IN THE SUPREME COURT OF THE STATE OF NEVADA

CASIANO R. FLAVIANO, MD; and SUSHIL R. PATEL, MD Petitioners, v. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE BITA YEAGER, DISTRICT JUDGE, Respondent, And ARLIS NEASON, AS HEIR OF THE ESTATE OF JEFFREY NEASON; AND DIGNITY HEALTH MEDICAL GROUP NEVADA, LLC, A DOMESTIC LIMITED-LIABILITY COMPANY, Real Parties in Interest	Supreme Court Case No. 83821 District Court Case No.: A-20-824585-C

ARLIS NEASON, AS HEIR OF THE ESTATE OF JEFFREY NEASON'S ANSWER TO PETITIONERS SUSHIL R. PATEL M.D.'S AND CASIANO R. FLAVIANO M.D.'S PETITION FOR WRIT OF MANDAMUS

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NRAP 26.1 DISCLOSURE

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

1. All parent corporations and publicly-held companies owning 10 percent or more of the party's stock: None

2. Names of all law firms whose attorneys have appeared for the party or amicus in this case (including proceedings in the district court or before an administrative agency) or are expected to appear in this court: Greenman Goldberg Raby & Martinez Lewis Brisbois Bisgaard & Smith LLP; McBride Hall; Gordon Rees Scully Mansukhani LLP.

3. If litigant is using a pseudonym, the litigant's true name: N/A

Dated this 1st day of February, 2022.

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I. STATEMENT

Petitioners contend this matter is retained by the Nevada Supreme Court under NRAP 17(a)(12) because they state it raises a principal question of statewide public importance. However, this case does not raise an issue of first impression, does not involve a principal issue of statewide importance nor inconsistent decisions, and does not otherwise fall within NRAP 12(a).

Instead, this case involves whether the District Court's factual determination based on the entire record that Real Party In Interest, Arlis Neason, as Heir to the Estate of Jeffrey Neason's ("Arlis Neason") pre-complaint medical affidavit is sufficient under NRS 41A.071(2)'s "substantially similar" provision, as interpreted by this Court in *Borger v. Dist. Ct.*, 120 Nev. 1021, 102 P.32d 600 (2004) and its progeny.

II. ISSUE PRESENTED

Whether the Court should overturn the District Court's factual determination that Arlis Neason's medical expert affidavit by Dr. Davoren is sufficient and meets the standards of NRS 41A.071, and in particular, whether the District Court's determination of the facts, using the correct law, that he practices or has practiced in an area that is "substantially similar" to the type of malpractice engaged in at the time of the alleged negligence, was a manifest abuse of discretion or clearly erroneous.

III. STATEMENT OF FACTS

Petitioners set forth the procedural history of the case through the amended complaint, motions to dismiss, deposition of Dr. Davoren (Arlis Neason's pre-complaint medical affiant), supplemental briefing after the deposition, and the Court's order denying Petitioners' motion to dismiss after review of the entire record, complaints, affidavit, deposition testimony, and argument by counsel at the hearing, a transcript of which has not been requested or provided to the Court by Petitioners, despite their knowledge of their intent to seek writ relief.

The operative First Amended Complaint ("FAC") alleges medical negligence against Petitioners and Dignity Health. (Petitioners' Appendix ("App."), 22-41). Jeffrey Neason was seen at the Genesis Clinic, ultrasound examinations revealed a thrombosis of the left internal jugular vein, and he was prescribed a blood thinner, Eliquis. (App. 25). He was then seen by Dr. Ratnasabapathy who agreed with the prescription and told him to seek treatment at a hospital should he experience chest pains, shortness of breath, or bleeding symptoms. (*Id*.)

Jeffrey then presented to an ER hospital with complaints of chest and back pain, where his troponin level was elevated at 7, he was diagnosed with a non-ST segment elevation myocardial infarction cardiac event, and his CT angiogram confirmed left internal jugular vein thrombosis. (App. 25-26).

He then reported visual changes and mild gait ataxia, a non-contrast CT of the head was interpreted as suspicious for acute ischemia/infarct, and an additional CT showed normal results and a normal cerebral perfusion scan. (App. 26).

Jeffrey was later noted to have wheezing and shortness of breath and his chest x-ray revealed multilobar pneumonia. (*Id.*). He was later discharged to Dignity Health Rehabilitation. (*Id.*). Jeffrey's prescriptions at the time of admission included Eliquis, 81mg Aspirin, and prednisone. (*Id.*). Upon admission, he was evaluated by Petitioner Dr. Flaviano and his medications were continued. (*Id.*). He was to receive 10mg of Eliquis twice daily, with the dosage to eventually reduce to 5mg. (*Id.*).

Three days later, his hemoglobin level was recorded as 9.8 and treating provider Petitioner Dr. Patel noted that Jeffrey's hemoglobin levels needed to be monitored, specifically while he was on Eliquis. (*Id.*). His hemoglobin level continued to drop the next day, recorded as 6.8, and Dr. Patel noted that he planned to discontinue Eliquis. (App. 26-27). Dr. Flaviano noted an elevated white blood count and discontinued the Eliquis. (App. 27). Around 8:30 p.m. that evening, a nurse noted that Jeffrey's parent had observed dark black stool residue on Jeffrey's pants. (*Id.*).

The next day, Jeffrey's hemoglobin was noted to be 4.5 and shortly after that same morning he was found on the floor of the bathroom with a large amount of

black, tarry stool. (*Id*.). He was transported to St. Rose's emergency where he passed away as a result of Petitioners' and Dignity Health's negligence. The FAC then alleges additional allegations of negligence against Dignity Health as well. (App. 27-30).

The FAC as did the initial complaint attached Dr. Davoren's affidavit setting forth all these above facts from his review of all the records, and his opinions based thereon, which included:

> 27. 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.

(App. 40-41).

Dr. Davoren's Affidavit stated he was a full-time licensed general surgeon, completed a bachelor's degree in Biology / pre-medicine at College of Holy Cross, hid Doctor of Medicine at the University of Oklahoma, served as a General Medical Officer for the United States Army, completed his Residency in General Surgery at the University of Kansas, became a Board-Certified General Surgeon, and that based upon his training, background, knowledge, and experience, he was familiar with the

applicable standards of care for treatment of patients demonstrating the symptoms and conditions that Jeffrey Neason presented to Dignity Health Rehabilitation Hospital. (App. 35).

The District Court allowed Petitioners to take Dr. Davoren's deposition. Petitioners selectively cite portions of the deposition out of context, however, during questioning by Petitioners' counsel, Dr. Davoren specifically testified that his practice does involve the same issues and treatment as Petitioners, but which Petitioners omit in their papers. Among other things, he testified as follows:

- Dr. Davoren is president of the medical staff at Olathe Medical Center, chief of surgery, employed as a physician, and maintains clinical hours where he treats patients, operates or is in the GI lab doing colonoscopies or upper endoscopies (*id*. at 257-258);
- His hospital has rehabilitative services and that he is *actively* involved in the patients' care (*id*. at p.258-259);
- He is part of the group process assessing whether a patient should receive rehabilitative services (*id*. at 259);
- As part of their treatment he interacts with the staff regularly in directing orders for these patients in their treatment (*id*. at 260);
- He refers patients to physical medicine rehabilitation ("PMR") specialists (*id*. at 262) and he creates and devises treatment plans for these patients on whom he does surgery (*id*. at 261); and,
- He has been previously retained as an expert to render an opinion about the acts of a PMR physician by the defendant in that particular case (*Id*. at 266-267), among other testimony.

When Petitioners' counsel asked a line of questioning designed to try and preclude Dr. Davoren from testifying because of some artificial, non-legal standard created by a board of certification, which is different than Nevada's NRS 41A.071's standard, Dr. Davoren aptly described the standard and issue he was opining on as follows:

> Q. Okay. Are you familiar with the statement in 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 medicine. But it's just general medicine knowledge**.

(App. 270).

Petitioners in their briefing also selectively cite to "yes" and "no" non-determinative self-serving questions and answers from the deposition focused on whether Dr. Davoren is in the same exact field as Petitioners, or if he is certified or licensed in those particular specific fields, etc., but they omit from their papers his

full responses in context that show he is qualified to render the opinions in this case. For example, when specifically asked about the malpractice issue in this case, Dr. Davoren explains:

> Q. … How would you - - 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 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 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 … it was by bleeding, which was exacerbated by the Eliquis. So the crux of this case has nothing to do with [] any specialty [of Petitioners]. This is basic medicine that we learn in third year of medical school [that a] patient whose hemoglobin is decreasing over time in a demonstrable fashion, you have an obligation to try and determine and correct whatever the cause of that is. And that should be every discipline … 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 hemoglobin is decreasing …

(App. At 278-279).

Dr. Davoren further described the following review he undertook to render opinions:

> 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 (sic) 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 a PMR physician, but [expected of] any physician. ….. In this case, my – what [I'm] looking for was all the different things that could have possibly caused a gastrointestinal hem ran on the patient with Crohn's disease.

(App. 267-268).

During briefing, Arlis Neason also submitted the affidavit and report of Dr. Fish, board certified in Physiatry, Director of Physiatry at UCLA Medical Center, among other things. (App. 78-93). Dr. Fish reviewed the matter, agreed the Petitioners did not meet the applicable standard of care, prepared a report concluding the same, and also referred Arlis Neason to Dr. Davoren because he too believed "the treatment in this case is not unique to the purview … of a physiatrist" and that Dr. Davoren is qualified as someone who treats patients with medical issues Jeffery Neason was experiencing." (App.79-80).

Just as did Dr. Davoren, Dr. Fish concluded the Petitioners and medical staff at Dignity Health did not meet standard of care and this directly led to the Jeffrey's Neason's death. (App. 87). He identified similar failures as did Dr. Davoren, including the failure to adequately identify Jeffrey had a number of concurrent risk factors placing him at "HIGH RISK" for a GI bleed, failure to identify and act upon laboratory evidence indicating an active bleed, failure to redraw labs in a timely manner even after potential for GI bleed was recognized, failure to provide

reasonable testing and/or workup to evaluate for a GI bleed, failure to recognize a critical lab values and immediately transfer to acute care, etc. (App. 87-88).

Dr. Fish's declaration and report further demonstrate that the lawsuit has merit and the medical opinions are not limited to the finite specialty of the Petitioners.

IV. ARGUMENT

A. Writ Relief Is Not Appropriate Here; The Court Did Not Manifestly Abuse Its Discretion And The Decision Was Not Clearly Erroneous.

"Mandamus is an extraordinary remedy, and the decision as to whether a petition will be entertained lies within the sound discretion of this court." *Borger v. Dist. Ct.*, 102 Nev. 1021, 1025, 102 P.3d 600 (2004). While Petitioners contend there are no disputed issues of fact here, the District Court made a factual determination applying the correct law, based on Dr. Davoren's deposition testimony, the Complaints, Davoren affidavit, and his qualifications, and determined those facts met the "substantially similar" requirement under NRS 41A.071(2).

There is a factual dispute at the heart of this case. Petitioners falsely contend it is undisputed that Dr. Davoren does not practice in a "substantially similar" practice area as the Petitioners under NRS 41A.071, which was hotly disputed in the Oppositions and Supplemental Oppositions, and in the lower court hearings, all throughout the District Court and here. Just because Petitioners say it is purportedly undisputed that Dr. Davoren is not qualified does not make it so. Petitioners are in

the appellate court trying to get a second bite at the apple of the lower court's factual determination that went against them which the lower court made after multiple hearings, deposition testimony, and significant deliberation.

"An appellate court is not particularly well-suited to make factual determinations in the first instance" as it is not geared to factfinding. *Zugel v. Miller*, 99 Nev. 100, 101, 659 P.2d 296, 297 (1983); *see also Anderson v. Bessemer*, 470 U.S. 564, 575, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985) (explaining that a trial court is better suited as an original finder of fact because of the trial judge's superior position to make determinations of credibility and experience in making determinations of fact).

In *Borger*, the court was clarifying the then-recently passed NRS 41A.071 statute to avoid "inconsistent rulings at the [district court] level" going forward, among other reasons. *Borger*, 102 Nev. 1025-26. The *Borger* Court clarified that "the 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," and interpreted the "substantially similar" provision with some instructive guidelines and discussion for the district court determinations discussed more fully below in Argument subsection C. *Id*. at 1028.

Here, however, Petitioners argue that Dr. Davoren does not practice in the *same* practice area as Petitioner physicians so, as they argue, he does not therefore practice in a "substantially similar" area under the statute, which *Borger* has rejected and made clear is not the law. Petitioners take issue with the District Court's factual determination under NRS 41A.071 applying the correct law, *Borger*, essentially arguing the District Court construed the facts wrong.

Petitioners argue that the District Court manifestly abused its discretion. "An arbitrary or capricious exercise of discretion is one 'founded on prejudice or preference rather than on reason,' or 'contrary to the evidence or established rules of law." *State v. Dist. Court*, 127 Nev. 927, 931-932, 267 P.3d 777 (2011), citing *City Council v. Irvine*, 102 Nev. 277, 279, 721 P.2d 371, 372 (1986) (concluding that "[a] city board acts arbitrarily and capriciously when it denies a license without any reason for doing so."). "A manifest abuse of discretion is '[a] clearly erroneous interpretation of the law or a clearly erroneous application of a law or rule.'" *State*, 127 Nev. at 932, citing *Jones Rigging and Heavy Hauling v. Parker*, 347 Ark. 628, 66 S.W.3d 599, 602 (Ark. 2002) (stating that a manifest abuse of discretion "is one exercised improvidently or thoughtlessly and without due consideration"); *Blair v. Zoning Hearing Hd. of Tp. of Pike*, 676 A.2d 760, 761 (Pa. Commw. Ct. 1996) ("[M]anifest abuse of discretion does not result from a mere error in judgment, but

occurs when the law is overridden or misapplied, or when the judgment exercised is manifestly unreasonable or the result of partiality, prejudice, bias or ill will.").

Here, the District Court did not manifestly abuse its discretion, was not clearly erroneous, and did not apply the wrong law. Writ relief is inappropriate here because the issue of law—what is "substantially similar" under NRS 41A.071—has been clarified already for the District Courts in *Borger* and this case does not involve application of the wrong law. Instead, it involves dissatisfied Petitioners who contend the District Court, while using the correct law, misapplied the *facts*, not law. In essence, Petitioners seek to second-guess the District Court's determination, which, if allowed, would result in innumerable petitions seeking to undo factual determinations of the District Court, which is not appropriate for rare, exceptional, writ relief here.

Not every NRS 41A.071 medical affidavit sufficiency ruling is subject to, or proper for, writ relief, or the legislature would have written that into the statute, which it did not. Here, the District Court, upon considerable determination, after multiple hearings and discovery, found the facts sufficient under NRS 41A.071 to meet the "substantially similar" requirement, as clarified by this Court in *Borger*.

B. <u>Purpose And Intent of NRS 41A.071.</u>

"NRS 41A.071, enacted as part of the special legislative package, requires that medical malpractice complaints filed on or after October 1, 2002, be

accompanied by affidavits of merit from medical experts." *Borger v. Dist. Ct.*, 102 Nev. 1021, 1024, 102 P.3d 600, 602 (2004). Thus, inherent and of primary importance in construing the statute is that the case has merit.

In that vein, 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, 459, 117 P.3d 200 (2005). NRS 41A.071 was intended to deter frivolous lawsuits. *Szydel*, 121 Nev. at 459. The "underlying purpose … is to ensure that such actions be brought in good faith based upon competent expert opinion" to foreclose "frivolous lawsuits filed with some vague hope that a favorable expert opinion might eventually surface." *Borger*, 120 Nev. at 1029.

The Court has also held that "in order to achieve NRS 41A.071's purpose of deterring frivolous claims and providing defendants with notice of the claims against them, while also complying with the notice-pleading standards for complaints, the district court should read a medical malpractice complaint and affidavit of merit together when determining whether the affidavit meets the requirements of NRS 41A.071." *Zohar v. Zbiegien*, 130 Nev. 733, 734, 334 P.3d 402, 403 (2014). Here, we also have the benefit of Dr. Davoren's deposition testimony when being specifically questioned by Petitioners' counsel, though deceptively quoted out of context in the Petition and accurately set forth in this Answer.

The affidavit requirement is thus intended primarily to foreclose frivolous medical malpractice suits at the pleading stage, not to block meritorious suits on narrow technical grounds. Notably missing in this case, however, is any showing or real argument that the lawsuit is meritless or frivolous, which it is not, and instead seeks to have the action dismissed on narrow grounds that the affiant physician is in a different specialty, which is directly contrary to the intent and purpose of the statute, the cases interpreting NRS 41A.071, and which does not render Dr. Davoren unqualified under the statute in any event.[1]

To the extent not otherwise stated, Arlis Neason opposes all arguments of Petitioners regardless how they are characterized because Dr. Davoren is qualified under the statute to provide the medical affidavit of merit for the issues in this case.

C. Dr. Davoren Meets The Requirements of NRS 41A.071 Under The Law And This Court's Interpretation And Application Thereof.

NRS 41A.071 requires that the medical malpractice affidavit accompanying the complaint:

1. Supports the allegations contained in the action;

[1] When construing a statute, the legislative intent is controlling. *Szydel v. Markman*, 121 Nev. 453, 456, 117 P.3d 200 (2005). "When a statute is susceptible to more than one reasonable interpretation, it is ambiguous, and this court must resolve that ambiguity by looking to the statute's legislative history and 'construing the statute in a manner that conforms to reason and public policy.'" *Zohar v. Zbiegien*, 130 Nev. at 737.

> 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.071. Petitioners' Petition takes issue with subsection (2) and does not contend Dr. Davoren's affidavit does not specifically support the allegations under subsection (1).

Under NRS 41A.071(2), "the affiant must practice or have practiced in an area that is 'substantially similar to the type of practice engaged in at the time of [the defendant's] alleged malpractice.'" *Borger*, 102 Nev. at 1024; NRS 41A.071(2). The Court in *Borger* then held and clarified that this section 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. *Id*.

Borger recognized that the "Legislature has not provided specific 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." *Id*. at 605. To interpret the phrase, the *Borger* Court cited to Connecticut law that stated "the threshold question of admissibility is governed by

the scope of the witness' knowledge and not the artificial classification of the witness by title." *Id.*, citing *Marshall v. Yale Podiatry Group*, 5 Conn. App. 5, 496 A.2d 529, 531 (Conn. App. Ct. 1985).

In *Borger*, a gastroenterologist was qualified to opine as to the medical malpractice of a general surgeon. In that case, Alan Borger consulted with James Lovett, M.D., a general surgeon, for treatment of recurrent lower digestive tract difficulties. *Id*. at 601. Eventually, Dr. Lovett secured a clinical consultation from Dipak Desai, M.D., a gastroenterologist. *Id*. Dr. Desai diagnostically confirmed that Borger suffered from a condition known as Crohn's disease and agreed with Dr. Lovett's recommendations for surgical intervention, and in accordance with the joint assessment, Dr. Lovett performed a colectomy upon Borger. *Id*. at 601-602.

Unfortunately, Borger's condition did not improve over time and he began treatment with a second gastroenterologist, Marc Kudisch, M.D., who concluded that Dr. Desai misdiagnosed Borger with Crohn's disease, and that Dr. Lovett recommended and performed an unnecessary and overly aggressive surgical procedure. *Id*. at 602. The Borger complaint against Dr. Lovett, Lewis & Lovett, Ltd., d/b/a Desert West Surgery, Dr. Desai and his corporate affiliate Endoscopy Center of Southern Nevada, L.L.C., d/b/a Gastroenterology Center of Nevada, alleged (1) that Dr. Lovett and Dr. Desai misdiagnosed Borger's condition, (2) that Dr. Lovett's conduct fell below the standard of care by performing the wrong surgical

procedure, and (3) that the surgical result obtained was deficient. Borger filed an amended complaint in the matter, which incorporated an affidavit of Dr. Kudisch supporting the allegations against both physicians. *Id*. at 603.

Dr. Lovett and Desert West Surgery moved to dismiss Borger's complaint for failure to submit an affidavit of merit by an expert in Dr. Lovett's area of practice-general surgery, arguing Borger's failure to supply an affidavit from a general surgeon mandated dismissal of the action against him. *Id*. Borger argued in response that Dr. Kudisch practiced within a discipline substantially similar to that practiced by Dr. Lovett in his assessment, diagnosis and treatment of Borger. *Id*. The district court dismissed the case against Dr. Lovett and his professional corporation and Borger filed a writ of mandamus, where the Court reversed the decision.

The Court, noting the statute was intended to foreclose frivolous suits, stated Dr. Lovett took "a literal approach to the provision, contending that an affiant supporting allegations against a malpractice defendant must certify that he or she specifically engages in the same type of practice area as the defendant … That is, a complaint against a general surgeon must be supported by an affidavit from a general surgeon." *Id*. Accordingly, Dr. Lovett erroneously reasoned that "regardless of the discipline of medicine implicated by the patient's need for surgical intervention, a solely clinical subspecialist in the field of medicine involved may not support a complaint by the patient against a surgeon" … an approach which the district court

took "despite the fact that Dr. Lovett's diagnosis and treatment clearly involved issues related to the practice of gastroenterology." *Id*. at 604.

The *Borger* Court interpreted "substantially similar" under NRS 41A.071 citing and referring to Connecticut law. "[I]n addressing a similarly worded testimonial requirement, the Connecticut Appellate Court has held that 'the threshold question of admissibility is governed by the scope of the witness' knowledge and not the artificial classification of the witness by title.'" *Borger*, 120 Nev. at 605, citing *Marshall v. Yale Podiatry Group*, 5 Conn. App. 5, 496 A.2d 529, 531 (Conn. App. Ct. 1985).

"Although the Nevada special session legislation 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 the 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." *Id*. at 605.

The Court in *Borger* thus concluded the district court erred in dismissal because "[t]he diagnosis and treatment rendered by Dr. Lovett implicates Dr. Kudisch's area of expertise, the practice of gastroenterology" and "[t]hus, the statute was not violated when Dr. Kudisch drew conclusions about perceived deficiencies

in Dr. Lovett's diagnosis, choice of treatment modality and the surgical result obtained" and, "because NRS 41A.071 governs the threshold requirements for initial pleadings in medical malpractice cases, not the ultimate trial of such matters, [the Court] must liberally construe this procedural rule of pleading in a manner that is consistent with our NRCP 12 jurisprudence." *Id*. at 605.

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. *Zohar*, 130 Nev. 733. The Nevada Supreme Court reversed dismissal because the statute was enacted to deter baseless medical malpractice litigation and 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 739.

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.* The Court's decision in *Baxter v. Dignity Health*, 131 Nev. 759, 357 P.3d 927 (2015) also emphasized 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 liberally construed and less stringent than the requirements for establishing a violation of the standard of care at trial.

In *Marshall v. Yale Podiatry Group,* 496 A.2d 529 (1985), the case relied upon by the Nevada Supreme Court in *Borger*, the court considered the question of whether an expert in one area of medicine can testify in a case involving allegations against an expert in a different area of medicine where the foundation for the opinion is in the general area of medicine, just like is at issue here. *Marshall* held "where the evidence indicates that the specialties overlap and the applicable standard of care is common to each, a medical expert from either of the overlapping groups who is familiar with that common standard is competent to testify as to the standard of care." *Marshall*, 496 A.2d at 531.

Marshall turned to the court's discussion in another similar case, *Fitzmaurice v. Flynn*, 167 Conn. 609, 359A.2d 887 (1975):

> [T]he court found that the trial court erred in excluding the plaintiff's expert, a practicing surgeon specializing in breast cancer surgery, from testifying as to the proper medical standards of practice among obstetrician-gynecologists pertaining to breast examinations. In that case, the testimony was "that breast lump examinations are performed in exactly the same manner by obstetrician-gynecologists and surgeons; and that these two specialties are identical with respect to breast lump examination and diagnosis."
>
> …

> The threshold question of admissibility is governed by the scope of the witness' knowledge and not the artificial classification of the witness by title.

Marshall, 459 A.2d at 531. This is the precise standard the Nevada Supreme Court reiterated in *Borger* when it cited to *Marshall*, and involves a situation very similar to this action.

Again, in the *Marshall* case relied upon in *Borger*, *Marshall* approvingly addressed yet another case, *Katsetos v. Nolan*, that held:

> Our appellate courts have had occasion to address this issue since that case. In *Katsetos v. Nolan*, 170 Conn. 637, 646-47, 368 A.2d 172 (1976), the court held that where the evidence presented at trial showed that the treatment in question falls within the field of all medical specialties and the minimum standard of care was common to all specialties, the plaintiff's medical experts were competent to testify as to the applicable standard of care, although not specialists in the same field as the defendants."

Marshall, 459 A.2d at 531. Once again, this is similar to this action.

While *Katsetos* was not specifically in the context of the pre-suit expert affidavit, the pre-suit expert requirements should not be more stringently construed than the expert requirements for trial, but rather, the pre-suit expert requirement should be more liberally construed while ensuring the case is not frivolous. As *Marshall* recognized, "The decisions allowing and excluding expert testimony in this area generally focus on the expert's familiarity with the school of medicine and the procedures involved." *Id*. at 532.

Dr. Davoren made similar points during his deposition as more fully set forth in the factual section above that the specialty involved is basic general medicine in terms of a patient with a decreasing hemoglobin that has been documented on a blood thinner and is not unique to physical medicine rehab. (App. 270). 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 blood thinners, and 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. (App. 278-279). It was by bleeding, which was exacerbated by the Eliquis, such that the crux of this case has nothing to do with any specialty of Petitioners, but rather is basic medicine that a patient whose hemoglobin is decreasing over time in a demonstrable fashion, there is an obligation to try and determine and correct whatever the cause of that is. (*Id*.). That is not limited to Petitioners' specific discipline. (*Id*.).

In any event, Dr. Davoren also testified how his practice *does* involve some of the same or similar issues and treatment as Petitioners including rehabilitative services and treatment discussed in the factual section above, but which Petitioners ignore.

Dr. Davoren is qualified to testify as to the standard of care required by all defendants in this case under liberally construed NRS 41A.071 (and under the more

stringent trial expert requirements), and there can be no true suggestion that the case lacks merit or is frivolous, the primary purpose and intent of the statute. Rather, as bolstered by among other things, physiatrist Dr. Fish who also reviewed the case, recommended Dr. Davoren for the pre-complaint affidavit, also prepared a report, and who likewise concurred in the opinions that Petitioners were professionally negligent, the case is most certainly not frivolous.

The affidavit is a preliminary procedure and should be construed liberally as opposed to the more strict testifying requirements for trial. Dr. Davoren is qualified to testify as to the standard of care of Dr. Flaviano and Dr. Patel, and other healthcare providers and staff at Dignity Health, because the malpractice issue in this case involve areas of medicine a general surgeon is trained and practices in. Independently, Dr. Davoren's practice does involve the same issues, treatment, and practice areas anyways.

At a minimum, the Court did not manifestly abuse its discretion or make a clearly erroneous ruling in making the factual determination that the practices are substantially similar under Nevada law for the purposes of NRS 41A.071. The mere fact that the malpractice and failure to recognize the basic need for a blood transfusion given the known decreasing levels occurred at a physical rehabilitation facility does not mean only a physiatrist can testify regarding the propriety of the

care received. This is an egregious case of medical malpractice leading to the death of Jeffrey Neason that has extreme merit by all accounts.

Petitioners' briefing relies on *Carnes v. Wairimu*, 2011 Nev.Unpub. LEXIS 504. *Carnes* relies upon *Staccato v. Valley Hospital*, 123 Nev. 526, 170 P.3d 503 (2007) concerning the qualification of an expert at the trial stage. In *Staccato*, the primary issue was "whether a physician is qualified to testify as to the proper standard of care in a malpractice action against a nurse when the allegedly negligent act implicates the physician's realm of expertise." *Id*. at 527, 170 P.3d at 504. In resolving this question, the Supreme Court noted that, "in Nevada, expert qualification does not hinge on the specialty or license of the medical caregiver but, instead, turns on 'whether the proposed witness's special knowledge, skill, experience, training, or education will assist the jury.'" *Id*. at 531.

Thus, it held that "a physician or other medical provider is not automatically disqualified from testifying against a defendant who specializes in a different area of medicine or who practices in a different medical discipline." *Id*. at 531-32. Consequently, the Supreme Court "emphasized that 'the proper measure for evaluating whether a witness can testify as an expert is whether that witness possesses the skill, knowledge, or experience necessary to perform or render the medical procedure or treatment being challenged as negligent, and whether that witness's opinion will assist the jury.'" *Id*. at 527. Because the emergency room

physician in *Staccato* was qualified to administer injections—the medical procedure or treatment at issue—the Court reversed the lower court, concluding that the physician was qualified as an expert and could offer standard-of-care testimony in relation to the nurse." *Id*. at 533. *Staccato* concluded:

> [A] physician or other medical care provider is qualified to testify as to the accepted standard of care for a procedure or treatment if the physician's or provider's experience, education, and training establish the expertise necessary to perform the procedure or render the treatment at issue. In so concluding, we clarify that a medical expert witness need not have the same credentials or classification as the defendant medical care provider. Instead, in accordance with Nevada's statutory scheme governing expert witness testimony, and in furtherance of sound public policy, the proper measure for evaluating whether a witness can testify as an expert is whether that witness possesses the skill, knowledge, or experience necessary to perform or render the medical procedure or treatment being challenged as negligent, and whether that witness's opinion will assist the jury.

This action is similar to *Borger*, the cases discussed above from *Marshall*, and *Staccato*, in that Dr. Davoren is qualified and competent in the treatment being challenged as negligent here, and his training, practice, experience, skill in the negligent area is substantially similar to allow for him to provide the NRS 41A.071 affidavit as an expert witness. The remainder of Petitioners' arguments go more to cross-examination of his *specialty*, but not his qualification to opine on the area of negligence specifically involved in this specific case here.

D. Dignity Health's Answer/Joinder Is Improper, Untimely, and Should Be Denied To The Extent Entertained.

Dignity Health, a real party in interest and not a petitioner, filed an untimely Answer styled as a Joinder, and did not seek a proper extension to do so. Thus, the Court should not consider it.

As of the filing of this Answer, the Court has not granted the Answer styled as a Joinder, and therefore Dignity Select is not a proper petitioner requiring a response. To the extent the Court later grants a 'joinder' or treats the papers as writ relief, it should grant Arlis Neason a chance to fully and separately respond.

In any event, Dignity Health's Answer essentially argues as a medical facility and staff, no specific names were stated but that the same grounds as Petitioners, that a sufficient medical affidavit is required, warrants dismissal of the medical facility. Dignity Health's argument and fails for the same reasons as Petitioners.

Among other things, an expert affidavit of merit that failed to specifically name allegedly negligent defendants can still comply with NRS 41A.071 as to the unnamed parties if, as here, it is clear that defendants and the court received sufficient notice of the nature and basis of the medical malpractice claims, because the courts should read a medical malpractice complaint and a plaintiff's NRS 41A.071 expert affidavit together.

In *Zohar*, the Court considered "whether an expert affidavit attached to a medical malpractice complaint, which otherwise properly supports the allegations of medical malpractice contained in the complaint but does not identify all the defendants by name and refers to them only as staff of the medical facility, complies with the requirements of NRS 41A.071." *Zohar*, 130 Nev. at 734-735. The Court concluded "that in order to achieve NRS 41A.071's purpose of deterring frivolous claims and providing defendants with notice of the claims against them, while also complying with the notice-pleading standards for complaints, the district court should read a medical malpractice complaint and affidavit of merit together when determining whether the affidavit meets the requirements of NRS 41A.071. *Id*.

It then held "the expert affidavit that referred to staff and the medical facility to provide adequate notice and reversed the district court's dismissal order. *Id*. Similarly here, Dignity Health is on notice and is alleged to be negligent in several manners. (App. 27-30). The quote in Dignity Health's paper is out of context and it does not matter if Dr. Davoren knows the names of the negligent participating staff there; his affidavit and the operative complaint allege the staff and medical facility were negligent in various manners, sufficient under the statute and *Zohar*.

V. CONCLUSION

Real Party In Interest respectfully requests this Court decline to entertain the Petition and not warranting the rare, exceptional review. Alternatively, Real Party

In Interest requests the Court deny the Petition and allow the action in the lower court to proceed.

Dated this 1st day of February, 2022

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/s/ Dillon Coil

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CERTIFICATE OF COMPLIANCE AND ATTORNEY'S CERTIFICATE

Pursuant to NRAP 32(a)(9) and Pursuant to NRAP 28.2:

1. I hereby certify that this Brief complies with the formatting, typeface and type style requirements of Rule 32(a)(4)-(6), because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 365, 14 point font, double spacing, and certify it complies with either the page- or type-volume limitation under the applicable Rule because it is proportionately spaced, has a typeface of 14 points or more, and contains 6,685 words. I certify this based on type-volume limitations relied upon by the word or line count of the word-processing system used to prepare the brief.

2. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) and certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains 6,685 words.

3. Finally, I hereby certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion

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

Dated this 1st day of February, 2022

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CERTIFICATE OF MAILING

I hereby certify that on this 1st day of February, 2022, I served the foregoing ARLIS NEASON, AS HEIR OF THE ESTATE OF JEFFREY NEASON'S ANSWER TO PETITIONERS SUSHIL R. PATEL M.D.'S AND CASIANO R. FLAVIANO M.D.'S PETITION FOR WRIT OF MANDAMUS upon the following parties by placing a true and correct copy thereof in the United States Mail in Las Vegas, Nevada with first class postage fully prepaid:

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