical issues Jeffrey Neason was experiencing.

_____2/8/2021_____

Dr. David Fish, MD

David E. Fish, MD, MPH

PHYSICAL MEDICINE AND REHABILITATION
PAIN MEDICINE
ELECTRODIAGNOSTIC MEDICINE

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Medical Records Review and Report

DATE OF EVALUATION: 9 / 21 / 2020

RE: Jeffrey Neason DOB: 9 / 29 / 82 Date of Death: 11/13/19 Age: 37 yrs

To Whom This May Concern:

I was asked to evaluate the medical records of Jeffrey Neason. I am currently a full-time faculty member at UCLA Medical Center. My position is Director of Physiatry and Interventional Pain Management at the UCLA Spine Center. I am board certified in Physiatry and Pain Management. I have also provided my CV.

MEDICAL and BILLING RECORDS REVIEWED

Death Certificate: 11/13/19. Cause: Complications of Colon Cancer
Community Ambulance 11/13/19: Dignity Rehab Hospital to St. Rose Siena Hospital
Comprehensive Cancer Centers of Nevada
Case Preparation Report, Embalmer Phuong Le 11/20/19
Clark Country Coroner/Medical Examiner Report 11/13/19 3:20pm
Dignity Health Rehab Hospital
Genesis Medical Group
Henderson Fire Department Prehospital Care Report Summary
Henderson Police Department Incident Report
Jackson Physical Therapy
Pueblo Medical Imaging
St Rose Hospital

Timeline:

4/5/19: Genesis medical Group: Cough, congestion, and post-nasal drip. Ordered: Sulfasalazine, Prednisone, OT cough, nebulizer

8/26/19: Genesis Medical Group: Limp when walking, neck and right shoulder pain after 7/30/19 MVA. Meds: Sulfasalazine, folic acid, Flagyl, KCl, prednisone, Vit D3

10/7/19: Genesis Medical Group: Upper back pain due to accident July 2019. Bilateral chest pain that started on 9/14 after mopping the floor. EKG reviewed. Pain muscular in nature. PT

10/21/19: Jackson PT: Therapy: Cervical, thoracic, lumbar spine, 7/30/19 MVA

10/30/19: Genesis Medical Group: Swelling and pain left neck and chest. Meds: Sulfasalazine, folic acide, Flagyl, KCL, prednisone, Vit D3, Eliquis 5mg. Ultrasound with left IJ DVT. Start Eliquis, refer to Heme Onc. CXR negative.

10/30/19: Comprehensive Cancer Center: Reason for visit: Blood clot in neck. 7/30/19 was in MVA
Medications:
Eliquis 5mg 2 tabs twice daily (Started 10/30/19)
Sulfasalazine 500mg twice daily
Prednisone 5mg 1 tab daily
Folic Acid 1mg 1 tab daily
KCL 20%
Vit D
Claritin
Metronodazole 500mg
Allergies: Zithromax

10/31/19: Comprehensive Cancer Centers of Nevada, Ratnasabapathy, MD. Newly diagnosed left jugular DVT. Swelling and redness in neck, UC with nearly occlusive thrombus in the left internal jugular vein. Hx Chron's disease, Bowel Obstruction. Meds: Sulfasalazine, Prednisone, Potassium, Eliquis. Continue Eliquis loading dose. Neck and chest CT.

11/3/19: Henderson Police Department Incident Report. Son has blood clot and on blood thinner, now has balance and vision probs. Male is only 78 lbs/special needs.

11/3/19: Henderson Fire Dept Prehospital Care Report Summary

Narrative History Text:

S: PATIENT HAS A CC OF WEAKNESS X 2 DAYS. PATIENT STATES THE WEAKNESS STARTED YESTERDAY AT 0300. HE STATES HE WAS WALKING AROUND WHEN HE BEGAN TO FEEL WEAK. PATIENT ALSO HAS A COMPLAINT OF NO APPETITE, LOSS OF COORDINATION, AND CHILLS. PATIENT STATES HE DID NOT FALL, AND DOES NOT REMEMBER ANY ABNORMAL EVENTS LEADING UP TO THIS EVENT. PATIENTS MOTHER STATES PATIENT HAD BLOOD CLOT THAT SWELLED ON HIS LEFT SIDE OF HIS NECK. MOTHER STATES HE WENT TO A CLINIC ON WEDNESDAY AND WAS PRESCRIBED ELIQUIS. PATIENT STATES THE SWELLING HAS GONE DOWN BUT HE FEELS WEAK SINCE THE START OF HIS NEW MEDICATION. PATIENT DENIED DENIED CHEST PAIN, SOB, LOC, SYNCOPE, ABDOMINAL PAIN, N/V/D, CHANGES IN URINARY OUTPUT OR BOWEL MVTS,
TRAUMA OR FALLS, ILLEGAL DRUGS, ALCOHOL INTAKE, OTHER CHANGES IN BASELINE MEDS OR DIAGNOSIS. SI OR HI

BP 121/82 9:15

11/3/19-11/8/19: St. Rose Hospital
37 year old male, hx of Crohn's Disease and Johanson-Blizzard Syndrome presents with parents for chest and back pain s/p MVA. Troponin > 7in ER, peaked to 9. Cardiology consulted, Non STEMI, Echo normal, offered left heart catherization, parents opted to treat conservatively

11/3/19: Nurse noted stroke-like symptoms with vision distortion. Neurology consult did not feels he was appropriate for TPA. Imaging negative for acute stroke. MRI offered, mother declined given claustrophobia.

Developed hypoxia, tachycardia. CXR with multifocal pneumonia, started on IV Rocephin. Parents refused azithromycin stating it worsens diarrhea.
Continued Eliquis given left neck DVT. Reduced to 5mg bid after completing 10mg BID loading.
Followed acute MI protocol, started on ASA and Lipitor. Metoprolol started, changed to Cardizem.
Continued prednisone.

Imaging St. Rose Hospital Visit
11/3/19 Echo:

SUMMARY:

1. Left ventricle: The cavity size is normal. Wall thickness is normal. Systolic function is normal. The estimated ejection fraction is 50-55%. Wall motion is normal; there are no regional wall motion abnormalities. The study is not technically sufficient to allow evaluation of LV diastolic function.
2. Left atrium: The atrium is mildly dilated.
3. Aortic valve: Thickening, consistent with sclerosis. There is mild regurgitation.

11/3/19: Xray chest

FINDINGS:
Lungs are clear without focal opacity or edema. Heart size and mediastinal contour normal. No pleural effusion or pneumothorax. No acute bony abnormality.

11/3/19: CT angio:

IMPRESSION:

No pulmonary embolism.

No consolidation, edema, nodule, mass or effusion.

Soft tissue masslike appearance in the limited visualized left lower neck and a few small lymph nodes in the mediastinum. This could be due to distended thrombosed left internal jugular vein though a lymph node or mass or mass lesions of other etiology cannot be excluded.

Very limited visualized upper abdomen raises possibility for retroperitoneal lymphadenopathy and splenomegaly. Clinical correlation with history of malignancy, lymphoma and further evaluation of the neck and abdomen may be considered.

11/4/19: CT cerebral perfusion w/contrast
Normal
11/4/19 CT Angio Head and Neck

IMPRESSION: Unremarkable CT angiogram of the head and neck.

11/4/19: CT head:

IMPRESSION:

1. Abnormal low attenuation edema involving the cortical and subcortical white matter of both occipital lobes, left greater than right, suspicious for acute ischemia/infarction. This can be seen in posterior reversible encephalopathy syndrome upper (PRES). Recommend further evaluation with MRI brain with and without contrast.
2. No acute intracranial hemorrhage.

11/6/19: CXR:
Interval development of bibasilar airspace disease concerning for multilobar pneumonia
11/7/19 CXR:
Stable multifocal pneumonia

Discharge Medications:
Atorvastatin 10mg
ASA 81 mg
Eliquis 5mg BID
Diltiazem 30mg

Prednisone 20
Sulfasalazine 500mg
KCL 3.75mL once daily
Folic Acid 1mg once daily
Claritin 5mg daily
Levalbuterol nebulizer
Ceftriazone 1gram daily
Lactobacillus
Discharge to Rehabilitation Facility 11/8/19
Vitals: 46.5, HR 105, RR 17, BP 100/63. SpO2 100%

Dignity Health Rehab Hospital 11/8/19-11/13/19
11/8/19: Flaviano, MD.
CC: Encephalopathy. H&P: Symptoms of vision distortion. Parent's refusing Axithromycin stating it worsens his diarrhea. Started on Eliquis and continued, reduced to 5mg BID. Remains on prednisone for Crohn's. With decline in function, requires 24 hr supervision.
Meds:
Tylenol 650mg
Alum, Mag Hydroxide 15ml Oral
Eliquis 5mg BID
Aspirin 81mg oral
Lipitor 10mg
Dulcolax 10mg
Rocephin 1G IV
Clonidine 0.1 q6h PRN
Diltiazem 30mg q6h
Colace 100mg BID
Pepcid 20mg BID
Floranex 1 tab TID
Folic Acid 1mg once daily
Neurontin 100mg nightly
Robitussin PRN
Hydralazine 25mg po Q6hrs
Hydroxyzine 25mg 4x daily PRN
Lactulose PRN
Levalbuterol nebulizer q4hs prn
Claritin 10mg qday
Milk of Magnesia 30ml Oral PRN
Zofran 4mg q8hrs PRN
Percocet 5/325 q4hrs PRN
Miralax PRN
Potassium Chloride 10mEg Oral Qday
Prednisone 20mg twice daily
Senna nightly PRN
Fleet enema PRN
Sulfasalazine 500mg twice daily
Trazodone 25mg nightly PRN
Vit D 1,000 units once a day

BP 114/92 **Hemoglobin/Hematocrit 11.4/32.8 11/8/19**
Plan: Therapies 3hrs/day, 5 days/week. 24hr physiatry supervision, 24 hr nursing.
"Patient's labile blood pressure, 122/76 to 119/79, places patient at risk for stroke, renal complications, and MI"

11/10/19: **H/H 9.8/28.1** (No progress note identified in records)

11/11/19: Flaviano, MD. 12.33pm Progress Note BP 111/72. Some loose stools due to Chrons. On Eliquis. "Monitor CBC"

11/11/19. Consult note Internal Medicine Patel 3:02 pm (Consult ordered 11/8/19, 19:57). "Current Hemoglobin noted to be low and patient cannot confirm if he has noticed blood in the stools." Plan: Continue ASA, Statin. Monitor HGB while on Eliquis; monitor for GI bleed."

11/12/19 0358: **H/H 7.0/20.1**
11/12/19 1220: **H/H 6.8/19.6**
11/12/19. Progress note Internal Medicine Patel: Diarrhea better. "Pt believes he still may be darker but not sure" Anemia, exacerbated by OAC. "Repeating HBG; if still low will d/c Eliquis; monitor for GI bleed; check iron studies."

11/12/19: Progress Note: Flaviano, MD 4:27 pm. BP 105/77. Team conference. "WBC elevated on steroids. Monitoring HGB. Stop Apizxaban."

11/12/19: Speech: "I am really tired today"

11/12/19 3:40pm: Sweety RN: Spoke with Dr. Patel to relate Stat hemoglobin 6.8. Given orders to discontinue Eliquis and Aspirin, repeat labs ordered to tomorrow AM. No other orders at this time.

11/12/19: Cunanan, RN 8:30pm: Eliquis and Aspirin discontinued. "Arlis mentioned brought son'/pt's clothes home to launder, noticed dark, black stool residue on pants.

11/13/19 0559: **H/H 4.5/13.3**

1/13/19 10:54 am. Nursing note, Murray RN: Pt found on floor in bathroom with black tarry stool. Patient reported he feels like passing out so he sat on the floor. BP 80/50, tachycardiac with HR 127.

11/13/19: 10:56am: Nursing note Cruz, RN: "Pt picked up by ambulance via Gurnee. Appears to be awake, pale looking."

11/13/19: Flaviano, MD Progress Note 11:53am
Team conference. Black Tarry stools, drop in BP. Transferred acutely to ER. BP 100/62

DC Summary 11/13/19: "Preceding events led to patient's decline in function. Acute physical therapy and occupational therapy failed to return patient back to prior level of function." "Drop in HGB monitored as gross bleed monitored. On 11/13/19 patient had black tarry stools and drop in blood pressure. He was transferred acutely to the ER.":Monitor CBC. Drop in NGB monitored as gross bleeding monitored, On 11/13/19 patient had black tarry stools and drop in blood pressure. He was transferred acutely to the ER"

Labs:
Hemoglobin/Hematocrit:

11/8/19:	11.4/32.9
11/10/19:	**9.8/28.1**
11/12/19 0358:	**7.0/20.1**
11/12/19 1220:	**6.8/19.6**
11/13/19 0559:	**4.5/13.3**

Vitals:
BP
11/9/19: 108-119/70-83
11/10/19: 98-108/60-70
11/11/19: 105-128/66-72
11/12/19:101-105/55-77
11/13/19: 98-106/62-63

Community Ambulance 11/13/19: Dignity Rehab Hospital to St. Rose Siena Hospital

Narrative History Text:
U/A REPORT AND PAPERWORK GIVEN BY RN. PER RN THE PT HAD A SYNCOPAL EPISODE IN THE RESTROOM. THEIR INITIAL BP SHOWED 82/52 WITH A HEART RATE OF 127. THE PT IS AT THE REHAB FACILITY FOR HAVING STROKE LIKE SYMPTOMS AND DEVELOPING PNEUMONIA WHILE HE WAS IN THE HOSPITAL. HE THEN WAS SENT TO THE REHAB FACILITY. THE PT IS BEING SENT TO ST. ROSE SIENA ER FOR HIGHER LEVEL OF CARE.

I FOUND THE PT IN BED AT THE FACILITY. THE PT IS A/O X4. THE PT IS PALE AND DRY. THE PT DENIES ANY PAIN OR DISCOMFORT. THE PT DENIES CP, SOB, N/V/D, OR DIAPHORESIS. PER ANOTHER RN THE PT WAS BEING ASSISTED IN THE RESTROOM WHEN HE WAS FEELING FAINT. HE WAS HELPED TO HIS KNEE SO HE WOULDN'T FALL TO THE FLOOR. THE PT NEVER HAD A LOSS OF CONSCIOUSNESS. THE PT WAS ASSISTED BACK INTO BED PTA OF EMS. WE PLACED THE GURNEY NEXT TO THE BED AND LIFTED THE PT OVER TO THE GURNEY. PT SECURED TO THE GURNEY WITH SHOULDER STRAPS AND LAP BELTS. V/S OBTAINED. 3 LEAD AND 12 LEAD OBTAINED. THE MONITOR SHOWED SINUS TACHYCARDIA. WE TOOK THE PT DOWN TO THE AMBULANCE AND LOADED HIM INTO THE BACK. I GAVE A TELEMETRY REPORT TO ST. ROSE SIENA ER. I CONTINUED TO MONITOR THE PT DURING THE VERY SHORT TRANSPORT ACROSS THE PARKING LOT TO THE AMBULANCE ENTRANCE AT THE ER. NO CHANGES IN PT CONDITION NOTED. THE PT ATTEMPTED TO SING THE EPCR A FEW TIMES, BUT WAS UNABLE TO COMPLETE A SIGNATURE. PT TRANSFERRED TO ER BED A11. REPORT AND PAPERWORK GIVEN TO RN.

Death Certificate: 11/13/19. Cause: "Complications of Colon Cancer"

Clark County Coroner/Medical Examiner Report 11/13/19 3:20pm: Location and date of incident: 7/30/19 Silverado Ranch Boulevard and War Horse Way

MEDICAL IMAGING

8/26/19: Xray C spine Pueblo Medical Imaging

IMPRESSION:
1. Reversal of the normal cervical lordosis which can be seen in setting of muscle spasm or patient positioning.
2. No acute osseus abnormality of the cervical spine.

8/26/19: Xray Right Hip Pueblo Medical Imaging

IMPRESSION:
No evidence of fracture or dislocation.

8/26/19: Xray right shoulder Pueblo Medical Imagin

IMPRESSION:
No evidence of fracture or dislocation.

10/30/19: US Soft Tissue, Pueblo Medical Imaging
DVT left internal jugular vein

10/30/19: Chest Xray, Pueblo Medical Imaging
Unremarkable

COMMENTARY AND MEDICAL DECISION MAKING:

I am evaluating the medical records of Jeffrey Neason for evaluation purposes only. All records sent to me are reviewed for the purpose of a medical decision based upon the events and records outlined above. The opinions of this report are within a reasonable degree of medical probability and are based upon my review and examination of the evidence in the medical records provided to me. All of my opinions have been rendered with a reasonable degree of medical probability but are preliminary to the extent that there is relevant information that I have not yet had the opportunity to review.

My opinions in regards to Jeffrey Neason are based upon my clinical experience as an active treating Physiatrist who specializes and is boarded in Physiatry, Pain Medicine, and Electrodiagnostic Medicine. I am currently on staff at the UCLA School of Medicine in the UCLA Spine Center and the UCLA Medical Center. I am involved with resident and fellowship training of physicians at UCLA and must maintain updated and clinically relevant evidence-based guidelines for treatment of patients that fall within the standards of care. Based upon my review of the records available to me, I would make the following opinions to a reasonable degree of medical probability based on events and medical evidence:

Based on my review of medical records above, medical staff at Dignity Hospital Rehabilitation Center did not meet standard of care on 11/10/10, 11/11/19, 11/12/19, and 11/13/19, and this directly led to the subsequent events on 11/13/19, and unfortunately, Jeffrey's Neason's death.

1) **Failure to adequately identify that Jeffrey Neason had a number of concurrent risk factors placing him at HIGH RISK for a GI bleed:**
    a. hx of Chron's disease
    b. oral steroids (increase risk of ulcers and GI bleed)
    c. aspirin (increases risk of GI bleed)
    d. Eliquis is an anticoagulant, thus increasing the risk of bleeding

    - Each of these factors individually increase risks of a GI bleed, and in combination would increase risk even more. Despite this, the Rehabilitation Facility PM&R physician and Internal Medicine Physician did not recognize Jeffrey Neason's presentation and clear evidence from laboratory data as a potentially life-threatening situation.

2) **Failure to identify and act upon laboratory evidence indicating an active bleed**
    - Labs on 11/10/19 shows a drop in hemoglobin to 9.8 from 11.4 on 11/8/19, and hematocrit of 28.1 from 32.9. Particularly for this patient who is on an antiplatelet agent (ASA), anticoagulation (Eliquis), chronic steroids, and Chron's disease, this drop of almost 2 points

hemoglobin at the very least should have warranted a recheck of labs, and if they remained low, an immediate workup should have been initiated on 11/10/19

3) **Failure to redraw labs in a timely manner, even after potential for GI bleed was recognized**
   - Labs were not drawn again until two days later, on 11/12/19. For a drop in hemoglobin and hematocrit in a patient with these risk factors, close follow-up and trending of labs would be standard of care.

4) **Failure to immediately stop any agents contributing to a potential bleed in a timely manner**
   - With these risk factors and a decrease in hemoglobin and hematocrit, one immediate step would also be to stop any medications contributing to the bleed, including Eliquis and ASA. These were not stopped until 11/12/19

5) **Significant delay in Internal Medicine Consultation**
   - Records indicate that although order was placed on 11/8/19 at 7:57 pm for Internal Medicine Consultation, this consultation did not happen until 11/11/19, and note was not signed until 11/11/19 at 3:02pm.

6) **Failure to provide reasonable testing and/or workup to evaluate for a GI bleed**
   - Despite a clear downward trend in labs, and several notes indicating that this was concern, no Guaic Test or FOBT (Fecal Occult Blood Test) was performed, which would have been easy ways to determine if was any blood in Mr. Neason's stool. Instead, providers relied on asking the patient, who just had an MI and possible stroke, and did not remember if he had any darker stools or not.

7) **Failure to recognize a critical lab value and immediately transfer to acute care on 11/12/19**
   - Repeat labs on 11/12/19 showed a significant drop in hemoglobin and hematocrit, to 7.0 and 20.1. This reflected greater than 4 point drop in hemoglobin, and over 8 point drop in hematocrit, clearly indicating an acute and significant loss of blood. This lab was reported at 4am on 11/12/19. Combined with the prior results from 10/10/19, it is clear that Mr. Neason at this time had a significant bleed. Standard of care at this time, with this result, would be to immediately transfer Mr. Neason to the emergency room for further emergent workup and treatment, including possible transfusion.
   - A STAT hemoglobin result of 6.8 was relayed to the internal medicine consultation physician at 3:40 pm on 11/12/19. Rather than immediate transfer to ER, orders were given only to stop Eliquis and Aspirin, and repeat labs again the next morning. No other orders were given – no further workup was done to evaluate for an acute GI bleed.

8) **Failure to recognize even more urgent critical lab value and immediately transfer to acute care on 11/13/19**
   - Labs from 5:59 am on 11/13/19 showed an even more critical hemoglobin of 4.5, with a continued precipitous and life-threatening trend downward. It was not until 10:54 am, 5 hours after this urgently critical lab was reported, and 23 hours after the critical 6.8 result, that patient was eventually transferred to the ER.

The medical and professional opinions expressed within this report are unique and specific to the factual circumstances of this individual case and therefore may not apply to other cases or factual scenarios.

David E. Fish, MD, MPH
Chief, Division of Interventional Pain Physiatry
Professor, UCLA Department of Orthopaedic Surgery
Physical Medicine and Rehabilitation, The UCLA Spine Center
Electrodiagnostic Medicine, Pain Medicine, Sports Medicine
UCLA School of Medicine

EXHIBIT 2

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MICHAEL DAVOREN, MD, FACS

EDUCATION

1985-1989 College of the Holy Cross Worcester, Massachussetts
BA in Biology/pre-medicine

1989-1993 University of Oklahoma Oklahoma City, Oklahoma
Doctor of Medicine

1993-1994 University of Kansas Wichita, Kansas
Internship in General Surgery

1997-2002 University of Kansas Wichita, Kansas
Residency in General Surgery

ACCREDITATIONS

Board Certified in General Surgery 2004

Recertified 2013, expiration 2025

Advanced Trauma Life Support Instructor 1998-2007

America's Top Surgeons 2007 Consumer Research Council

PROFESSIONAL EXPERIENCE

1994-1997 United States Army Wiesbaden Germany
General Medical Officer

- Clinic Commander 1996 Tuzla, Bosnia
- Army Commendation Medal x2, Army Achievement Medal x2, Southwest Asia Service Medal with bronze star, NATO Medal

2002 Clinical Professor of Surgery University of Kansas-Wichita

2003- Present Private Practice Olathe Medical Center Olathe, Kansas

PROFESSIONAL MEMBERSHIPS

Fellow American College of Surgeons

Kansas Chapter of the American College of Surgeons

Johnson County Medical Society

Society for Laparoendoscopic Surgeons

Kansas Medical Society

American Hernia Society

ADDITIONAL PROFESSIONAL ACTIVITIES

Leadership Council of the Kansas Chapter of the American College of Surgeons 2005-2017

Program Chair Annual Meeting Kansas Chapter American College of Surgeons 2006-2007

President of the Kansas Chapter of the American College of Surgeons 2010-2011

Oncology Committee Olathe Medical Center 2004

Infection Control Committee Olathe Medical Center 2005

Trauma Committee Olathe Medical Center 2003-present

Critical Care Committee Olathe Medical Center 2006-present

Surgical Administrative Committee Olathe Medical Center 2010-present

Chief of Surgery Olathe Medical Center Olathe, KS 2010-2012

Peer Review Committee Olathe Medical Center 2010-2012, 2017-19

Credentialing Committee Olathe Medical Center 2010- 2012, 2017-2019

Medical Executive Committee Olathe Medical Center 2010-2012, 2015-present

Physician Leadership Council Olathe Medical Center 2009-present

Chief of Surgery Olathe Medical Center since 1/1/17

Medical Staff President-elect Olathe Medical Center since 1/1/19

Chairman Peer Review Committee Olathe Medical Center 1/1/19-present

Davoren, M.P., Postier, R. Ameliorating the End-organ Effects of Endotoxin Shock. Poster presentation at University of Oklahoma College of Medicine Research Day, 1992.

Davoren, M.P., Voight D., Smith, R.S. Transection of the Common Bile Duct with an Associated Transection of the Pancreas in Blunt Trauma: A Case Report and Review of the Literature. Presented at Southwest Surgical Society, Colorado Springs. 1999.

Davoren, M.P., Esophageal Reflux: Evaluation and Surgical Treatment. Grand Rounds University Of Kansas School of Medicine. April 2002.

Davoren, M.P., Thomas, B.R. Perforation of the Esophagus by a Coat Hanger. Presented at the Kansas Chapter of the American College of Surgeons Meeting. October 2002.

Davoren, M.P., Shield, C.F., Pre and Post Transplant Cholecystectomy in the Cardiac Transplant Population. Presented at The Kansas Chapter of the American College of Surgeons Meeting. October 2002.

EXHIBIT 6

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Attorneys for Defendant
Casiano Flaviano, M.D.

DISTRICT COURT

CLARK COUNTY, NEVADA

ARLIS NEASON, as Heir of the Estate of JEFFREY NEASON, Plaintiff, vs. DIGNITY HEALTH MEDICAL GROUP, NEVADA, LLC, a domestic limited-liability company; CASIANO R. FLAVIANO, M.D.; SUSHIL R. PATEL, M.D.; DOES I through X; and ROE BUSINESS ENTITIES I through X; inclusive, Defendants.	Case No. A-20-824585-C Dept. No.: XXIX **DEFENDANT CASIANO FLAVIANO, M.D.'S REPLY IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT** **Hearing Date: February 23, 2021** **Hearing Time: 9:30 a.m.**

COMES NOW Defendant Casiano Flaviano, M.D., by and through his counsel of record, S. Brent Vogel and Katherine J. Gordon of LEWIS BRISBOIS BISGAARD & SMITH LLP, and submits his Reply points and authorities in support of his Motion to Dismiss Plaintiff's First Amended Complaint pursuant to N.R.C.P. 12(b)(5).

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This Reply is made and based upon the papers and pleadings on file herein, the Memorandum of Points and Authorities set forth below, and such argument of counsel which may be requested by the Court during the hearing of this matter.

DATED: February 16, 2021.

LEWIS BRISBOIS BISGAARD & SMITH LLP

By */s/ Katherine J. Gordon*

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Attorneys for Defendant Casiano Flaviano, M.D.

MEMORANDUM OF POINTS AND AUTHORITIES

I. PLAINTIFF DID NOT OPPOSE DISMISSAL OF HIS NEGLIGENT HIRING, RETENTION AND SUPERVISION CLAIM

Dr. Flaviano moved to dismiss Plaintiff's second cause of action for Negligent Hiring, Retention, and Supervision which is asserted against "all Defendants." Plaintiff's First Amended Complaint does not allege that Dr. Flaviano owed a duty of care to Plaintiff related to the hiring, retention or supervision of [unidentified] employees. It also fails to allege that Dr. Flaviano breached this duty. The individual allegations found within the second cause of action focus solely on the acts of Dignity Rehabilitation, as opposed to the individual physician Defendants.

Dr. Flaviano moved to dismiss the second cause of action pursuant to N.R.C.P. 12(b)(5) on the basis it is deficient as a matter of law and fails to state a claim upon which relief can be granted. Plaintiff filed his Opposition to the Motion to Dismiss on February 8, 2021. Therein, he did not oppose dismissal of the negligent hiring, retention and supervision claim against Dr. Flaviano. Pursuant to E.D.C.R. 2.20(e), the "[f]ailure of the opposing party to serve and file written opposition may be construed as an admission that the motion and/or joinder is meritorious and a consent to granting the same." Therefore, Dr. Flaviano requests this Court construe Plaintiff's failure to oppose dismissal of the negligent hiring, retention and supervision claim as an admission the Motion to Dismiss was meritorious and that Plaintiff consented to the granting of the same.

II. PLAINTIFF DID NOT OPPOSE DISMISSAL OF HIS REQUEST FOR PUNITIVE DAMAGES

Dr. Flaviano also moved to dismiss Plaintiff's request for punitive damages because the First Amended Complaint is devoid of allegations that Dr. Flaviano acted with oppression, fraud or malice, express or implied as required by N.R.S. 42.005. The allegations against Dr. Flaviano are limited to assertions of professional negligence based on untimely and/or inappropriate medical care. It is well-established that tort liability alone is insufficient to support an aware of punitive damages. *Wichinsky v. Mosa*, 109 Nev. 84, 89, 847 P.2d 727 (1993).

Plaintiff's Opposition to the Motion to Dismiss did not contain points and authorities in opposition to dismissal of his punitive damages request. Therefore, Dr. Flaviano requests the Court construe Plaintiff's failure to file a written opposition as an admission the Motion to Dismiss was meritorious and that he consented to its granting pursuant to E.D.C.R. 2.20(e).

III. PLAINTIFF PROVIDED NO INFORMATION THAT DR. DAVOREN'S EXPERIENCE AND TRAINING FULFULL THE REQUIREMENTS OF N.R.S. 41A.071

In this medical malpractice action, Plaintiff maintains the individual physician Defendants, Drs. Flaviano and Patel, breached the applicable standard of care in their care and treatment of Mr. Neason while he was an inpatient at Dignity Rehabilitation. Dr. Flaviano is a Physical Medicine and Rehabilitation specialist, and Dr. Patel specializes in Internal Medicine. Despite the fact neither physician is a general surgeon, and none of the medical malpractice allegations concern surgery whatsoever, Plaintiff's First Amended Complaint is supported by a expert affidavit authored by Michael Davoren, M.D., a general surgeon who practices in Kansas.

Dr. Flaviano moved to dismiss Plaintiff's professional negligence claims on the basis the affidavit from a general surgeon under the facts and circumstances of this case fails to fulfill the requirements of N.R.S. 41A.071 which mandate the expert affidavit be authored by a physician "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." There is no information in Dr. Davoren's affidavit, or in his curriculum vitae (which was not provided until Plaintiff's Opposition to the current Motion) to suggest Dr. Davoren practices or has practiced in Dr. Flaviano's area of specialty.

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.

The medical affidavit filed with Plaintiff's First Amended Complaint fails to meet the requirements of N.R.S. 41A.071. The entirety of information regarding Dr. Davoren's training, background, knowledge, and experience is limited to general surgery. By contrast, Defendant 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 is a Physical Medicine, Rehabilitation and *Non-Surgical* Sports Medicine specialist. Dr. Davoren's training and experience, as outlined in his affidavit, does not include any experience in the specialty area of Physical Medicine and Rehabilitation. Despite this fact, Dr. Davoren's proclaims in his affidavit that he possesses the training, background, knowledge and experience to offer expert testimony regarding the standard of care applicable to any and *all* health care providers who treated Mr. Neason at Dignity Rehabilitation. This shotgun approach to expert medical testimony defeats the purpose of N.R.S. 41A.071.

In response to Dr. Flaviano's Motion, Plaintiff 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, and all the unidentified medical staff of Dignity Rehabilitation). However, Plaintiff failed to support this statement with any specific information regarding Dr. Davoren's experience or work history. In the absence of this information, it is impossible to find that Dr. Davoren's practices or has practiced in an area substantially similar to that engaged in by the physician Defendants.

Instead of providing potentially helpful information regarding the scope of Dr. Davoren's experience, training and practice area(s), Plaintiff's Opposition stated only it would be an "absurd result" to deny Dr. Davoren the ability to present an affidavit under N.R.S. 41A.071 in this case,

and highlighted the fact the affidavit requirement is merely a preliminary procedure that must be construed liberally.[1] Plaintiff cited to *Borger v. Eighth Judicial District Court*, 120 Nev. 1021, 102 P.3d 600 (2004) wherein the Court held that N.R.S. 41A.071 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 605. Yet, Plaintiff provided absolutely no information to support a finding that Dr. Davoren's present or former practice reasonably relates to either Dr. Flaviano or Dr. Patel's practice area. No facts were provided to establish that Dr. Davoren has ever worked in a rehabilitation facility, or is (or has been) responsible as a physician for the overall day-to-day care and monitoring of inpatients. By contrast, the information available through Dr. Davoren's affidavit and curriculum vitae are entirely devoid of any experience relating to the area of practice of either physician Defendant.

A motion to dismiss tests the legal sufficiency of the claim set out against the moving party. *See Zalk-Josephs Co. v. Wells-Cargo, Inc.*, 81 Nev. 163, 400 P.2d 621 (1965). Dr. Flaviano contests the legal sufficiency of Plaintiff's expert affidavit, and in response Plaintiff failed to provide the Court with *any* specific information to deny the Motion. Plaintiff's blanket statement that it would be "absurd" to find that a general surgeon cannot opine as to the standard of care applicable to a Physical Medicine specialist does not assist the Court in evaluating the merits of the current Motion. It would have been helpful for Plaintiff to explain *why* this finding is allegedly absurd. Based on the lack of information provided in Plaintiff's Opposition, it must be assumed no basis exists to establish that Dr. Davoren practices or has practiced in a substantially similar practice area as Dr. Flaviano and, therefore, fails to meet the requirements set forth in N.R.S. 41A.071.

Further, while the requirements of N.R.S. 41A.071 are procedural in nature, it does not follow that such requirements are without purpose and may be ignored by Plaintiff. Plaintiff's ability to simply obtain an affidavit of merit from any physician in an effort to pro forma avoid

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[1] *See* Plaintiff's Opposition, 11:3-6.

dismissal of his malpractice claim, regardless of the physician's specialty or scope of practice, is contrary to the purpose of N.R.S. 41A.071. Plaintiff's reliance on the procedural aspect of N.R.S. 41A.071 is overstated and antithetical to the purpose of requiring an expert affidavit.

The instant Motion provided Plaintiff with the opportunity to establish for the Court Dr. Davoren's training and experience and the reason he qualifies as an expert under N.R.S. 41A.071 (as such were not apparent in his affidavit). Plaintiff failed to do so. Plaintiff 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. Plaintiff incorrectly believes the statutory language mandating that an affidavit be authored by an expert who "practices or has practiced in the same or substantially similar area" is simply superfluous, or somehow inapplicable to Plaintiff.

Because Plaintiff failed to provide the Court with any information to support a finding that Dr. Davoren fulfills the requirements of N.R.S. 41A.071, the Motion to Dismiss should be granted.

IV. THE RECORDS REVIEW ATTACHED TO PLAINTIFF'S OPPOSITION IS INSUFFICIENT UNDER N.R.S. 41A.071

As a supplemental basis for opposing Dr. Flaviano's Motion, Plaintiff highlighted the fact it was not his idea to retain a general surgeon for purposes of a N.R.S. 41A.071 expert affidavit, but was instead a recommendation by David Fish, M.D. Plaintiff attached a records review to his Opposition that was prepared by Dr. Fish, who practices in the area of Physical Medicine and Rehabilitation. Plaintiff also obtained a recent affidavit from Dr. Fish that stated he indeed did suggest that Plaintiff retain Dr. Davoren for purposes of an expert affidavit. The question that is never answered in Plaintiff's Opposition, or in Dr. Fish's records review and recent affidavit, is **why** Dr. Fish suggested that a general surgeon prepare the necessary expert affidavit instead of simply executing the affidavit himself. It belies logic that Dr. Fish, a physician who apparently practices in the same area as Dr. Flaviano, prepared an unsworn records review but then shirked the responsibility of submitting an affidavit or declaration, and instead suggested a general

surgeon (in a case that has nothing to do with surgery) sign the affidavit.

Plaintiff's reference to the prior records review prepared by Dr. Fish—and Dr. Fish's suggestion that someone else prepare the expert affidavit—raises more questions than answers. Plaintiff is quick to point to Dr. Fish as the reason he retained a general surgeon, and even obtained a recent affidavit from Dr. Fish to prove the recommendation occurred, but nowhere does Plaintiff and/or Dr. Fish explain the purpose for this odd recommendation. Moreover, Dr. Fish's recent affidavit still does not include an opinion that Dr. Flaviano's care and treatment of Mr. Neason fell below the applicable standard of care and caused the alleged injuries. Why would Plaintiff go to the trouble of obtaining a recent affidavit from Dr. Fish to prove he recommended the use of a general surgeon and still not include the necessary standard of care opinions from Dr. Fish, a Physical Medicine specialist, in the affidavit?

The basis for Dr. Flaviano's Motion to Dismiss is the lack of similarity between the general surgeon expert and Dr. Flaviano. This lack of similarity does not exist between Dr. Fish and Dr. Flaviano, yet Plaintiff and Dr. Fish go to great lengths to avoid Dr. Fish providing the necessary expert opinions to support Plaintiff's allegations of malpractice. Plaintiff's reference to a Physical Medicine physician's continued refusal to provide an expert affidavit under N.R.S. 41A.071—even in response to Dr. Flaviano's Motion to Dismiss—actually supports Dr. Flaviano's position because it reveals that a general surgeon is willing to provide expert opinions in this case, but a Physical Medicine specialist is not.

Additionally, Plaintiff cannot rely on the records review prepared by Dr. Fish for purposes of fulfilling the requirements of N.R.S. 41A.071. The statute mandates that expert opinions be set forth in an affidavit, thus imposing the requirements of N.R.S. 53.020 and 53.045. The Nevada Supreme Court addressed this requirement in *Buckwalter v. Eighth Judicial District Court* and held N.R.S. 41A.071 could be met by either a valid affidavit or declaration. 126 Nev. 200, 234 P.3d 920, 234 P.3d at 920 (2010).

In Nevada, affidavits are governed by N.R.S. 53.020 which states that if an affidavit is taken in another state or territory of the United States and is to be used in an action in Nevada, it

"shall be taken before a commissioner appointed by the Governor of this State to take affidavits and depositions in such other state or territory, or before any notary public or judge of a court of record having a seal." Dr. Fish is located in Los Angeles, California. His records review is simply a letter and is not notarized and no statement appears that the report was made before a judicial officer. As such, the report does not qualify as an affidavit pursuant to N.R.S. 41A.071.

Likewise, Dr. Fish's report does not qualify as a declaration that complies with N.R.S. 41A.071. Declarations in Nevada are governed by N.R.S. 53.045 which states:

> Any matter whose existence or truth may be established by an affidavit or other sworn declaration may be established with the same effect by an unsworn declaration of its existence or truth signed by the declarant under penalty of perjury, and dated, in substantially the following form:
>
> 1. If executed in this state: "I declare under penalty of perjury that the foregoing is true and correct."
> 2. Except as otherwise provided in NRS 53.250 to 53.390, inclusive, if executed outside this state: "I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct."

In *MountainView Hospital, Inc. v. Eighth Judicial District Court*, 128 Nev. 180, 273 P.3d 861 (2012), the Nevada Supreme Court considered a matter of first impression whether a medical expert's notarized opinion without a supporting jurat fulfilled the requirements of N.R.S. 41A.071. The Court determined that to fulfill the requirement for an "affidavit," an expert opinion letter must either: (1) contain the language "I declare under penalty of perjury that the foregoing is true and correct;" or (2) have an accompanying jurat indicating the declarant made the statements before a judicial officer and swore to the truth of the statements. *Id.* at 866. Dr. Fish did not sign his letter under the penalty of perjury under the law of the State of Nevada.

Although Dr. Fish apparently practices in the same area as Dr. Flaviano, and despite the

fact the current Motion is premised on the lack of practice area similarity between Plaintiff's generally surgery expert Dr. Davoren and Dr. Flaviano, Plaintiff still has not submitted a valid expert affidavit or declaration from Dr. Fish. Dr. Fish's alternative recommendation that a general surgeon (who clearly does not fulfill the requirements of N.R.S. 41A.071) provide the expert affidavit is confusing at best and suspicious at worst. This is especially true in light of Plaintiff's failure to inform the Court of the reason Dr. Fish punted responsibility for providing expert opinions under oath to a physician who practices in an unrelated area of medicine.

V. CONCLUSION

For the reasons set forth above, Defendant Casiano Flaviano, M.D. respectfully requests this Honorable Court dismiss Plaintiff's Complaint.

DATED: February 16, 2021.

LEWIS BRISBOIS BISGAARD & SMITH LLP

By */s/ Katherine J. Gordon*

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KATHERINE J. GORDON
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Tel. 702.893.3383

Attorneys for Defendant Casiano Flaviano, M.D.

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of February 2021, a true and correct copy of **DEFENDANT CASIANO FLAVIANO, M.D.'S REPLY IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT** was served by electronically filing with the Clerk of the Court using the Odyssey E-File & Serve system and serving all parties with an email-address on record, who have agreed to receive electronic service in this action.

Gabriel A. Martinez, Esq.
Dillon G. Coil, Esq.
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breen@breen.com
Attorneys for Plaintiff

By /s/ *Johana Whitbeck*
Johana Whitbeck, an Employee of
LEWIS BRISBOIS BISGAARD & SMITH LLP

EXHIBIT 7

JOIN
ROBERT C. MCBRIDE, ESQ.
Nevada Bar No.: 7082
SEAN M. KELLY, ESQ.
Nevada Bar No.: 10102
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E-mail: rcmcbride@mcbridehall.com
E-mail: smkelly@mcbridehall.com
Attorneys for Defendant
Sushil R. Patel, MD

DISTRICT COURT

CLARK COUNTY, NEVADA

ARLIS NEASON, as Heir of the Estate of JEFFREY NEASON; Plaintiff, vs. DIGNITY HEALTH MEDICAL GROUP, NEVADA, LLC, a domestic limited-liability company; CASIANO R. FLAVIANO, M.D.; SUSHIL R. PATEL, M.D.; DOES I through X, and ROE BUSINESS ENTITIES I through X, inclusive, Defendants.	**CASE NO.: A-20-824585-C** **DEPT NO.: 31** **DEFENDANT SUSHIL R. PATEL, MD'S JOINDER TO CASIANO R. FLAVIONO, MD'S REPLY IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT**

COMES NOW, Defendant, SUSHIL R. PATEL, MD, by and through his counsel of record, ROBERT C. McBRIDE, ESQ. and SEAN M. KELLY, ESQ. of the law firm of McBRIDE HALL, and hereby files this Joinder to Defendant Casiano R. Flaviano, MD's Reply in Support of Motion to Dismiss Plaintiff's First Amended Complaint.

This Joinder is made and based upon the papers and pleadings on file herein, the Memorandum of Points and Authorities attached hereto, such other documentary evidence as may be presented and any oral arguments at the time of the hearing of this matter. This Defendant expressly adopts and incorporates by reference herein all of the Points and Authorities set forth in

/ / /

Defendant Casiano R. Flaviano, MD's Reply in Support of Motion to Dismiss Plaintiff's First Amended Complaint

DATED this 16th day of February 2021.

McBRIDE HALL

/s/ *Sean M. Kelly*
Robert C. McBride, Esq.
Nevada Bar No.: 7082
Sean M. Kelly, Esq.
Nevada Bar No.: 10102
8329 W. Sunset Road, Suite 260
Las Vegas, Nevada 89113
Attorneys for Defendant *Sushil R. Patel, MD*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 16th day of February 2021, I served a true and correct copy of the foregoing DEFENDANT SUSHIL R. PATEL, MD'S JOINDER TO CASIANO R. FLAVIONO, MD'S REPLY IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT addressed to the following counsel of record at the following address(es):

☒ **VIA ELECTRONIC SERVICE:** by mandatory electronic service (e-service), proof of e-service attached to any copy filed with the Court; or

☐ **VIA U.S. MAIL:** By placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, addressed as indicated on the service list below in the United States mail at Las Vegas, Nevada; or

☐ **VIA FACSIMILE:** By causing a true copy thereof to be telecopied to the number indicated on the service list below.

Gabriel A. Martinez, Esq.
Dillon G. Coil, Esq.
Taylor J. Smith, Esq.
GREENMAN GOLDBERG RABY & MARTINEZ
2770 S. Maryland Parkway, Suite 100
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-and-

Breen Arntz, Esq.
Nevada Bar No.: 3853
ARNTZ ASSOCIATES
5545 Mountain Vista, Suite E
Las Vegas, Nevada 89120
Attorneys for *Plaintiff*

S. Brent Vogel, Esq.
Nevada Bar No. 6858
Katherine J. Gordon, Esq.
Nevada Bar No. 583
LEWIS BRISBOIS BISGAARD & SMITH, LLP
6385 S. Rainbow Blvd., Suite 600
Las Vegas, Nevada 89118
Attorneys for *Defendant Casiano Flaviano, MD*

/s/ *Kellie Piet*
An Employee *McBRIDE HALL*

EXHIBIT 8

S. BRENT VOGEL
Nevada Bar No. 6858
Brent.Vogel@lewisbrisbois.com
KATHERINE J. GORDON
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6385 S. Rainbow Boulevard, Suite 600
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Attorneys for Defendant
Casiano Flaviano, M.D.

DISTRICT COURT

CLARK COUNTY, NEVADA

ARLIS NEASON, as Heir of the Estate of JEFFREY NEASON, Plaintiff, vs. DIGNITY HEALTH MEDICAL GROUP, NEVADA, LLC, a domestic limited-liability company; CASIANO R. FLAVIANO, M.D.; SUSHIL R. PATEL, M.D.; DOES I through X; and ROE BUSINESS ENTITIES I through X; inclusive, Defendants.	Case No. A-20-824585-C Dept. No.: 31 **ORDER GRANING IN PART AND DEFERRING IN PART DEFENDANT CASIANO R. FLAVIANO, M.D.'S MOTION TO DISMISS AND SUSHIL R. PATEL, M.D.'S JOINDER**

This matter came on for hearing on February 23, 2021 at 9:30 a.m. This Court, having considered the pleadings and papers on file, heard oral argument, and for other good cause appearing, hereby ORDERS as follows:

IT IS HEREBY ORDERED, ADJUDGED and DECREED that Defendant Casiano R. Flaviano, M.D.'s Motion to Dismiss, and Defendant Sushil R. Patel, M.D.'s Joinder thereto, is GRANTED IN PART AND DEFERRED IN PART as follows:

…

1. The Motion to Dismiss Plaintiff's claims for negligent hiring, retention and supervision is GRANTED without prejudice based on E.D.C.R. 2.20(e) because Plaintiff did not file a memorandum of points and authorities in opposition to dismissal of the negligent hiring, retention and supervision claims, and further based on Plaintiff counsel's statement during the hearing that Plaintiff had no opposition to dismissal of the negligent hiring, retention and supervision claims;

2. The Motion to Dismiss Plaintiff's request for punitive damages is GRANTED without prejudice based on E.D.C.R. 2.20(e) because Plaintiff did not file a memorandum of points and authorities in opposition to dismissal of the request for punitive damages, and further based on Plaintiff counsel's statement during the hearing that Plaintiff had no opposition to dismissal of the request for punitive damages;

3. The Motion to Dismiss Plaintiff's claims for medical malpractice is DEFERRED until such time as Defendants conduct limited discovery related to the issue of whether Plaintiff's proposed expert witness, Michael Davoren, M.D., fulfills the requirements of N.R.S. 41A.071;

4. If the limited discovery conducted by Defendants consists of a deposition of Dr. Davoren, the substantive portion of such deposition (excluding introductions, admonitions, objections and breaks) should not exceed one (1) hour;

6. Any costs charged by Dr. Davoren for attending the deposition are to be paid by Plaintiff;

7. The parties are to use best efforts to complete the limited discovery within 30 days of the date of this signed Order; and

8. Within ten (10) days of conclusion of the limited discovery, Defendants will file supplements to the Motion to Dismiss and Joinder. Plaintiff will file a supplemental

…

…

…

…

opposition to the Motion to Dismiss within ten (10) days of the filed supplement to the Motion to Dismiss.

IT IS SO ORDERED.

DATED this 8th day of March 2021.

DISTRICT COURT JUDGE

Approved As to Form And Content By:

Dated this 7th day of March 2021.

GREENMAN GOLDBERG RABY & MARTINEZ

/s/ Breen Arntz
Gabriel A. Martinez, Esq.
Dillon G. Coil, Esq.
Taylor J. Smith, Esq.
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Las Vegas, NV 89109
and
Breen Arntz, Esq.
ARNTZ ASSOCIATES
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Attorneys for Plaintiff

Approved As to Form And Content By:

Dated this 7th day of March 2021.

McBRIDE HALL

/s/ Sean Kelly
Robert C. McBride, Esq.
Sean M. Kelly, Esq.
8329 W. Sunset Road, Suite 260
Las Vegas, NV 89113
Attorneys for Defendant
Sushil R. Patel, M.D.

Respectfully Submitted By:

LEWIS BRISBOIS BISGAARD & SMITH, LLP

/s/ Katherine J. Gordon
S. BRENT VOGEL
Nevada Bar No. 6858
KATHERINE J. GORDON
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6385 S. Rainbow Boulevard, Suite 600
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Attorneys for Defendant
Casiano Flaviano, M.D.

LEWIS BRISBOIS BISGAARD & SMITH LLP ATTORNEYS AT LAW

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of March 2021, a true and correct copy of **ORDER GRANTING IN PART AND DEFERRING IN PART DEFENDANT CASIANO FLAVIANO, M.D.'S MOTION TO DISMISS AND DEFENDANT SUSHIL PATEL, M.D.'S JOINDER** was served by electronically filing with the Clerk of the Court using the Odyssey E-File & Serve system and serving all parties with an email-address on record, who have agreed to receive electronic service in this action.

Gabriel A. Martinez, Esq.
Dillon G. Coil, Esq.
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Attorneys for Defendant Sushil R. Patel, M.D.

By /s/ Roya Rokni
an Employee of LEWIS BRISBOIS BISGAARD & SMITH LLP

LEWIS BRISBOIS BISGAARD & SMITH LLP ATTORNEYS AT LAW

Rokni, Roya

From: Sean M. Kelly <smkelly@mcbridehall.com>
Sent: Sunday, March 7, 2021 9:07 PM
To: Gordon, Katherine
Cc: BREEN ARNTZ; breen@breen.com; gmartinez@ggrmlawfirm.com; dcoil@ggrmlawfirm.com; tsmith@ggrmlawfirm.com; Daor, Joshua; Rokni, Roya
Subject: Re: [EXT] Re: Neason v. Flaviano, et al.

Looks good to me. You can use my e-signature in same. Thanks for preparing!

Sean M. Kelly, Esq.
smkelly@mcbridehall.com | www.mcbridehall.com
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Telephone: (702) 792-5855
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On Mar 7, 2021, at 6:36 PM, Gordon, Katherine <Katherine.Gordon@lewisbrisbois.com> wrote:

Here you go.
I also changed the numbered order of the last paragraphs.

From: BREEN ARNTZ <breenarntz@me.com>
Sent: Sunday, March 7, 2021 6:15 PM
To: Gordon, Katherine <Katherine.Gordon@lewisbrisbois.com>
Cc: Sean M. Kelly <smkelly@mcbridehall.com>; breen@breen.com; gmartinez@ggrmlawfirm.com; dcoil@ggrmlawfirm.com; tsmith@ggrmlawfirm.com; Daor, Joshua <Joshua.Daor@lewisbrisbois.com>;

Rokni, Roya

From: BREEN ARNTZ <breenarntz@me.com>
Sent: Sunday, March 7, 2021 7:23 PM
To: Gordon, Katherine
Cc: Sean M. Kelly; breen@breen.com; gmartinez@ggrmlawfirm.com; dcoil@ggrmlawfirm.com; tsmith@ggrmlawfirm.com; Daor, Joshua; Rokni, Roya
Subject: Re: [EXT] Re: Neason v. Flaviano, et al.
Attachments: Neason - Proposed Order Granting in Part and Deferring in Part Motion to Dismiss (draft 2) 4837-6917-0655 v.1.docx; Neason - Proposed Order Granting in Part and Deferring in Part Motion to Dismiss.pdf

Looks good. Thank you.

Breen Arntz, Esq.
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Office: 702.595.4800
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On Mar 7, 2021, at 6:37 PM, Gordon, Katherine <Katherine.Gordon@lewisbrisbois.com> wrote:

Here you go.
I also changed the numbered order of the last paragraphs.

From: BREEN ARNTZ <breenarntz@me.com>
Sent: Sunday, March 7, 2021 6:15 PM
To: Gordon, Katherine <Katherine.Gordon@lewisbrisbois.com>
Cc: Sean M. Kelly <smkelly@mcbridehall.com>; breen@breen.com; gmartinez@ggrmlawfirm.com; dcoil@ggrmlawfirm.com; tsmith@ggrmlawfirm.com; Daor, Joshua <Joshua.Daor@lewisbrisbois.com>; Rokni, Roya <Roya.Rokni@lewisbrisbois.com>
Subject: Re: [EXT] Re: Neason v. Flaviano, et al.

Ah shoot, can't you just put a sentence in right after the one giving you ten days to give plaintiff an additional to respond.

Breen Arntz, Esq.

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On Mar 7, 2021, at 6:12 PM, Gordon, Katherine <Katherine.Gordon@lewisbrisbois.com> wrote:

I understand. I was concerned with the amount of time staggered supplements may take. But I'm open to that change. Please send an updated draft with your proposed changes so Sean and I can review and approve.
Thanks-
Katie

From: BREEN ARNTZ <breenarntz@me.com>
Sent: Sunday, March 7, 2021 6:08 PM
To: Gordon, Katherine <Katherine.Gordon@lewisbrisbois.com>
Cc: Sean M. Kelly <smkelly@mcbridehall.com>; breen@breen.com; gmartinez@ggrmlawfirm.com; dcoil@ggrmlawfirm.com; tsmith@ggrmlawfirm.com; Daor, Joshua <Joshua.Daor@lewisbrisbois.com>; Rokni, Roya <Roya.Rokni@lewisbrisbois.com>
Subject: [EXT] Re: Neason v. Flaviano, et al.

I'm okay with most of your order. I don't like the idea that I have to file my supplemental brief at the same time as you. I should be given the opportunity to reply to yours since it's your motion.

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On Mar 7, 2021, at 5:57 PM, Gordon, Katherine <Katherine.Gordon@lewisbrisbois.com> wrote:

Attached please find a draft proposed Order Granting in Part and Deferring in Part Defendant Casiano Flaviano, M.D.'s Motion to Dismiss and Defendant Sushil Patel, M.D.'s Joinder. Please review at your earliest convenience. If the draft meets your approval, please let us know that we have authority to use your e-signature. If you have proposed changes, please send back a redlined version of the attached Word document.

Thank you-
Katie

Katherine J. Gordon
Partner
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EXHIBIT 9

JOIN
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dwrenn@grsm.com

Attorneys for Defendant,
DIGNITY SELECT NEVADA, LLC

DISTRICT COURT

CLARK COUNTY, NEVADA

ARLIS NEASON, as Heir of the Estate of JEFFREY NEASON, Plaintiff, v. DIGNITY SELECT NEVADA, LLC a foreign limited-liability company; CASIANO R. FLAVIANO, MD; SUSHIL R. PATEL, MD; DOES I through X; and ROE BUSINESS ENTITIES I through X; inclusive Defendants.	CASE NO. A-20-824585-C DEPT. NO. XXXI **DEFENDANT DIGNITY SELECT NEVADA, LLC'S LIMITED JOINDER TO DEFENDANT CASIANO R. FLAVIANO, M.D.'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT AND SUSHIL R. PATEL, M.D.'S SUBSTANTIVE JOINDER**

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Gordon Rees Scully Mansukhani, LLP
300 S. 4th Street, Suite 1550
Las Vegas, NV 89101

DEFENDANT DIGNITY SELECT NEVADA, LLC'S LIMITED JOINDER TO DEFENDANT CASIANO R. FLAVIANO, M.D.'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT AND SUSHIL R. PATEL, M.D.'S SUBSTANTIVE JOINDER

Defendant DIGNITY SELECT NEVADA, LLC ("Dignity Select"), by and through its attorneys of record, Robert E. Schumacher, Esq. and Dione C. Wrenn, Esq. of the law offices of Gordon Rees Scully Mansukhani, LLP, hereby submits this limited, substantive joinder to Defendant Casiano R. Flaviano, M.D.'s Motion to Dismiss Plaintiff Arlis Neason's First Amended Complaint, and Sushil R. Patel, M.D.'s substantive joinder thereto. Specifically, Dignity Select joins the Defendant-physicians' arguments with respect to dismissal of Plaintiff's First Cause of Action for Medical Negligence. This Joinder is brought pursuant to EDCR 2.20, NRCP 12(b)(5) and NRS 41A.071. Further, it is based upon the accompanying Memorandum of Points and Authorities and any exhibits attached hereto, the pleadings and papers on file with the Court, and upon any oral argument that may be presented at the time of the hearing on this matter.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Dignity Select recently discovered that it is named as a defendant in Plaintiff Arlis Neason's ("Plaintiff") First Amended Complaint that was filed on January 14, 2021. Dignity Select does not have a record of service of process with respect to the First Amended Complaint. The docket does not reflect an executed affidavit establishing completion of service on Dignity Select's registered agent. Written requests to Plaintiff's counsel for a copy of the signed affidavit of service are unanswered. The docket reveals significant dispositive motion practice by the Defendant-physicians who were originally named in the initial complaint. Both sought dismissal of Plaintiff's first cause of action for medical negligence, second cause of action for negligent hiring, retention and supervision, and punitive damages relief.

On March 8, 2021, this Court entered an order granting in part and denying in part the Defendant-physicians' motions to dismiss Plaintiff's First Amended Complaint. This Court dismissed Plaintiff's second cause of action and the request for punitive damages. However, the

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Court held in abeyance its decision with respect to Plaintiff's claims for medical malpractice to permit the parties limited discovery on whether Plaintiff's proposed expert witness, Michael Davoren, M.D. fulfills the requirements of N.R.S 41A.071. Dignity Select is uninformed with respect to what limited discovery the Defendant-Physicians conducted.

Dignity Select's joinder is limited to the portion of the Defendant-physicians' motions to dismiss seeking dismissal of Plaintiff's First Cause of Action for Medical Negligence. The Court has not yet disposed of that matter. Dignity Select will separately seek dismissal of Plaintiff's second cause of action and requested punitive damages.

II. PLAINTIFF'S MEDICAL EXPERT AFFIDAVIT FAILS TO MEET THE REQUIREMENTS OF NRS 41A.071

"'Professional negligence' means the failure of a provider of health care, in rendering services, to use the reasonable care, skill or knowledge ordinarily used under similar circumstances by similarly trained and experienced providers of health care." *See* NRS 41A.015. Dignity Health Rehabilitation Hospital is a provider of healthcare within the meaning ascribed by NRS 41A.017.[1] If "an action for professional negligence is filed in the district court, the district 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.

[1] "Provider of health care" means a physician licensed pursuant to chapter 630 or 633 of NRS, physician assistant, dentist, licensed nurse, dispensing optician, optometrist, registered physical therapist, podiatric physician, licensed psychologist, chiropractor, doctor of Oriental medicine, medical laboratory director or technician, licensed dietitian or a licensed hospital, clinic, surgery center, physicians' professional corporation or group practice that employs any such person and its employees."

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See NRS 41A.071 (emphasis added).

Plaintiff alleges that Dr. Patel, Dr. Flaviano, and unspecified staff from Dignity Health Rehabilitation Hospital provided treatment to the deceased that was below the standard of care. Dr. Patel is an Internal Medicine Specialist, and Dr. Flaviano is a Physical Medicine and Rehabilitation Specialist. Through the physicians and staff, Dignity Health Rehabilitation Hospital provides comprehensive physical medicine and rehabilitation programs and services. As Drs. Patel and Flaviano aptly pointed out in their motion to dismiss briefing, the affidavit authored by Dr. Davoren does not satisfy the N.R.S. 41A.071 requirement.

Dr. Davoren is a board certified general surgeon in private practice at Olathe Medical Center in Olathe, Kansas. Based on the information in his affidavit, Dr. Davoren does not practice internal medicine or physical medicine. He is not a rehabilitation specialist. The curriculum vitae (CV) that Plaintiff disclosed in her Opposition to the Defendant-Physicians' Motion to Dismiss and related joinder further demonstrates that Dr. Davoren's training and experience is in limited to general surgery – not in internal and rehabilitation medicine.

As such, Dignity Select hereby joins Defendant Casiano R. Flaviano, M.D.'s Motion to Dismiss Plaintiff Arlis Neason's First Amended Complaint, and Sushil R. Patel, M.D.'s substantive Joinder thereto, specifically as they relate to Plaintiff's medical negligence claim and Dr. Davoren's deficient affidavit.

DATED this 5th day of April, 2021.

GORDON REES SCULLY MANSUKHANI LLP

/s/Dione C. Wrenn
ROBERT E. SCHUMACHER, ESQ.
Nevada Bar No. 7504
DIONE C. WRENN, ESQ.
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Attorneys for Defendant, DIGNITY SELECT NEVADA, LLC

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 5th day of April 2021, I served a true and correct copy of the **DEFENDANT DIGNITY SELECT NEVADA, LLC'S LIMITED JOINDER TO DEFENDANT CASIANO R. FLAVIANO, M.D.'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT AND SUSHIL R. PATEL, M.D.'S SUBSTANTIVE JOINDER** via the Court's Electronic Filing/Service system upon all the parties on the E-Service Master List.

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Taylor J. Smith, Esq.
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and

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Attorneys for Plaintiff

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Katherine J. Gordon, Esq.
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Attorneys for Defendant, CASIANO FLAVIANO, M.D.

/s/ Andrea Montero
An Employee of GORDON REES SCULLY MANSUKHANI, LLP

EXHIBIT 10

MOTD
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Attorneys for Defendant,
DIGNITY SELECT NEVADA, LLC

DISTRICT COURT

CLARK COUNTY, NEVADA

ARLIS NEASON, as Heir of the Estate of JEFFREY NEASON, Plaintiff, v. DIGNITY SELECT NEVADA, LLC a foreign limited-liability company; CASIANO R. FLAVIANO, MD; SUSHIL R. PATEL, MD; DOES I through X; and ROE BUSINESS ENTITIES I through X; inclusive Defendants.	CASE NO. A-20-824585-C DEPT. NO. XXXI **HEARING NOT REQUESTED** **DEFENDANT DIGNITY SELECT NEVADA, LLC'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT**

Defendant DIGNITY SELECT NEVADA, LLC ("Dignity Select"), by and through its attorneys of record, Robert E. Schumacher, Esq. and Dione C. Wrenn, Esq. of the law offices of GORDON REES SCULLY MANSUKHANI, LLP, hereby submits its Motion to Dismiss Plaintiff Arlis Neason's First Amended Complaint. This Motion is brought pursuant to NRCP 12(b)(5) and NRS 41A.071. Further, it is based upon the accompanying Memorandum of Points and Authorities and any exhibits attached hereto, the pleadings and papers on file with the Court, and upon any oral argument that may be presented at the time of the hearing on this matter.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Dignity Select recently discovered that it is named as a defendant in Plaintiff Arlis Neason's ("Plaintiff") First Amended Complaint that was filed on January 14, 2021. Dignity Select does not have a record of service of process with respect to the First Amended Complaint. The docket does not reflect an executed affidavit establishing completion of service on Dignity Select's registered agent. Written requests to Plaintiff's counsel for a copy of the signed affidavit of service are still unanswered. Upon review of the docket, Dignity Select became aware of significant dispositive motion practice by Defendants Casiano R. Flaviano, M.D. and Sushil R. Patel, M.D. (the "Defendant-Physicians") who were originally named in the initial complaint. Both sought dismissal of Plaintiff's first cause of action for medical negligence, second cause of action for negligent hiring, retention and supervision, and punitive damages relief.

On March 8, 2021, this Court entered an order granting in part and denying in part the Defendant-physicians' motions to dismiss Plaintiff's First Amended Complaint. This Court dismissed Plaintiff's second cause of action and the request for punitive damages. However, the Court held in abeyance its decision with respect to Plaintiff's claims for medical malpractice to permit the parties limited discovery on whether Plaintiff's proposed expert witness, Michael Davoren, M.D. fulfills the requirements of N.R.S 41A.071. To date, Plaintiff has not produced Dr. Davoren for deposition.

This Motion follows Dignity Select's limited joinder to the Defendant-Physicians' motions to dismiss seeking dismissal of Plaintiff's First Cause of Action for Medical Negligence. The Court has not yet disposed of that matter. Given Dignity Select's late joinder to the litigation, Dignity Select did not have the benefit of joining the Defendant-Physicians' motions prior to the court issuing its ruling dismissing Plaintiff's second cause of action and request for punitive damages. Thus, Dignity Select hereby submits this Motion to Dismiss Plaintiff's First Amended Complaint, which incorporates the arguments for dismissal of Plaintiff's medical negligence claim asserted in Dignity Select's April 5, 2021 joinder.

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II. DISMISSAL OF PLAINTIFF'S MEDICAL EXPERT AFFIDAVIT IS WARRANTED AS PLAINTIFF'S MEDICAL EXPERT AFFIDAVIT FAILS TO MEET THE REQUIREMENTS OF NRS 41A.071.

"'Professional negligence' means the failure of a provider of health care, in rendering services, to use the reasonable care, skill or knowledge ordinarily used under similar circumstances by similarly trained and experienced providers of health care." *See* NRS 41A.015. Dignity Health Rehabilitation Hospital is a provider of healthcare within the meaning ascribed by NRS 41A.017.[1] If "an action for professional negligence is filed in the district court, the district 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.

See NRS 41A.071 (emphasis added).

Plaintiff alleges that Dr. Patel, Dr. Flaviano, and unspecified staff from Dignity Health Rehabilitation Hospital provided treatment to the deceased that was below the standard of care. Dr. Patel is an Internal Medicine Specialist, and Dr. Flaviano is a Physical Medicine and Rehabilitation Specialist. Through the physicians and staff, Dignity Health Rehabilitation Hospital provides comprehensive physical medicine and rehabilitation programs and services. As Drs. Patel and Flaviano aptly pointed out in their motion to dismiss briefing, the affidavit authored by Dr. Davoren does not satisfy the N.R.S. 41A.071 requirement.

[1] "Provider of health care" means a physician licensed pursuant to chapter 630 or 633 of NRS, physician assistant, dentist, licensed nurse, dispensing optician, optometrist, registered physical therapist, podiatric physician, licensed psychologist, chiropractor, doctor of Oriental medicine, medical laboratory director or technician, licensed dietitian or a licensed hospital, clinic, surgery center, physicians' professional corporation or group practice that employs any such person and its employees."

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Dr. Davoren is a board certified general surgeon in private practice at Olathe Medical Center in Olathe, Kansas. Based on the information in his affidavit, Dr. Davoren does not practice internal medicine or physical medicine. He is not a rehabilitation specialist. The curriculum vitae (CV) that Plaintiff disclosed in her Opposition to the Defendant-Physicians' Motion to Dismiss and related joinder further demonstrates that Dr. Davoren's training and experience is in limited to general surgery – not in internal and rehabilitation medicine. There is nothing in Dr. Davoren's background to suggest that he is qualified to offer expert opinions as to whether the treatment the deceased received at Dignity Select's rehabilitation hospital fell below the standard of care. To date, Plaintiff has not provided any facts, information, or testimony to establish that Dr. Davoren ever worked in a rehabilitation facility, or that his practice includes (or at any time included) overseeing the day-to-day care and monitoring of inpatients.

Also, in Plaintiff's opposition, Plaintiff raises (for the first time) that she retained David Fish, M.D., a physiatrist and pain management specialist, to also review the deceased's medical records. *See* Plaintiff's February 8, 2021 Opposition, 8:8-15. For reasons that were not addressed in the opposition, and remain unknown to this moving defendant, Dr. Fish did not author the expert affidavit to accompany the operative complaint and instead referred Plaintiff to Dr. Davoren (a general surgeon) for that purpose. *Id.* In the February 8 Opposition, Plaintiff attaches an unsworn statement from Dr. Fish attesting to the referral and offering general support to the sufficiency of Dr. Davoren's qualifications. *See* Plaintiff's February 8, 2021 Opposition, Exhibit 1. Dr. Fish does not give any details as to why he "believed that Dr. Davoren was also qualified […]." *Id.*

The late introduction of Dr. Fish's unsworn statement does not cure the procedural deficiency that Plaintiff is facing. She still does not have an expert affidavit that satisfies the requirements of NRS 41A.071. Dr. Davoren has not and does not currently practice in a *substantially similar* area as the medical providers identified in the case at bar. Even if this Court considered Dr. Fish's unsworn statement and accompanying records review, those items

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also fail to meet the standard.[2] Dismissal of Plaintiff's first cause of action is appropriate.

III. PLAINTIFF'S SECOND CAUSE OF ACTION IS DEFICIENT BECAUSE IT MERELY PLEADS CONCLUSIONS

Plaintiff's second cause of action for negligent hiring, training claims against Dignity Select must be dismissed because Plaintiff fails to "state a claim upon which relief can be granted." NRCP 12(b)(5). Dismissal is proper if Plaintiffs can prove no set of facts, which, if true, would entitle them to relief. *See Buzz Stew, Ltd. Liab. Co. v. City of N. Las Vegas,* 124 Nev. 224, 228, 181 P.3d 670, 672 (2008). Moreover, pleading of conclusions must be "sufficiently definite to give fair notice of the nature and basis or grounds of the claim and a general indication of the type of litigation involved." *See Taylor v. State of Nevada*, 73 Nev. 151, 152, 153, 311 P.2d 733, 734 (1957). Notwithstanding all favorable inferences, based on Plaintiff's own admissions, it cannot establish any set of facts that would entitle it to relief. *Blackjack Bonding v. City of Las Vegas Municipal Court*, 116 Nev. 1213, 1217, 14 P.3d 1275, 1278 (2000) (affirming dismissal).

Plaintiff alleges the following with respect to her negligent hiring, retention, and supervision claim:

> 47. Dignity provides medical treatment to its patients.
> 48. Dignity breached its duty to its patient, Jeffrey Neason, in the following ways:
> a. By choosing not to implement proper reporting techniques regarding changes to patient's condition.
> b. By choosing not to implement policies and procedures that ensure that its employees are providing treatment that conforms to the standard of care, including patients such as Jeffrey Neason.
> [49]. Defendants should have been aware prior to the treatment of Jeffrey Neason that Defendants had a process in place which presented an unnecessary risk of injury to patients such as Jeffrey Neason, and failed to take reasonable steps to prevent foreseeable injury, or even death.
> [50]. The substandard practice of Dignity employees should have been known to all Defendants and they should have taken reasonable precautions and actions to prevent further injury to patients such as Jeffrey Neason. Said failures, acts and omissions resulted in injury and damage to Jeffrey Neason.

See Plaintiff's First Amended Complaint, ¶¶47 – 50.

[2] Dr. Fish's statement is not notarized, nor can it be construed as a declaration as it was not offered under penalty of perjury. *See generally*, NRS 53.010 – NRS 53.045.

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To "succeed on a claim for negligent training and supervision in Nevada, the plaintiff must prove that an employer breached its 'duty to use reasonable care in the training, supervision, and retention of its employees to make sure that the employees are fit for their positions'." *See Hansen v. Albertson's Companies, LLC*, 2020 WL 8261604, 2:19-cv-02050, *4 (D. Nev. December 14, 2020) (quoting *Hall v. SSF, Inc.*, 930 p.2D 94, 99 (Nev. 1996)). Claims for negligent training and supervision "are based upon the premise that an employer should be liable when it places an employee, who it knows or should have known behaves wrongfully, in a position in which the employee can harm someone else." *Daisley v. Riggs Bank, N.A.*, 372 F.Supp.2d 61, 79 (D.D.C. 2005). An employee's "wrongful behavior does not in and of itself give rise to a claim for negligent training and supervision." *See Okeke v. Biomat USA, Inc.*, 927 F.Supp.2d 1021, *1028 (D. Nev. 2013) (citing *Colquhoun v. BHC Montevista Hospital, Inc.*, 2010 WL 2346607, *3 (D. Nev. June 9, 2010)). Separately, the "tort of negligent hiring imposes a general duty on the employer to conduct a reasonable background check on a potential employee to ensure that the employee is fit for the position." *See Hansen*, 2020 WL 8261604, *4 (quoting *Burnett v. C.B.A. Sec. Serv., Inc.*, 820 P.2d 750, 789 (Nev. 1991). A breach occurs "when an employer hires an employee even though the employer knew or should have known of that employee's dangerous propensities." *See Long v. Diamond Dolls of Nevada, LLC*, 2020 WL 6381673, *7 (D. Nev. October 29, 2020)

Here, Plaintiff does not allege or otherwise claim that any employees were negligently trained. Plaintiff asserts vague, conclusory, and wholly deficient allegations that Dignity Select is liable for negligent hiring, training and supervision. The underlying allegations seem to take issue with Dignity Select's purported lack of implementation of unspecified "proper reporting techniques" and "policies and procedures." *See* Plaintiff's First Amended Complaint, ¶¶ 47 – [50]. However, Plaintiff does not identify any specific employees, whether by name or general designation, who demonstrated any "dangerous propensities" that would or could have put Dignity Select on notice that those unnamed employees were unfit. In fact, Plaintiff does not even allege that Dignity Select was negligent in conducting background checks, nor does Plaintiff allege that Dignity Select knew or should have known that its employees were unfit for

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hire. Similarly, Plaintiff does not allege that Dignity Select failed to adequately supervise any of its employees to ensure they were fit for their positions.

Plaintiff's second cause of action against Dignity Select is deficient as a matter of law. She also fails to state a claim upon which relief can be granted. For those reasons, dismissal is warranted.

IV. PLAINTIFF FAILS TO ALLEGE ANY FACTUAL ALLEGATIONS WARRANTING PUNITIVE DAMAGES

Under Nevada law, in order to recover punitive damages, a plaintiff "must show the defendant acted with oppression, fraud or malice." *See Pioneer Chlor Alkali Co. v. National Union Fire Ins. Co.*, 863 F.Supp. 1237, 1250 (D. Nev. 1994). Oppression "is a conscious disregard for the rights of others constituting cruel and unjust hardship." *Id*. (citing *Ainsworth v. Combined ins. Co. of America*, 763 P.2d 673, 675 (Nev. 1988)). Malice "is conduct which is intended to injure a person or despicable conduct which is engaged in with a conscious disregard of the rights and safety of others." *See Martin v. Collier*, 2011 WL 1628028, *2 (D. Nev. April 28, 2011) (citing NRS 42.005(1)).

In the March 8, 2021 Order, this Court granted the Defendant-Physicians' sought dismissal of Plaintiff's prayer for punitive damages. Dignity Select avers that, as punitive damages is a relief and not a cause of action, the Court's Order should apply to the case as a whole – not solely to the Defendant-Physicians. In the event the Court finds otherwise, Dignity Select hereby moves for dismissal of Plaintiff's request for punitive damages because Plaintiff's First Amended Complaint is devoid of a single allegation that it, or any other defendant, engaged in oppressive, fraudulent, or malicious conduct.

V. CONCLUSION.

Dignity Select respectfully requests that this Court issue an order dismissing Plaintiff's First Amended Complaint, in its ***entirety***. The Court has already dismissed Plaintiff's second cause of action as against the Defendant-Physicians, as well as Plaintiff's prayer for punitive damages. The same determinations should be made as to Dignity Select. As to Plaintiff's first cause of action for medical negligence, Plaintiff has not and cannot cure the blatant deficiency in

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his expert's affidavit.

DATED this 30th day of April, 2021.

GORDON REES SCULLY MANSUKHANI LLP

/s/ Dione C. Wrenn
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30th day of April 2021, I served a true and correct copy of the **DEFENDANT DIGNITY SELECT NEVADA, LLC'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT** via the Court's Electronic Filing/Service system upon all the parties on the E-Service Master List.

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EXHIBIT 11

DISTRICT COURT
CLARK COUNTY, NEVADA

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

Plaintiff,

vs.

DIGNITY SELECT NEVADA, LLC, a foreign limited-liability company; CASIANO R. FLAVIANO, MD.; SUSHIL R. PATEL, MD; DOES I through X; and ROE BUSINESS ENTITIES I through X; inclusive,

Defendants.

Cause No. A-20-824585-C

DEPOSITION OF MICHAEL DAVOREN, MD

TAKEN ON BEHALF OF DEFENDANTS

MAY 18, 2021

Reported by Celena D. Davis, RPR, CCR

INDEX OF EXAMINERS

DEPOSITION OF MICHAEL DAVOREN, MD

EXHIBITS

(The exhibits are attached electronically.)

DISTRICT COURT
CLARK COUNTY, NEVADA

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

Plaintiff,

vs.

Dignity SELECT NEVADA, LLC, a foreign limited-liability company; CASIANO R. FLAVIANO, MD.; SUSHIL R. PATEL, MD; DOES I through X; and ROE BUSINESS ENTITIES I through X; inclusive,

Defendants.

Cause No. A-20-824585-C

DEPOSITION OF MICHAEL DAVOREN, MD, produced, sworn and examined on the 18th day of May, 2021, between the hours of 8:00 of that day and 6:00 in the evening of that day via Zoom videoconference, before CELENA D. DAVIS, a Registered Professional Reporter and Certified Court Reporter and Notary Public within and for the State of Missouri, in a certain cause now pending in the District Court of Clark County, Nevada, between ARLIS NEASON, as Heir of the Estate of JEFFREY NEASON, Plaintiff, and DIGNITY SELECT NEVADA, LLC, a foreign limited-liability company; CASIANO R. FLAVIANO, MD.; SUSHIL R. PATEL, MD; DOES I through X; and ROE BUSINESS ENTITIES 1 through X; inclusive, Defendants; taken on behalf of the Defendants.

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REPORTER: My name is Celena Davis, an Illinois and Missouri notary public and certified shorthand reporter. This deposition is being held via videoconferencing equipment. The witness and reporter are not in the same room. The witness will be sworn in remotely pursuant to agreement of all parties.

The parties stipulate that the testimony is being given as if the witness was sworn in person.

(The deposition began at 4:31.)

MICHAEL DAVOREN, MD,

duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

EXAMINATION

QUESTIONS BY MS. WRENN:

Q. Thank you, Madam Court Reporter, and also Dr. Davoren. Thank you for being available so late in the day. We appreciate it. So hopefully, this shouldn't take too long. You know, we'll try to move through things.

But could you please state and spell your name for the record?

A. Yes. It's Michael Paul Davoren, D-a-v-o-r-e-n.

Q. Thank you. And do you understand that the oath you just took here today is the same oath to tell

the truth as if you were in formal Court of Law and it carries with it the same penalties of perjury?

A. I do understand.

Q. Have you ever been deposed before?

A. A few times, yes.

Q. Do you recall the time period of your last deposition?

A. It was about ten months ago.

Q. And do you recall what state you were in for that one?

A. It was a Zoom. I was here in Kansas and the other parties were in Las Vegas.

Q. So it was -- was it a Nevada case?

A. Yes, it was.

Q. Are you okay with me skipping through the admonitions or do you want me to go through those?

A. No, you can skip them for the sake of brevity.

Q. Thank you very much. And, also, I'd like to ask: What type of case was the Nevada matter that you were deposed in ten months ago?

A. It's a colon case, a colon resection case.

Q. And did you provide expert testimony in that case?

A. It's still ongoing.

Q. Okay. Thank you. And are you willing to tell me the name, the caption for the case?

A. Yeah. It's -- I'll have to pull it up. Hold on one moment. I'm sorry. Smith versus Chen.

Q. Nevada state court or federal?

A. It's Nevada state court.

Q. Thank you. So can you tell me your understanding of why you're being deposed in this matter today?

A. Yes. I was asked to give my opinions on a case regarding a patient who was at a rehab facility and had a gastrointestinal bleed and subsequently died. And the deposition today was -- there were concerns that my background as a surgeon might prevent me or might not qualify me to give opinions regarding the actions taken by a physiatrist.

Q. Thank you, Doctor. And I just realized, I was trying to hop in and get started. I very rudely didn't introduce myself. My name is Dione Wrenn, and I work for the law firm Gordon Rees. And we represent the rehabilitation hospital or Dignity Select in this matter.

So what did you do to prepare for your deposition today?

A. I reviewed the records for the patient,

Mr. Neason, regarding the timeframe prior to this hospitalization at Dignity, while he was at Dignity, and then subsequently when he was taken back to -- or taken to St. Rose Dominican by ambulance and subsequently expired.

Q. And do you have a -- is the list or the documents that you reviewed the same ones that are listed in the affidavit that you authored?

A. Yes. Then there is -- I got an amended autopsy report that I received earlier, so that would have been different than what's on my affidavit, because I just received that, that autopsy and toxicology report today.

MR. ARNTZ: And just so you guys know -- can you hear me?

MS. WRENN: Yes.

MR. ARNTZ: Just so you know, they revised the autopsy report. I just barely saw it today, but I'll supplement the record. I can e-mail it to you all as we're sitting here if you want me to. That's a pretty recent development.

A. And that didn't change any of the bases for my opinions or the opinions themselves.

BY MS. WRENN:

Q. The opinions that you authored in the

affidavit?

A. Yes.

Q. Thank you. And just for the record, I'm going to -- I've had quite a few of them. But just so we have it listed, I just want to put on the record that your affidavit is going to be Exhibit A.

(Exhibit A was introduced into the record.)

BY MS. WRENN:

Q. And in looking at your affidavit, the records that you reviewed in preparation for today are the items listed under Number 9 of your affidavit, A through L, as well as an amended autopsy and toxicology report that you received today?

A. Yes.

Q. Thank you. Have you spoken to anyone in preparation for your deposition?

A. I spoke with the plaintiff attorney in the case.

Q. I believe plaintiff has two law firms. Which attorney did you speak with?

A. I spoke with Breen today. And then I also spoke with -- I don't know the other attorney's name, but I've spoken to another attorney from the other law firm.

MR. ARNTZ: Today?
A. No, not today. This was two weeks ago.
MR. ARNTZ: Okay. He was just -- he wanted to talk just to tell me that this deposition had been requested. That was basically the extent of the conversation.
BY MS. WRENN:
Q. Thank you. And when did you speak with Mr. Breen?
A. Earlier today.
MR. ARNTZ: Right before we started.
MR. WRENN: Thank you, Counsel.
BY MS. WRENN:
Q. Were you provided any policies and procedures with respect to patient referral for Dignity Health Rehabilitation Hospital?
A. No.
Q. Have you been provided any policies and procedures of the hospital with respect to patient admissions?
A. No.
Q. How about the policies and procedures for patient discharge?
A. No.
Q. Is it fair to say you were not provided any

policies and procedures with respect to Dignity Health Rehabilitation Hospital?

A. Yes.

Q. And did you request the policies and procedures?

A. We had talked about that, yes.

Q. "We" being?

A. Mr. Breen and I had earlier -- prior, I had asked about getting those items.

Q. Prior to today?

A. Just earlier today. Excuse me.

Q. And was it indicated to you that you would be receiving those policies and procedures at some point?

A. My understanding was that I would be.

Q. But you didn't have them, at least for the affidavit?

A. Correct.

Q. Now, do you maintain a job file for the work you've performed thus far in the case?

A. I do. I keep a file of records I received, invoices sent and those types of things.

Q. Is it maintained electronically?

A. It is.

Q. And could you provide that to counsel so

that the attorneys can get it from him?
A. Yeah, absolutely. I'd be happy to.
Q. Thank you. And would it be accurate to say that you reviewed the entirety of your job file in preparation for today?
A. Yes, I have reviewed it.
Q. And do you maintain a testimony list?
A. I do. And that was submitted to Mr. Breen's firm.
Q. Okay. I'll reach out to counsel about that. I only have the CV. And I didn't see your testimony list on there, as well, so I'll check with them, as well. Thank you.
So what professional licenses do you hold?
A. The Kansas medical license.
Q. And is Kansas the only state where you're currently licensed to practice medicine?
A. It is.
Q. And is it accurate that throughout your professional career, you've not held a license or practiced in Nevada?
A. I have not.
Q. Are you board certified?
A. I am.
Q. What board certifications do you have?

A. The American Board of Surgery.
Q. Any others?
A. No.
Q. Where are you currently employed?
A. Olathe Medical Center in Olathe, Kansas, O-l-a-t-h-e.
Q. Thank you. And what is your professional title?
A. I'm president of the medical staff, chief of surgery, and then surgeon.
Q. Are you considered in private practice?
A. No, I'm an employed physician.
Q. Do you maintain or have clinical hours?
A. Yes.
Q. And just for those of us who may not know or we don't want to assume anything, what does that entail when you have your clinic?
A. During the clinic, I currently have two half-day clinics where I see patients in the office from 9 a.m. to noon on Tuesdays and Wednesdays; and every other Friday, I have a clinic from noon to 4:00. And the other days, I'm either operating or in the GI lab doing colonoscopies or upper endoscopies.
Q. And if we could break that down, so what is a colonoscopy, for the record?

A. A colonoscopy is a test to look for lesions of the colon or abnormalities of the colon using a fiber optic basically telescope. It has a digital image that shows up on a video screen. We can look inside the colon to identify growths or other abnormalities in the colon.

Q. And how about an upper endoscopy?

A. It's similar. It's, again, a flexible fiber optic, basically telescope that we utilize to observe the esophagus, stomach and the first part of the small intestine.

Q. Thank you. And the hospital that you work in, is it a rehabilitative hospital?

A. It is not a rehab hospital, no. We do have rehabilitation facilities and we maintain both inpatient and outpatient rehab services.

Q. Are you actively involved in the rehabilitation services or arm of the hospital?

A. Yes. Via patients that have rehabilitation services, yes, I'm actively involved in their care.

Q. To your knowledge, do you currently have any patients who are in the rehabilitation hospital wing that you're working with?

A. So it's not actually a wing. We have the services come in. So like right now, I have a patient

in the ICU who is receiving physical therapy, occupational therapy, and speech therapy all after a surgery for infarcted intestine. So I'll interact with the different techs for that, and I'll interact with the other doctors regarding that care.

Q. Are any of your patients that you treated, most recently or in your recent history, individuals who suffered recent strokes?

A. Yes.

Q. And would you be the physician that would recommend or send a patient or -- let me back up. Strike that.

Would you be the physician to do the assessment to determine if a patient should receive rehabilitation services?

A. So I'm part of that process, yes. It's a group process. We'll get input from our physical therapy department, occupational therapy department, nurses, care coordinators, physicians.

And we all get together, and along with the family, of course, and the patient to determine where the disposition should be, whether it be a skilled nursing facility, a rehab facility or sometimes it's, unfortunately, palliative care or even Hospice.

Q. And have you ever worked in the capacity of

being a medical director or chief physician of some sort for a rehabilitation hospital?

A. No, I have not.

Q. As part of the treatment that you may provide to an individual who is receiving rehabilitation services, you interact with the staff regularly in directing orders for the patient in their treatment?

A. Certain parts of it, yes.

Q. Could you explain further? I know it's vague, but if there's an example that you have...

A. Right. So I have a patient who is currently in the hospital who came in with increasing paralysis of his lower extremities, and also had a perforated gastric ulcer from medications. So I did the surgery on him from that. He's at high-risk for DVT, so we have him on -- they wanted to put him on anticoagulant therapy, so we had to discuss that.

They also were doing a workup for what turned out to be a cervical spine lesion. And then I interacted with his neurosurgeon regarding time of surgery, and also physical therapy and occupational therapy about what different modalities or treatment he was able to have after the surgery. So that's probably one of the better examples, recently.

Q. Thank you. Did you also review any

statements or reports by Dr. Fish in this matter?
A. I did not.
MS. WRENN: I need to -- I'm going to pass the witness. Given some of his answers I need to look at something really quick and see what my last few questions are going to be. If someone wants to hop in, I don't want to waste time.

EXAMINATION

QUESTIONS BY MS. GORDON:
Q. Doctor, my name is Katie Gordon. I represent Dr. Flaviano in this case. I have a couple questions for you.
A. Sure.
Q. Are you board certified in physical medicine and rehabilitation?
A. I'm not.
Q. Have you ever practiced in the area of physical medicine and rehabilitation?
A. I have not.
Q. Did you do an internship in physical medicine and rehabilitation?
A. I did not.
Q. Did you do a residency in physical medicine and rehabilitation?
A. I have not.

Q. Have you ever taught any classes in physical medicine and rehabilitation services?
A. I have not.
Q. Have you ever acted as a consultant physician in the area of physical medicine or rehabilitation?
A. I have not.
Q. Have you referred patients to PMR specialists?
A. Yes.
Q. And when I say PMR, you understand that I mean physical medicine rehabilitation; right?
A. I'm aware of that, yes.
Q. I'll just take up the rest of our hour each time if I have to say it out loud.
When you refer someone to a PMR specialist, what is the purpose for doing that?
A. Usually, it's in the cases of patients who have musculoskeletal or neurologic injuries or deficits that require a care plan. And I want their input on that portion of their treatment. So in those cases, they will usually serve as part of a team approach, where we interact, and they will discuss their recommendations for improving the patients, those issues. And I'll interact with them about the

conditions that I'm involved in.

Q. Do you typically prepare treatment plans for your patients at -- is it Olathe Medical Center?

A. Everybody gets it wrong. It's okay. For which aspects of care?

Q. Well, would you create a treatment plan overall for any of your patients for whom you do surgery?

A. Yes.

Q. All right. And what kinds of circumstances are there that you would then prepare the overall treatment plan for these patients?

A. Well, every patient that I do surgery on, I have a care plan for how I want to handle the peri-operative period, both pre-operative, operative and post-operative timeframes. So essentially, every single patient has a care plan that's devised by me that I operate on.

Q. And would that care plan then end at the post-operative state?

A. So when that ends is -- according to Medicare definitions, it basically has 90 days global in terms of reimbursement. To be honest, we don't get reimbursed unless it's unusual until 90 days. But I have patients that I have seen for two decades almost,

and I continue along with their care, seeing them every few months for different issues. Sometimes it's the same issues, sometimes it's different issues.

Q. Do the patients for Olathe Medical Center have a primary treating physician?

A. So they have a primary care physician who coordinates outpatient care in general. Once they're in the hospital or if they've been referred to me, then they still will keep the responsibility; or else we'll do a team approach, where they will work on things like anti-hypertension medications, and I'll take care of surgical issues, but we work as a team in the hospital.

Q. If they're an inpatient at the medical center, do they have a hospitalist?

A. In some cases; in some cases, no. We have some family practice and internal medicine physicians who still round in the hospital. And so they will consult them. So they'll be involved in the care actively in the hospital. We have other primary care physicians who defer to the hospitalists, so the hospitalists would then get involved while the patient is in the hospital to help coordinate care with us.

Q. Have you ever acted as a hospitalist at Olathe Medical Center?

A. No.

Q. Have you ever been retained as an expert witness in giving opinions as to the care and treatment provided by a physical medicine and rehabilitation physician?

MR. ARNTZ: Object to form of the question.

A. There was -- I don't know if it was directly -- there was one case where I was consulted to render an opinion about a retained wound vac sponge in a patient who was in the rehabilitation facility under the auspices of a physical medicine rehab doctor. I don't know whether that applies to what you're looking for.

BY MS. GORDON:

Q. Sure. Did you render opinions about whether a physical medicine and rehabilitation physician fell below the applicable standard of care?

A. In that case, I didn't, and my opinion was they did not fall below.

Q. I'm sorry. Your opinion was that they did not fall below the standard of care?

A. Yes.

Q. But you were specifically retained to render an opinion about the acts of a PMR physician?

A. Because the wound vac had been ordered by the physical medicine physician while the patient was in a rehabilitation facility, and there was a retained

sponge, they filed suit against the home health agency, the physical medicine and rehab doctor. So I was retained --

Q. Were you retained by the plaintiff?

A. No. I was retained by the defense counsel.

Q. Okay. In November of 2019, did you hold any privileges at a hospital or facility to perform PMR services?

A. No.

Q. Between 2015 and 2019, did you take any CME courses that were dedicated to the practice of PMR services?

A. No.

Q. Before you signed your affidavit in this case on November 10th of 2020, did you review the prevailing standards of the practices for PMR physicians?

A. No.

Q. Did you research the generally accepted opinions in the PMR specialty?

A. Regarding which topic?

Q. Regarding rehabilitation and physical medicine specialty. Did you look up any standard of care guidelines regarding PMR physicians?

A. Again, that's a hugely broad topic.

Q. Let me ask this way: What did you review, if anything, in order to render your opinion that Dr. Flaviano fell below the standard of care, other than the medical records?

A. So I reviewed both the package insert for Eliquis; I reviewed the prevailing articles out there on Eliquis and gastrointestinal hemorrhage; I reviewed medical school texts I have that discuss decreasing hemoglobin and looking for signs of bleeding; and then also, just my own basic knowledge of patients who have a documented decrease in hemoglobin on a repetitive basis in terms of what would be expected from a physician, not specifically an MR physician, but any physician.

Q. Did you save in your job file the articles that you found regarding GI bleeds and Eliquis?

A. No. There are hundreds and thousands. In this case, what I was looking for was all the different things that could have possibly caused a gastrointestinal hemorrhage in a patient with Crohn's disease. Now that we have the autopsy, we already have the answer.

Q. What was the amendment that is stated on that new autopsy report that you have and we don't have?

A. So there was a toxicology report, which lists the apixaban levels within the patient's

bloodstream at the time of his death, which indicates that he still had detectable levels in his bloodstream. And then there was also -- prior to that, I did not have a complete listing of the pathologic forensic findings. I was missing a page.

Q. And then you were provided with that page in the amendment?

A. So I've got -- as far as I know, I have all the necessary -- or all the pages that are available for that report at this point.

Q. On your CV, I notice that you stated that you're a fellow of the American College of Surgeons; is that right?

A. I am.

Q. Okay. And you're a member of the Kansas chapter of the American College of Surgeons?

A. I am.

Q. You are still, currently?

A. Yes.

Q. Okay. And are you familiar with -- let me ask you this: You've been a fellow of the American College of Surgeons since 2004; right?

A. Yes.

Q. Okay. Are you familiar with the statement of a physician acting as an expert witness that was sent

out by the American College of Surgeons? It's dated April 1st, 2011.

A. Yes, very familiar with it.

Q. And you're familiar with their statement that in order to act as an expert witness as a general surgeon, that you must be actively involved in clinical practice of the specialty at the time of the alleged occurrence?

A. So in this case, because the specialty that's involved is basic general medicine, it doesn't have anything to do with specific physical medicine rehab. It's basic general medicine, in terms of a patient with a decreasing hemoglobin that's been documented on a blood thinner. That is why I felt that I was qualified to render this opinion, because this is not specific to any individual specialty within medicine, but it's just general medical knowledge.

Q. Do you believe that you are qualified to render an opinion as to the entirety of care that was given to Mr. Neason while he was at Dignity Rehab?

A. No. Only the portions where I made comments.

Q. And is it your testimony, then, that your opinions are limited to the GI bleed?

MR. ARNTZ: I'll object to the form of the

question.

A. Pending any new information, that is what I have rendered my opinions on, correct.

BY MS. GORDON:

Q. When is the last time that you prescribed Eliquis for a patient?

A. I had to renew a prescription on a patient last week.

Q. When is the last time that you prescribed Eliquis for a patient as a new prescription, as opposed to refilling it?

A. I don't prescribe it as a new intervention.

Q. And I believe you said that you have never spoken with Dr. Fish about this case?

A. The only way in which I spoke to him is originally, you know, in the interest of full disclosure, I had known Dr. Fish for 25 years now from the Army. And he mentioned to me when we were in conversation that he referred an attorney to me to talk about this particular case.

So in terms of that, yes, we have talked about it. But the specifics of it, no, we have not discussed the specifics of the case.

Q. Do you know why Dr. Fish recommended that you be contacted to act as an expert witness as opposed

to just him acting as an expert witness?

A. I'm not sure. I know he knows that I work with a lot of patients with gastrointestinal hemorrhages who are on blood thinners. Maybe that's why he referred the patient or this case to me. I'm not quite sure. I didn't delve into that.

Q. And Dr. Fish is a physical medicine and rehabilitation physician; correct?

A. Yes.

Q. Olathe Medical Center has specific PMR physicians; correct?

A. We have one on staff, yes.

Q. And you are not listed as one of the PMR physicians; correct?

A. No. We require board certification for our physicians, and I would be lacking that in numerous ways.

MS. GORDON: I think that's all I have for now. I may circle back. I'll go ahead and let Mr. Kelly go ahead and ask you some questions.

EXAMINATION

QUESTIONS BY MR. KELLY:

Q. Doctor, I represent Dr. Patel in this matter, and I'm going to be very brief.

Are you board certified in internal

medicine?

A. No.

Q. Have you ever done an internship in internal medicine?

A. No.

Q. Have you ever done a residency in internal medicine?

A. No.

Q. And based upon your statement just a moment ago, because you're not board certified in internal medicine, you are not -- or have never been, at Olathe, an internal medicine physician; correct?

A. Correct.

Q. You said that you are actively involved with the care of your patients in the rehab part of the hospital. While you're actively involved, is there still either a hospitalist or the patient's primary care physician also involved?

A. In some cases, yes; in other cases, no. It depends on the number of different issues that we are dealing with. So in some cases, where it's fairly straightforward, like in a trauma case, then I'll be working with the physical therapist and occupational therapist without the involvement of necessarily the hospitalist or internal medicine folks. But in a lot of

cases, yes, we work as a team.

MR. KELLY: That's all I have. Thank you.

EXAMINATION

QUESTIONS BY MS. WRENN:

Q. I have some follow-ups. Once again, my name is Dione Wrenn and I represent Dignity Select. So to confirm your earlier testimony, Olathe does not have an independent rehabilitation hospital; correct?

A. Correct.

Q. Those services, I think you mentioned, were brought in; is that correct?

A. No. They're a part of the facility, but we don't have a dedicated portion of the hospital that is devoted solely to the care and treatment involved with rehabilitation.

Q. So the services that the -- let's say the therapist or others who are part of that rehabilitation process, they are employees of Olathe?

A. They are.

Q. And are the rehabilitation services classified as acute inpatient rehabilitative care?

A. Yes, they would be acute.

Q. And do you have any input in the policies and procedures used by Olathe for their rehabilitation services?

A. Only in the sense that I'm on the medical executive committee. So if there's changes to policies and procedures that involve the medical staff, then those will go to the med executive community, and I sit on that as the president. But in terms of a lot of the nuts and bolts, no, I don't have participation in that care.

Q. What do you mean by the nuts and bolts?

A. So if they want to get a new range of motion machine for therapy after a knee replacement, I would not be involved in purchasing that or how that would be utilized.

Q. Have you been retained in a Nevada case to offer expert opinions on standard of care for an acute rehabilitation hospital?

A. The only one was that one sponge case. And it wasn't -- they did not -- actually, they did include that facility, but my opinion was limited to the wound vac itself.

Q. How about in Kansas?

A. No.

Q. And outside of Dr. Flaviano and Patel, which staff members are you referencing in your opinion that on numerous occasions, the staff at Dignity failed to provide timely testing for Jeffrey Neason's

gastrointestinal hemorrhage and failed to diagnose his bleed until 11/13/19?

A. That would be those two physicians. Physicians are the only individuals who are capable of actually doing those orders. The nursing staff, I don't have any knowledge at this point in time to render an opinion regarding the nursing staff standard of care.

Q. So does that change or alter how -- your reference in paragraph 21, where you talk about the staff and Drs. Patel and Flaviano?

A. That was who I was referring to at that time. The staff would only be serving in terms of how they assisted Dr. Flaviano and Patel in terms of their care and assessment of the patient.

Q. But you're not offering any opinions with respect to just the staff and the standards?

A. At this point in time, I'm not.

Q. Have you reviewed the policies and procedures for the rehabilitation services that are provided at Olathe?

A. Unfortunately, yes. That -- we've had to sift through those in terms of the by-laws committee. And we've had to view them. That's probably been a decade since I looked at those, though.

Q. And you didn't look at them back in 2019?

A. I did not.

MS. WRENN: That's all I have.

MS. GORDON: I don't have anything else. Thanks.

EXAMINATION

QUESTIONS BY MR. ARNTZ:

Q. Doctor, I'm going to ask like two questions. How would you -- if you could, for the court, explain what you see as the issues in this case as it relates to malpractice.

A. So the basis of this -- of the case, as I read the information and the facts of the case, is that this patient, Mr. Neason, was admitted to the facility on a blood thinner. His hemoglobin was documented to decrease over the course of a number of days in precipitous fashion while on a blood thinner.

Despite this decrease, the blood thinner was continued up until the afternoon prior to the patient transferring emergently to St. Rose Dominican, where he expired basically from exsanguination. Even though the death certificate says this is a result of complications from colon cancer, it was a complication of bleeding, which was exacerbated by the Eliquis.

So the crux of this case has nothing to do with the specifics of any given specialty. This is

basic medicine that we learned in our third year of medical school. A patient whose hemoglobin is decreasing over time in a demonstrable fashion, you have an obligation to try to determine and correct whatever the cause of that is.

And that should span every discipline. Even if you're a psychiatrist, if you're treating a patient in the hospital and you have knowledge that that patient's hemoglobin is decreasing to a dangerous level, you have an obligation, if you don't know what test to order, at least to get the patient referred to someone who does or at least to a facility who can take care of the patient.

Q. So would you say that it's not so much knowing exactly how to treat the patient, but knowing that a drop of hemoglobin is indicative of a problem?

A. Correct. I mean, there are certain basic things, though, that every single one of us learned in medical school. We all learned about stool blacks for checking for colon bleeding. We all learned that when hemoglobin decreases far enough, patients die. It doesn't have to be zero. That's just part of everybody's medical training.

And the fact that blood thinners in our society, which are highly prevalent, I think numerous

specialties would have the ability to identify and opine about the effects of a blood thinner on a patient whose hemoglobin is decreasing.

Q. And is that standard of care that would be applicable to a physician treating a patient with these different issues, is that standard of care different from a physiatrist to a general surgeon to an internist?

A. No. We all have the same basic medical knowledge. These are not -- this is not -- you know, I know we talked about this numerous times. I do not contend to be a physical medicine rehab physician.

I do have basic medical knowledge due to my medical school training and subsequent training since then. I have specialized knowledge from my subsequent training.

I did not look at this case with the expectation that a physical medicine rehab physician would meet the same standard that I would as a general surgeon. I looked at this case as would the physicians in this case meet the standard for any treating physician in a facility where they have this information available to them.

MR. ARNTZ: Okay. That's all I have.

EXAMINATION

QUESTIONS BY MS. GORDON:

Q. I have a follow-up. Taking that statement that you just made, Doctor, about knowledge of a physician regarding a patient's hemoglobin result, you would agree with me, then, that that physician is only as good as the time that he receives those results; does that make sense?

MR. ARNTZ: Object to form.

A. If I can rephrase what I think you're asking is that -- is the physician dependent on getting those results from staff. And that was where the earlier query about the Dignity hospital staff and their potential role in this case -- and that's why I said I'm not ready to render an opinion.

Because, obviously, there could be some situation where the physician may have an opinion that they were not notified in a timely fashion. That is not documented in any of the documents I have available. So I do agree that if you don't get the information, if it's not available to you, then it's hard to act on that information.

Q. That's fair. And I wasn't referring to staff, I was referring to the time that the lab results are actually available.

You would agree with me, then, that a physician is not expected to take action on test results

that are not yet available to him or her?
A. Yes, I think that I would agree with that. That seems like a common sense statement, yes.
Q. And taking your general knowledge of medicine, at what point did Mr. Neason's hemoglobin results mandate that Dr. Flaviano do something that he did not do?
A. 11/12 --
MR. ARNTZ: Let me --
MS. GORDON: I'm sorry. 11/12?
MR. ARNTZ: Let me object to the question. This does seem like it's going more into his basic opinions and not his qualifications. But if you can explain the nexus, Katie, going down this line. But it seems this has more to do just with his opinions.
MS. GORDON: Sure. I don't plan on going down this line too very much.
BY MS. GORDON:
Q. I'm just wondering, based on the general nature of your medical background, what result or multiple results are you referring to with Mr. Neason's hemoglobin that mandated that Dr. Flaviano do something that he did not do?
A. I'm sorry. I was waiting to make sure there were no other objections.

So I'm outlining on 11/11/19, the hemoglobin had been noted to decrease from 11.4 to 9.8. At that point, the intervention that, at minimum should have been done, would be a stool guaiac, and then to monitor the patient's hemoglobin, as was suggested by Dr. Patel.

On 11/12/19, the hemoglobin was noted to further decrease to 7.0. At that point, the patient should have had the Eliquis stopped immediately, not waiting for a new result later on in the day, and the patient should have been transferred for evaluation for the source of blood loss.

Q. And that 7.0 result obviously would have had to have been available to the physicians in order to act on it; correct?

A. Correct. But it obviously was available, because they ordered a repeat of that result and got that. And that was documented at 12:20. So they -- and they said they were going to repeat it, so they had that result available at the 7.0 prior to ordering the repeat.

Q. So is 7.0 your cutoff time for them needing to transfer Mr. Neason?

A. At that point in time, I would say that the patient -- it was mandated that the patient be

transferred for evaluation for the source of their blood loss.

MS. GORDON: Okay. That's all I have. Thank you.

MR. ARNTZ: I don't have anything else. Anybody else?

MS. GORDON: Can we get a rough of this, please, because we have to file some supplemental briefings with the court.

MS. WRENN: I was going to suggest that, too.

REPORTER: No problem. What types of transcripts would you like?

MS. WRENN: An e-trans.

MS. GORDON: E-trans.

MR. KELLY: E-trans.

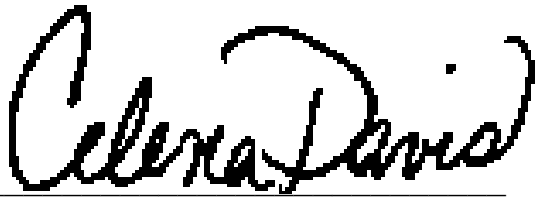
MR. ARNTZ: E-trans.

(Exhibit B was marked for identification.)

(The deposition concluded at 5:18.)

CERTIFICATE OF REPORTER

I, Celena D. Davis, Registered Professional Reporter and Certified Court Reporter and Notary Public within and for the State of Missouri do hereby certify that the witness whose testimony appears in the foregoing deposition was duly sworn by me; that the testimony of said witness was taken by me to the best of my ability and thereafter reduced to typewriting under my direction; that I am neither counsel for, related to, nor employed by any of the parties of the action in which this deposition was taken, and further, that I am not a relative or employee of any attorney or counsel employed by the parties thereto, nor financially or otherwise interested in the outcome of the action.



CELENA D. DAVIS, RPR, CCR
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My Commission expires September 8, 2022.

EXHIBIT 12

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DISTRICT COURT

CLARK COUNTY, NEVADA

ARLIS NEASON, as Heir of the Estate of JEFFREY NEASON, Plaintiff, vs. DIGNITY HEALTH MEDICAL GROUP, NEVADA, LLC, a domestic limited-liability company; CASIANO R. FLAVIANO, M.D.; SUSHIL R. PATEL, M.D.; DOES I through X; and ROE BUSINESS ENTITIES I through X; inclusive, Defendants.	Case No. A-20-824585-C Dept. No.: XXXI **DEFENDANT CASIANO FLAVIANO, M.D.'S SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S COMPLAINT** **Hearing Held on: February 23, 2021 at 9:30 a.m.**

COMES NOW Defendant Casiano Flaviano, M.D. by and through his counsel of record, S. Brent Vogel and Katherine J. Gordon of LEWIS BRISBOIS BISGAARD & SMITH LLP, and submits his Supplemental Memorandum of Points and Authorities in support of the Motion to Dismiss Plaintiff's Complaint. More specifically, following the deposition of Plaintiff's proposed expert witness, Michael Davoren, M.D., it is clear Dr. Davoren does not fulfill the requirements of N.R.S. 41A.071 and Plaintiff's claims against Dr. Flaviano should be dismissed pursuant to N.R.C.P. 12(b)(5).

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The Supplemental Memorandum of Points and Authorities is made and based upon the papers and pleadings on file herein, the Memorandum of Points and Authorities set forth below, and such argument of counsel which may be requested by the Court should another hearing be scheduled of this matter.

DATED this 28th day of May, 2021.

LEWIS BRISBOIS BISGAARD & SMITH LLP

By */s/ Katherine J. Gordon*

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SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES

I.

RELEVANT PROCEDURAL BACKGROUND

Plaintiff filed this medical malpractice matter on November 11, 2020. Plaintiff alleges the care and treatment provided to her son, Jeffrey Neason, by Defendants Casiano Flaviano, M.D. and Sushil Patel, M.D. at Dignity Health Rehabilitation Center ("Dignity Rehabilitation") in November 2019, fell below the standard of care. Dr. Flaviano is a Physical Medicine and Rehabilitation specialist. Dr. Patel is an Internal Medicine specialist.

According to the Complaint, Dr. Flaviano and the remaining medical defendants failed to order timely and appropriate testing to evaluate a potential gastrointestinal hemorrhage. In support of the allegations, Plaintiff attached an affidavit authored by Michael Davoren, M.D., a general surgeon who practices in Kansas. However, none of the medical defendants practice in the area of General Surgery, and none of the malpractice allegations stem from a surgical procedure.

Because Dr. Davoren does not practice, and has not practiced, in the area of Physical Medicine and Rehabilitation or Internal Medicine (and therefore does not fulfill the requirements of N.R.S. 41A.071), Drs. Flaviano and Patel moved the Court to dismiss Plaintiff's claims of professional negligence against them. Plaintiff opposed the Motion. Following a hearing of the matter on February 23, 2021, the Court deferred its ruling to allow a limited, one-hour deposition of Dr. Davoren to address the scope of his professional background.[1] Drs. Flaviano and Patel were instructed to supplement the Motion to Dismiss within 10 days of Dr. Davoren's deposition. Dr. Davoren's limited deposition was taken on May 18, 2021. This Supplemental Memorandum of Points and Authorities follows.

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[1] The Court granted the other portions of the Motion to Dismiss seeking dismissal of Plaintiff's negligent hiring/supervision claim, and Plaintiff's request for punitive damages.

II.

INFORMATION OBTAINED DURING DR. DAVOREN'S DEPOSITION

During his deposition, Dr. Davoren admitted the following:

1. He is employed by Olathe Medical Center in Olathe, Kansas as a General Surgeon[2];
2. He is not Board Certified in Physical Medicine and Rehabilitation[3];
3. He has never practiced in the specialty area of Physical Medicine and Rehabilitation[4];
4. He did not complete an internship in the area of Physical Medicine and Rehabilitation[5];
5. He did not complete a residency in the area of Physical Medicine and Rehabilitation[6];
6. He has never taught classes in the area of Physical Medicine and Rehabilitation[7];
7. He has never acted as a consultant physician in the area of Physical Medicine and Rehabilitation[8];
8. He has referred his patients to Physical Medicine and Rehabilitation specialists[9];
9. When he refers patients to Physical Medicine and Rehabilitation specialists the circumstances involve patients with musculoskeletal or injury deficits that require a

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[2] *See* Uncertified Rough Draft deposition transcript of Michael Davoren, M.D., attached hereto as Exhibit "A", 7:11-12. Please note the page numbers of the transcript are indicated within the text of the document, and are not the page numbers that appear at the bottom of each page.

[3] *Id.* at 11:19-21.

[4] *Id.* at 11:22-24.

[5] *Id.* at 11:25 through 12:2.

[6] *Id.* at 12:3-5.

[7] *Id.* at 12:6-8.

[8] *Id.* at 12:9-12.

[9] *Id.* at 12:13-15.

care plan[10];

10. He does not act as a primary care physician and/or hospitalist for his surgical patients at Olathe Medical Center. His surgical patients have either a family practice/internal medicine primary care physician who acts as the patient's hospitalist during the hospital admission, or the patients have a hospitalist employed by the medical center[11];

11. He has never acted as a hospitalist at Olathe Medical Center[12];

12. Olathe Medical Center requires that its employee physicians who practice in the area of Physical Medicine and Rehabilitation are Board Certified in the specialty area of Physical Medicine and Rehabilitation;

13. 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[13];

14. 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[14];

15. He is a fellow of the American College of Surgeons[15];

16. He is aware of the Statement authored by the American College of Surgeons in April 2011, regarding physicians acting as expert witnesses that states in order to properly act as an expert the physician "must be actively involved in clinical practice of the specialty at the time of the occurrence[16];"

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[10] *Id.* at 12:20 through 13:5.
[11] *Id.* at 14:17 through 15:1.
[12] *Id.* at 15:2-4.
[13] *Id.* at 16:9-12.
[14] *Id.* at 16:13-16.
[15] *Id.* at 18:18-20.
[16] *Id.* at 19:2-6.

17. He did not review the prevailing standards of practice for Physical Medicine and Rehabilitation physicians before he signed his Affidavit in this case[17]; and

18. He did not review any standard of care guidelines regarding Physical Medicine and Rehabilitation physicians before he signed his Affidavit in this case[18].

Based on the foregoing admissions by Dr. Davoren, it is abundantly clear that he does not fulfill the requirements of N.R.S. 41A.071 which mandate that medical malpractice actions be filed with an expert affidavit supporting the allegations in the complaint, and that such expert must practice, or have practiced, in an area that is substantially similar to the type of practice engaged in by Dr. Flaviano at the time of the alleged negligence. *See* N.R.S. 41A.071(2).

III.

LEGAL ARGUMENT

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

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[17] *Id.* at 16:17-21.

[18] *Id.* at 16:17 through 17:16.

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 is required to support her allegations against Dr. Flaviano by an expert who practices, or has practiced, in the area of Physical Medicine and Rehabilitation. As a General Surgeon who admittedly does not, and never has, practiced in the area of Physical Medicine and Rehabilitation, Dr. Davoren does not fulfill the requirements of N.R.S. 41A.071.

As revealed in Dr. Davoren's *curriculum vitae* and his deposition testimony, the entirety of his training, background, knowledge, and experience is limited to general surgery. By contrast, 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. 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.[19]

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.

As clearly stated by the American College of Surgeons, of which Dr. Davoren is a fellow, a physician should not act as an expert witness unless he/she "is actively involved in clinical

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[19] 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 of the specialty at the time of the alleged occurrence."[20] 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 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.

It is anticipated Plaintiff will attempt to argue that any physician, regardless of specialty, is qualified to opine as to whether Drs. Flaviano and Patel's treatment fell below the standard of care. Plaintiff views this case as involving the treatment of one single medical conditions; *i.e.* a potential gastrointestinal bleed. Therefore, under this limited view, anyone who has completed medical school is qualified to criticize the acts of Drs. Flaviano and Patel because Mr. Neason's hemoglobin counts decreased during his admission at Dignity Rehabilitation. This position is improperly narrow, self-serving and speaks directly to the purpose of 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, Drs. Flaviano and Patel were tasked with using their 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 gastrointestinal bleed. The specialist physicians were understandably concerned about discontinuing Mr. Neason's anticoagulant medication.

It is, therefore, incumbent on a potential expert witness for Plaintiff to have the degree of

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[20] *See* Statement of the American College of Surgeons, dated April 11, 2011, attached hereto as Exhibit "B".

skill, education and experience to evaluate the actions of Drs. Flaviano and Patel under the *entirety* of circumstances in this case. Plaintiff, and her General Surgeon expert, cannot extrapolate one thread from the complex network of Mr. Neason's required 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. Plaintiff is required to obtain supportive testimony from an expert who practices, or has practiced, in Dr. Flaviano's area of medicine. She did not do this and her claims against Dr. Flaviano are subject to dismissal. When the complaint does not comply with N.R.S. 41A.071, it is void and must be dismissed. *Washoe Medical Center,* 148 P.3d at 794.

IV.

CONCLUSION

For the reasons set forth above, Defendant Casiano Flaviano, M.D. respectfully requests this Honorable Court dismiss Plaintiff's Complaint.

DATED: May 28, 2021.

LEWIS BRISBOIS BISGAARD & SMITH LLP

By */s/ Katherine J. Gordon*

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of May 2021, a true and correct copy of **DEFENDANT CASIANO FLAVIANO, M.D.'S SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS** was served by electronically filing with the Clerk of the Court using the Odyssey E-File & Serve system and serving all parties with an email-address on record, who have agreed to receive electronic service in this action.

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EXHIBIT A

QUESTIONS BY MS. WRENN:

Q. Thank you, Madam Court Reporter, and also Dr. Davoren. Thank you for being available so late in the day. We appreciate it. So hopefully, this shouldn't take too long. You know, we'll try to move through things.

But could you please state and spell your name for the record?

A. Yes. It's Michael Paul Davoren, D-a-v-o-r-e-n.

Q. Thank you. And do you understand that the oath you just took here today is the same oath to tell the truth as if you were in formal Court of Law and it carries with it the same penalties of perjury?

A. I do understand.

Q. Have you ever been deposed before?

A. A few times, yes.

Q. Do you recall the time period of your last deposition?

A. It was about ten months ago.

Q. And do you recall what state you were in for that one?

A. It was a Zoom. I was here in Kansas and

24 the other parties were in Las Vegas.

25 Q. So it was -- was it a Nevada case?

1 A. Yes, it was.

2 Q. Are you okay with me skipping through the

3 admonitions or do you want me to go through those?

4 A. No, you can skip them for the sake of

5 brevity.

6 Q. Thank you very much. And also I'd like to

7 ask: What type of case was the Nevada matter that you

8 were deposed in ten months ago?

9 A. It's a colon case, a colon resection case.

10 Q. And did you provide expert testimony in

11 that case?

12 A. It's still ongoing.

13 Q. Okay. Thank you. And are you willing to

14 tell me the name, the caption for the case?

15 A. Yeah, it's -- I'll have to pull it up.

16 Hold on one moment. I'm sorry. Smith versus Chen.

17 Q. Nevada state court or federal?

18 A. It's Nevada state court.

19 Q. Thank you. So can you tell me your

20 understanding of where why you're being deposed in this

matter today?

A. Yes. I was asked to give my opinions on a case regarding a patient who was at a rehab facility and had a gastrointestinal bleed and subsequently died. And the deposition today was -- there was concerns that my

background as a surgeon might prevent me or might not qualify me to give opinions regarding the actions taken by a physiatrist.

Q. Thank you, Doctor. And I just realized, I was trying to hop in and get started, I very rudely didn't introduce myself. My name is Dione Wrenn, and I work for the law firm Gordon Rees, and we represent the rehabilitation hospital or Dignity Select in this matter.

So what did you do to prepare for your deposition today?

A. I reviewed the records for the patient, Mr. Neason, regarding the timeframe prior to this hospitalization at Dignity, while he was at Dignity and then subsequently when he was taken back to -- or taken to St. Rose Dominican by ambulance and subsequently expired.

Q. And do you have a -- is the list or the

documents that you reviewed the same ones that are listed in the affidavit that you authored?

A. Yes. Then there is -- I got an amended autopsy report that I received earlier, so that would have been different than what's on my affidavit, because I just received that, that autopsy and toxicology report today.

MR. ARNTZ: And just so you guys know -- can you hear me.

MS. WRENN: Yes.

MR. ARNTZ: Just so you know, they revised the autopsy report. I just barely saw it today, but I'll supplement the record. I can e-mail it to you all as we're sitting here if you want me to. That's a pretty recent development.

A. And that didn't change any of the bases for my opinions or the opinions themselves.

BY MS. WRENN:

Q. The opinions that you authored in the affidavit?

A. Yes.

Q. Thank you. And just for the record, I'm

going to -- I've had a quite a few of them. But just so we have it listed, I just want to put on the record that your affidavit is going to be Exhibit A. And looking at your affidavit, the records that you reviewed in preparation for today are the items listed under number nine of your affidavit, A through L, as well as an amended autopsy and toxicology report that you received today?

A. Yes.

Q. Thank you. Have you spoken to anyone in

preparation for your deposition?

A. I spoken with the plaintiff in the case.

Q. I believe plaintiff has two law firms. Which attorney did you speak with?

A. I spoke with Breen today. And then I also spoke with -- I don't know the other attorney's name, but I've spoken to another attorney from the other law firm.

MR. ARNTZ: Today.

A. No. Not today. This was two weeks ago.

MR. ARNTZ: Okay. He was just -- he wanted to talk just to tell me this that deposition had been requested. That was basically the extent of the

conversation.

Q. Thank you. And when did you speak with Mr. Breen?

A. Earlier today.

MR. ARNTZ: Right before we started.

MR. WRENN: Thank you, Counsel.

BY MS. WRENN:

Q. Were you provided any policies and procedures with respect to patient referral for Dignity Health Rehabilitation Hospital?

A. No.

Q. Have you been provided any policies and

procedures of the hospital with respect to patient admissions?

A. No.

Q. How about the policies and procedures for patient discharge?

A. No.

Q. Is it fair to say you were not provided any policies and procedures with respect to Dignity Health Rehabilitation Hospital?

A. Yes.

Q. And did you request the policies and procedures?

A. We had talked about that, yes.

Q. We being --

A. Mr. Breen and I had earlier -- prior, I had asked about getting those items.

Q. Prior to today?

A. Just earlier today. Excuse me.

Q. And was it indicated to you that you would be receiving those policies and procedures at some point?

A. My understanding was that I would be.

Q. But you didn't have them, at least for of the affidavit?

A. Correct.

Q. Now, do you maintain a job file for the work you've performed thus far in the case?

A. I do. I keep a file of records I received, invoices sent and those types of things.

Q. Is it maintained electronically?

A. It is.

Q. And could you provide that to counsel, so that the attorneys can get it from him?

A. Yeah, absolutely. I'd be happy to.
Q. Thank you. And would it be accurate to say that you reviewed the entirety of your job file in preparation for today?
A. Yes. I have reviewed it.
Q. And do you maintain a testimony list?
A. I do. And that was submitted to Mr. Breen's firm.
Q. Okay. I'll reach out to counsel about that. I only have the CV. And I didn't see your testimony list on there as well. So I'll check with them as well. Thank you. So what professional licenses do you hold?
A. The Kansas medical license.
Q. And is Kansas the only state where you're currently licensed to practice medicine?
A. It is.

Q. And is it accurate that throughout your professional career, you've not held a license or practiced in Nevada?
A. I have not.
Q. Are you board certified?

A. I am.
Q. What board certifications do you have?
A. The American Board of Surgery.
Q. Any others?
A. No.
Q. Where are you currently employed?
A. Olathe Medical Center in Olathe, Kansas, O-l-a-t-h-e.
Q. Thank you. And what is your professional title?
A. I'm president of the medical staff, chief of surgery, and then surgeon.
Q. Are you considered in private practice?
A. No, I'm an employed physician.
Q. Do you maintain or have clinical hours?
A. Yes.
Q. And just for those of us who may not know or we don't want to assume anything, what does that entail when you have your clinic?
A. During the clinic, I currently have two

half-day clinics where I see patients in the office from nine am to noon on Tuesdays and Wednesdays. And every other Friday, I have a clinic from noon to 4:00. And

the other days, I'm either operating or in the GI lab doing colonoscopies or upper endoscopies.

Q. And if we could break that down, so what is a colonoscopy for the record?

A. A colonoscopy is a test to look for lesions of the colon or abnormalities of the colon using a fiber optic basically telescope. It has a digital image that shows up on a video screen. We can look inside the colon to identify growths or other abnormalities in the colon.

Q. And how about an upper endoscopy?

A. It's similar. It's, again, a flexible fiber optic basically telescope that we utilize to observe the esophagus, stomach and the first part of the small intestine.

Q. Thank you. And the hospital that you work in, is it a rehabilitative hospital?

A. It is not a rehab hospital, no. We do have rehabilitation facilities and we maintain both in patient and outpatient rehab services.

Q. Are you actively involved in the rehabilitation services or arm of the hospital?

A. Yes. Via patients that have rehabilitation services, yes, I'm actively involved in their care.

Q. To your knowledge, do you currently have any patients who are in the rehabilitation hospital wing that you're working with?

A. So it's not actually a wing. We have the services come in. So like right now, I have a patient in the ICU whose receiving physical therapy occupational therapy and speech therapy all after a surgery for in factor Ted intestine. So I'll interact with the different techs with that and I'll interact with the other doctors regarding that care.

Q. Are any of your patients that you treated most recently or in your recent history, individuals who suffered recent strokes?

A. Yes.

Q. And would you be the physician that would recommend or send a patient or -- let me back up. Strike that.

. Would you the physician to do the assessment to determine if a patient should receive rehabilitation services?

A. So I'm part of that process, yes. It's a group process. We'll get input from our physical

25 therapy department, occupational therapy department,

1 nurses, care coordinators, physicians and we all get
2 together and along with the family, of course and the
3 patient to determine where the disposition should be,
4 whether it be a skilled nursing facility, a rehab
5 facility or sometimes it's, unfortunately, palliative
6 care or even Hospice.
7 Q. And have I ever worked in the capacity of
8 being a medical director or chief physician of some sort
9 for a rehabilitation hospital?
10 A. No I have not.
11 Q. As part of the a treatment that you may
12 provide to an individual whose receiving rehabilitation
13 services, you interact with the staff regularly in
14 directing orders for the patient in their treatment?
15 A. Certain parts of it, yes.
16 Q. Could you explain further? I know it's
17 vague, but if there's an example that you have?
18 A. Right. So I have a patient whose currently
19 in the hospital who came in with increasing paralysis of
20 his lower extremities and also had a perforated gastric
21 ulcer from medications. So I did the surgery on him
22 from that. He's at high-risk for DVT, so we have him on

-- they wanted put him on anticoagulant therapy, so we had to discuss that.

He also had what turned out to be a

cervical spine lesion. And also with physical therapy and occupational therapy about what different modalities or treatment he was able to have after the surgery. So that's probably one of the better examples, recently.

Q. Thank you. Did you also review any statements or reports by Dr. Fish in this matter?

A. I did not.

MS. WRENN: I need to -- I'm going to pass the witness, given some of his answers. I need to look at something really quick and see what my last few questions are going to be. If someone wants to hop in, I don't want to waste time.

EXAMINATION

QUESTIONS BY MS. GORDON:

Q. Doctor, my name is Katie Gordon. I represent Dr. Flaviano in this case. I have a couple questions for you.

A. Sure.

Q. Are you board certified in physical

medicine and rehabilitation?

A. I'm not.

Q. Have you ever practiced in the area of physical medicine and rehabilitation?

A. I have not.

Q. Did you do an internship in physical

medicine and rehabilitation?

A. I did not.

Q. Did you do a residency in physical medicine and rehabilitation?

A. I have not.

Q. Have you ever taught any services in rehabilitation and physician services?

A. I have not.

Q. Have you ever acted as a consultant physician in the area of physical medicine or rehabilitation?

A. I have not.

Q. Have you referred patients to P M R specialists?

A. Yes.

Q. And when I say P M R, you understand that I mean physical medicine rehabilitation; right?

A. I'm aware of that.

Q. I'll just take up the rest of our hour each time if I have to say it out loud. When you refer someone to a P M R specialist, what is the purpose for doing that?

A. Usually it's in the cases of patients who have musculoskeletal or injury deficits that require a care plan. And I want their input on that portion of

their treatment. So in those cases, they will usually serve as part of a team approach, where we interact and they will discuss their recommendations for improving patients, those issues and I'll interact with them about the conditions that I'm involved in.

Q. Do you typically prepare treatment plans for your patients at -- is it Olathe Medical Center?

A. Everybody gets it wrong. It's okay. For which aspects of care?

Q. Well, would you create a treatment plan overall for any of your patients for whom you do surgery?

A. Yes.

Q. All right. And what kinds of circumstances

are there that you would then prepare the overall treatment plan for these patients?

A. Well, every patient that I do surgery on, I have a care plan for how I want to handle the perioperative period, both preoperative, operative and post-operative timeframes. So seen, every single patient has a care plan that's devised by me that I operate on.

Q. And would that care plan then end at the post-operative state?

A. So when that ends is according to

certificate it has 90 days of Medicare global days of reimbursement. To be honest, we don't get reimbursed unless it's unusual until 90 days. But I have patients that I have seen for two decades almost and I continue along with their care, seeing them every few months for different issues. Sometimes it's the same months, sometimes it's different.

Q. Do the patients for Olathe Medical Center from a primary treating physician?

A. So they have a primary care physician who coordinates outpatient care in general. Once they're in the hospital or if they've been referred to me, then

they still will keep the responsibility or else we'll do a team approach, where they will work on things like aunt hypertension medications and I'll take care of surgical issues, but we work as a team in the hospital.

Q. If they're an inpatient at the medical center, do they have a hospitalist?

A. In some cases, in some cases no. We have some family practice and internal medicine physicians who still round in the hospital. And so they will consult them. So they'll be involved in the care actively in the hospital. We have other primary care physicians who defer to the hospital lists, so the hospitalists would then get involved while the patient

is in the hospital to help coordinate care with us.

Q. Have you ever acted as a hospital list at Olathe medical center?

A. No.

Q. Have you ever been retained as an expert witness in giving opinions as to the care and treatment provided by physical medicine and rehabilitation physician?

MR. ARNTZ: Object to form of the question.

A. There was -- I don't know if it was directly -- there was one case where I was consulted to render an opinion about a retained wound vac sponge in a patient who was in the rehabilitation facility under the auspices of a physical medicine rehab doctor. I don't know whether that applies to what you're looking for.

Q. Sure. Did you render opinions about whether a physical medicine and rehabilitation physician fell below the applicable standard of care?

A. In that case I didn't and my opinion was they did not fall below.

Q. I'm sorry. Your opinion was that they did not fall below the standard of care?

A. Yes.

Q. But you were specifically retained to render an opinion about the acts of a PMR physician?

A. Because the wound vac had been ordered by the physical medicine physician while the patient was in a rehabilitation facility, and there was a retained sponge, they filed suit against the home health agency, the physical rehabilitation and rehab doctor. So I was retained --

Q. Were you retained by the plaintiff?

A. No. I was retained by the defense counsel.
Q. Okay. In November of 2019, did you hold any privileges at a hospital or facility to perform PMR services?
A. No.
Q. Between 2015 and 2019, did you take any CME courses that were dedicated to the practice of PMR services?
A. No.
Q. Before you signed your affidavit in this case on November 10th of 2020, did you review the prevailing standards of the practices for PMR physicians?
A. No.
Q. Did you research the generally accepted physicians in the PMR specialty?
A. Regarding which topic?
Q. Regarding rehabilitation and physical

medicine specialty. Did you look up any standard of care guidelines regarding PMR physicians?
A. Again, that's a hugely broad topic.
Q. Let me ask this way: What did you review,

if anything, in order to render your opinion that Dr. Flaviono fell below the standard of care other than the medical records?

A. So I reviewed both the package insert for Eliquis, I reviewed the prevailing articles out there on Eliquis and gastrointestinal hemorrhage. I reviewed medical school texts I have that discuss decreasing hemoglobin and looking for science of bleeding and then also just my own basic knowledge of patients who have a documented decrease in hemoglobin on a repetitive basis in terms of what would be expected from a physician. Not specifically M R physician, but any physician.

Q. Did you save in your job file the articles that you found regarding GI bleeds and Eliquis?

A. No. Those are hundreds and thousands. In this case, my -- what itches looking for was all the different things that could have possibly caused a gastrointestinal hem ran on the patient with Crohn's disease. Now that we have the autopsy, we already have the answer.

Q. What was the amendment that is stated on

that new autopsy report that you have and we don't have?

A. So there was a toxicology report, which

lists the apixaban levels within the patient's bloodstream at the time of his death, which indicates that he still had detectable levels in his bloodstream and then there was also -- prior to that, I did not have a complete listing of the pathologic forensic findings. I was missing a page.

Q. And then you were provided with at page in the amendment?

A. So I've got -- as far as I know, I have all the necessary -- or all the pages that are available for that report at this point.

Q. On your CV, I notice that you stated that you're a fellow of the American College of Surgeons; is that right?

A. I am.

Q. Okay. And you're a member of the Kansas chapter of the American College of Surgeons?

A. I am.

Q. You are still currently?

A. Yes.

Q. Okay. And are you familiar with -- let me ask you this: You've been a fellow of the American College of Surgeons since 2004; right?

A. Yes.

Q. Okay. Are you familiar with the statement on the physician acting as an expert witness that was sent out by the American College of Surgeons, it's dated April 1st, 2011?

A. Yes. Very familiar with it.

Q. And you're familiar with their statement that in order to act as an expert witness, as a general surgeon, that you must be actively involved in clinical practice of the specialty at the time of the alleged occurrence?

A. So in this case, because the specialty that's involved is basic general medicine, it doesn't have anything to do with specific physical medicine rehab. It's basic general medicine, in terms of a patient with a decreasing hemoglobin that's been documented on a blood thinner. That is why I felt that I was qualified to render this opinion, because this is not specific to any individual specialty within need sin. But it's just general medical knowledge.

Q. Do you believe that you are qualified to render an opinion as Totten tighter of care that was given it Mr. Neason while he was at Dignity rehab?

A. No. Only the portions where I made comments.

Q. And is it your testimony, then, that your opinions are limited to the GI bleed?

A.

MR. ARNTZ: I'll object to the form of the question.

A. Pending any new information, that is what I have rendered my opinions on; correct.

Q. When is the last time that you prescribed Eliquis for a patient?

A. I had to renew a prescription on a patient last week.

Q. When is the last time that you prescribed Eliquis for a patient as a new prescription as opposed to refilling it?

A. I don't prescribe it as a new intervention.

Q. And I believe you said that you have never spoken with Dr. Fish about this case?

A. The only way in which I spoke to him is it originally, you know, in the interest of full disclosure, I had known Dr. Fish for 25 years now, from the Army. And he mentioned to me when we were in

22 conversation that he referred an attorney to me to talk
23 about this particular case. So in terms of that, yes,
24 we have talked about it. But the specifics of it, no,
25 we have not discussed the specifics of the case.

1 Q. Do you know why Dr. Fish recommended that
2 you be contacted to act as an expert witness as opposed
3 to just him acting as an expert witness?
4 A. I'm not sure. I know he knows that I work
5 with a lot of patients with gastrointestinal hemorrhages
6 who are on blood thinners. Maybe that's why I referred
7 the patient or this case to me. I'm not quite sure. I
8 didn't delve into that.
9 Q. And Dr. Fish is a physical medicine and
10 rehabilitation physician; correct?
11 A. Yes.
12 Q. Olathe Medical Center has specific PMR
13 physicians; correct?
14 A. We have one on staff, yes.
15 Q. And you are not listed as one of the PMR
16 physicians; correct?
17 A. No. We require board certification for our
18 physicians and I would be lacking that in numerous ways.

Q. I think that's all I have for now. I may circle back. I'll go ahead and let Mr. Kelly go ahead and ask you some questions.

EXAMINATION

QUESTIONS BY MR. KELLY:

Q. Doctor, I represent Dr. Patel in this matter, and I'm going to be very brief. Are you board

certified in internal medicine?

A. No.

Q. Have you ever done an internship in internal medicine?

A. No.

Q. Have you ever done a residency in internal medicine?

A. No.

Q. And based upon your statement just a moment ago, because you're not board certified in internal medicine, you are not -- or have never been at Olathe on internal medicine physician; correct?

A. Correct.

Q. You said that you are actively involved with the care of your patients in the rehab part of the hospital. While you're actively involved, is there

still either a hospitalist or the patient's primary care physician also involved?

A. In some cases, yes. In other cases, no. It depends on the number of different issues that we are dealing with. To in some cases, where it's fairly straightforward, like in a trauma case, then I'll be working with the physical therapist and occupational therapist without necessarily the hospitalist os internal medicine folks. But in a lot of cases, yes, we

work as a team.

Q. That's all I have. Thank you.

EXAMINATION

QUESTIONS BY MS. WRENN:

Q. I have some follow-ups. Once again, my name is Dione Wrenn and I represent the Dignity select. So to confirm your earlier testimony, Olathe does not have an independent rehabilitation hospital; correct?

A. Correct.

Q. This services, I think you mentioned were brought in; is that correct?

A. No. They're a part of the facility, but we don't have a dedicated portion of the hospital that is

devoted solely to the care and treatment involved with rehabilitation.

Q. So the services that the -- let's say your therapist or others who are part that have rehabilitation process, they are employees of Olathe?

A. They are.

Q. And are they rehabilitation services classified as acute inpatient rehabilitative care?

A. Yes, they would be acute.

Q. And do you have any input in the policies and procedures used by Olathe for their rehabilitation services?

A. Only in the sense that I'm on the medical executive committee. So if there's changes to policies and procedures that involve the medical staff, then those will go to the med executive community and I sit on that as the president. But in terms of a lot of the nuts and bolts, no, I do have participation in that care.

Q. What do you mean by the nuts and bolts?

A. So if they want to get a new range of motion machine for therapy after a knee replacement, I would not be involved in purchasing that or how that

would be utilized.

Q. Have you been retained in a Nevada case to offer expert opinions on standard of care for an acute rehabilitation hospital.

A. The only one was that one sponge case. And it wasn't -- they did not -- actually, they did include that facility, but my opinion was limited to the wound vac itself.

Q. How about in Kansas?

A. No.

Q. And outside of a Dr. Flaviano and Patel, which staff members are you referencing in your opinion that on numerous occasions the staff at Dignity failed to provide timely testing for Jeffrey Neason's

gastrointestinal hemorrhage and failed to diagnose his bleed until?

A. That would be those physicians. Physicians are the only ones who are capable of actually doing those orders. The nursing staff, I don't have any knowledge at this point in time to render an opinion regarding the nursing staff. Standard of care.

Q. So does that change or alter how your

reference in paragraph 21 where you talk about the staff and doctors Patel and Flaviano?

A. That was who I was referring to at that time. The staff would only be how they assisted Dr. Flaviono and Patel in their care and assessment of the patients.

Q. But you're not offering any opinions with respect to just the staff and the standard?

A. At this point in time, I'm not.

Q. Have you reviewed the policies and procedures for the rehabilitation services that are provided at Olathe?

A. Unfortunately, yes. That -- we've had to sift through those in terms of the by-laws committee and we've had to view them, that's probably been a decade since I looked at those, though?

Q. And you didn't look at them back in 2019?

A. I did not.

MS. WRENN: That's all I have.

MS. GORDON: I don't have anything else, thanks.

EXAMINATION

QUESTIONS BY MR. ARNTZ:

Q. Doctor, I'm going to ask like two questions. How would you -- if you could, for the court, explain what you see as the issues in this case as it relates to malpractice?

A. So the basis of this -- of the case, as I read the information and the facts of the case, is that this patient Mr. Neason was admitted to the facility on a blood thinner. His hemoglobin was documented to decrease over the course of a number of days in precipitous fashion while on a blood thinner. Despite this decrease, the blood thinner was continued up until the afternoon prior to the patient transferring emergently to St. Rose Dominican, where he expired basically from ex sang which nation. Even though the death certificate says this is a result of complications from colon cancer, it was by bleeding, which was exacerbated by the Eliquis. So the crux of this case has nothing to do with the specs of any specialty. This is basic medicine that we learn in third year of medical

school S patient whose hemoglobin is decreasing over time in a demonstrable fashion, you have an obligation to try to determine and correct whatever the cause of

that is. And that should span every discipline, even if you're a psychiatrist, if you're treating a patient in the hospital and you have knowledge that that patient's hemoglobin is decreasing to an dangerous level, you have an obligation, if you don't know what test to order, at least to get the patient referred to someone who does or at least to a facility who can take care of the patient.

Q. So would you say that it's not so much knowing exactly how to treat the patient, but knowing that drop of hemoglobin is indicative of a problem?

A. Correct. I mean, there are certain basic things, though that after single one of us learned in medical school. We all learned about stool black checking for colon bleeding. We all learned when hemoglobin decrease, far enough, a patient dies. It doesn't have to be 0, that's just part of everybody's medical training. And the fact that blood thinners in our society, which are highly prevalent, I think numerous specialties would have the ability to identify and opine about the effects of a blood thinner whose patient's hemoglobin is decreasing.

Q. And is that standard of care that would be

applicable to a physician treating a patient with these

different issues? Is that standard of care different from a physiatrist to a general surgeon to an internist?

A. No. We all have the same basic medical knowledge. These are not -- this is not oh, I know we talked about this numb husband sometimes. I do not contend to be a million medicine rehab specialist. I do have medical knowledge from my training and since then. I have specialized I did not look at this case check collect with the expectation that a physical medicine rehab physician would meet the same standard that I would as a general surgeon. I looked at this case as would the physicians in this case meet the standard for any treating physician in a facility, where they have this information available, to them.

Q. Okay. That's all I have.

MS. GORDON:

Q. I have a follow-up. Taking that statement that you just made, doctor, about knowledge of a physician regarding a patient's hemoglobin result, you would agree with me, then, that that physician is only as good as the time that he receives those results, does that make sense?

MR. ARNTZ: Object to form.

A. If I can rephrase what I think you're

asking is that is the physician dependent on getting those results from staff and that was where the earlier query about the Dignity hospital staff and their potential roll in this case, and that's why I said I'm not ready to render an opinion, because obviously, there could be some situation where the physician may have an opinion that they were not notified in a timely fashion. That is not documented in any of the documents I have available. So I do agree that if you don't get the information, if it's not available to you, then it's hard to act on that information.

Q. That's fair. And I wasn't referring to staff. I was referring to the time that the lab results are actually available. You would agree with me then, that a physician is not expected to take action on test results that are not yet available to him or her.

A. Yes, I think that -- I would agree with that. That seems like a common sense statements, yes.

Q. And taking your general knowledge of medicine, at what point did Mr. Neason's hemoglobin results mandate that Dr. Flaviono do something that he did not do?

A. 1120.

MR. ARNTZ: Let me --

MS. GORDON: I'm sorry. 1112.

MR. ARNTZ: Let me object to the question. This does seem like it's going more into his basic opinions and not qualifications. But if you can explain the next us, Katie, going down this line.

MS. GORDON: Sure, I don't plan ongoing down this line too very much. I'm just wondering based on the general nature of your medical background, what result or multiple results are you referring to with Mr. Neason's hemoglobin that mandated that Dr. Flaviono do something that he did not do.

A. I'm sorry. I was waiting to make sure there were no other objections.

So I'm outlining, on 111119, the hemoglobin had been noted to decrease from 1124 to 928. At that point, the intervention that at minimum should have been done would be a stool guaiac. And then to monitor the patient's hemoglobin as was suggested by Dr. Patel. On 1113, the hemoglobin at that point, the patient should have had the Eliquis stopped immediately, not waiting for a new result later on in the day and the patient

should have been transferred for evaluation for the source of blood loss.

Q. And that 7.0 result obviously would have had to have been available to the physicians in order to act on it; correct?

A. Correct. But it obviously was available, because they ordered a repeat of that result. And got that and that was documented at 12:20. So they -- and they said they were going to repeat it, so they had that result available at the 7.0 prior to ordering the repeat.

Q. So is 7.0 your cutoff time for them needing to transfer Mr. Neason?

A. At that point in time, I would say that the patient, it was mandate that had the patient be transferred for evaluation for the source of their blood loss.

Q. Okay. That's all I have. Thank you.

MR. ARNTZ: I don't have anything else. Anybody else.

MS. GORDON: Can we get a rough of this, please, because we have to file some supplemental

18 briefings with the court.

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EXHIBIT B

Statement on the Physician Acting as an Expert Witness

Online April 1, 2011

This statement was originally published in the June 2000 issue of the Bulletin. This revised statement incorporates revisions recommended by the College's Central Judiciary Committee and was approved by the Board of Regents at its February 2011 meeting.

Physicians understand that they have an obligation to testify in court as expert witnesses on behalf of the plaintiff or defendant as appropriate. The physician who acts as an expert witness is one of the most important figures in malpractice litigation. In response to the need to define the recommended qualifications for the physician expert witness and the guidelines for his or her behavior, the Patient Safety and Professional Liability Committee of the American College of Surgeons has issued the following statement.

Failure to comply with either the recommended qualifications for the physician who acts as an expert witness, or with the recommended guidelines for behavior of the physician acting as an expert witness, may constitute a violation of one or more of the *Bylaws* of the American College of Surgeons.

Recommended qualifications for the physician who acts as an expert witness:

The physician expert witness must have had a current, valid, and unrestricted state license to practice medicine at the time of the alleged occurrence.

The physician expert witness should have been a diplomate of a specialty board recognized by the American Board of Medica Specialties at the time of the alleged occurrence and should be qualified by experience or demonstrated competence in the subject of the case.

The specialty of the physician expert witness should be appropriate to the subject matter in the case.

The physician expert witness who provides testimony for a plaintiff or a defendant in a case involving a specific surgical procedure (or procedures) should have held, at the time of the alleged occurrence, privileges to perform those same or similar procedures in a hospital accredited by The Joint Commission or the American Osteopathic Association.

The physician expert witness should be familiar with the standard of care provided at the time of the alleged occurrence and should have been actively involved in the clinical practice of the specialty or the subject matter of the case at the time of the alleged occurrence.

The physician expert witness should be able to demonstrate evidence of continuing medical education relevant to the specialt or the subject matter of the case.

The physician expert witness should be prepared to document the percentage of time that is involved in serving as an expert witness. In addition, the physician expert witness should be willing to disclose the amount of fees or compensation obtained fo such activities and the total number of times he or she has testified for the plaintiff or defendant.

Recommended guidelines for behavior of the physician acting as an expert witness:

Physicians have an obligation to testify in court as expert witnesses when appropriate. Physician expert witnesses are expect to be impartial and should not adopt a position as an advocate or partisan in the legal proceedings.

The physician expert witness should review all the relevant medical information in the case and testify to its content fairly, honestly, and in a balanced manner. In addition, the physician expert witness may be called upon to draw an inference or an opinion based on the facts of the case. In doing so, the physician expert witness should apply the same standards of fairness and honesty.

The physician expert witness should be prepared to distinguish between actual negligence (substandard medical care that results in harm) and an unfortunate medical outcome (recognized complications occurring as a result of medical uncertainty).

The physician expert witness should review the standards of practice prevailing at the time and under the circumstances of th alleged occurrence.

The physician expert witness should be prepared to state the basis of his or her testimony or opinion and whether it is based o personal experience, specific clinical references, evidence-based guidelines, or a generally accepted opinion in the specialty. The physician expert witness should be prepared to discuss important alternate methods and views.

Compensation of the physician expert witness should be reasonable and commensurate with the time and effort given to preparing for deposition and court appearance. It is unethical for a physician expert witness to link compensation to the outcor of a case.

The physician expert witness is ethically and legally obligated to tell the truth. Transcripts of depositions and courtroom testimony are public records and subject to independent peer reviews. Moreover, the physician expert witness should willingly provide transcripts and other documents pertaining to the expert testimony to independent peer review if requested by his or h professional organization. The physician expert witness should be aware that failure to provide truthful testimony exposes the physician expert witness to criminal prosecution for perjury, civil suits for negligence, and revocation or suspension of his or he professional license.

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Vol.96, No. 4, April 2011

EXHIBIT 13

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DISTRICT COURT

CLARK COUNTY, NEVADA

ARLIS NEASON, as Heir of the Estate of JEFFREY NEASON; Plaintiff, vs. DIGNITY HEALTH MEDICAL GROUP, NEVADA, LLC, a domestic limited-liability company; CASIANO R. FLAVIANO, M.D.; SUSHIL R. PATEL, M.D.; DOES I through X, and ROE BUSINESS ENTITIES I through X, inclusive, Defendants.	**CASE NO.: A-20-824585-C** **DEPT NO.: 31** **DEFENDANT SUSHIL R. PATEL, MD'S SUBSTANTIVE JOINDER TO CASIANO R. FLAVIONO, MD'S SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT**

COMES NOW, Defendant, SUSHIL R. PATEL, MD, by and through his counsel of record, ROBERT C. McBRIDE, ESQ. and SEAN M. KELLY, ESQ. of the law firm of McBRIDE HALL, and hereby files this Substantive Joinder to Defendant Casiano R. Flaviano, MD's Supplemental Memorandum of Points and Authorities in Support of Motion to Dismiss Plaintiff's First Amended Complaint.

This Substantive Joinder is made and based upon the papers and pleadings on file herein, the Memorandum of Points and Authorities attached hereto, such other documentary evidence as may be presented and any oral arguments at the time of the hearing of this matter. This Defendant

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expressly adopts and incorporates by reference herein all of the Points and Authorities set forth in Defendant Casiano R. Flaviano, MD's Supplemental Memorandum of Points and Authorities in Support of Motion to Dismiss Plaintiff's First Amended Complaint.

Specifically, this Defendant, Dr. Patel, is an Internist (Internal Medicine), not a surgeon. Plaintiff's expert, Dr. Davoren (surgeon), is not an internist and, therefore, does not practice in an area of medicine that is substantially similar to Dr. Patel. During his deposition, Dr. Davoren testified as follows: 1) that he is not Board Certified in Internal Medicine; 2) he has never done an internship in Internal Medicine; 3) has never done a residency in Internal Medicine; and 4) has never been considered an Internal Medicine physician at Olathe. As discussed in Dr. Flaviano's brief, the care and treatment provided by Dr. Patel and Flaviano to Mr. Neason is outside the purview of a general surgeon who has never practiced as an Internal Medicine physician. Accordingly, Plaintiff failed to meet the requirements set forth in NRS 41A.071, and the Court should enter judgment in Dr. Patel's favor based upon the pleadings in this case.

DATED this 1st day of June 2021.

McBRIDE HALL

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 1st day of June 2021, I served a true and correct copy of the foregoing DEFENDANT SUSHIL R. PATEL, MD'S SUBSTANTIVE JOINDER TO CASIANO R. FLAVIONO, MD'S SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT addressed to the following counsel of record at the following address(es):

☒ **VIA ELECTRONIC SERVICE:** by mandatory electronic service (e-service), proof of e-service attached to any copy filed with the Court; or

☐ **VIA U.S. MAIL:** By placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, addressed as indicated on the service list below in the United States mail at Las Vegas, Nevada; or

☐ **VIA FACSIMILE:** By causing a true copy thereof to be telecopied to the number indicated on the service list below.

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DISTRICT COURT

CLARK COUNTY, NEVADA

ARLIS NEASON, as Heir of the Estate of JEFFREY NEASON, Plaintiff, v. DIGNITY SELECT NEVADA, LLC a foreign limited-liability company; CASIANO R. FLAVIANO, MD; SUSHIL R. PATEL, MD; DOES I through X; and ROE BUSINESS ENTITIES I through X; inclusive Defendants.	CASE NO. A-20-824585-C DEPT. NO. XXXI **DEFENDANT DIGNITY SELECT NEVADA, LLC'S JOINDER TO CASIANO R. FLAVIANO, M.D.'S SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT**

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DEFENDANT DIGNITY SELECT NEVADA, LLC'S JOINDER TO CASIANO R. FLAVIANO, M.D.'S SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

Defendant DIGNITY SELECT NEVADA, LLC ("Dignity Select"), by and through its attorneys of record, Robert E. Schumacher, Esq. and Dione C. Wrenn, Esq. of the law offices of Gordon Rees Scully Mansukhani, LLP, hereby submits this joinder to Defendant Casiano R. Flaviano, M.D.'s ("Dr. Flaviano") Supplemental Memorandum of Points and Authorities in Support of Motion to Dismiss Plaintiff's First Amended Complaint.

Dignity Select hereby adopts and incorporates herein by reference, those portions of the Memorandum of Points and Authorities submitted by Dr. Flaviano. If for any reason Defendant Casiano Flaviano, M.D.'s Supplemental Memorandum of Points and Authorities in Support of Motion to Dismiss Plaintiff's First Amended Complaint becomes moot or is withdrawn, this Joinder shall serve as its own stand-alone motion.

This Joinder is made based upon the pleadings and papers on file herein and any oral argument of counsel which may be heard at the time of the hearing.

DATED this 2nd day of June 2021.

GORDON REES SCULLY MANSUKHANI LLP

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 2nd day of June 2021, I served a true and correct copy of the **DEFENDANT DIGNITY SELECT NEVADA, LLC'S JOINDER TO CASIANO R. FLAVIANO, M.D.'S SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT** via the Court's Electronic Filing/Service system upon all the parties on the E-Service Master List.

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