IN THE SUPREME COURT OF THE STATE OF NEVADA

SOUTHERN HILLS MEDICAL CENTER, LLC, doing business as SOUTHERN HILLS HOSPITAL AND MEDICAL CENTER Petitioner, THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE ERIKA BALLOU, DISTRICT JUDGE, DEPARTMENT 24; Respondent, And EMMANUEL GARCIA, Real Party in Interest.	SUPREME COURT CASE NO: DISTRICT COURT CASE NO:

PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

NATHAN REINMILLER
Nevada Bar No. 6793
HALL PRANGLE & SCHOONVELD, LLC
1140 North Town Center Drive, Suite. 350
Las Vegas, Nevada 89144
Phone: 702-889-6400
Facsimile: 702-384-6025
efile@hpslaw.com
Attorneys for Petitioner
Southern Hills Medical Center, LLC
d/b/a Southern Hills Hospital and Medical Center

NRAP 26.1 DISCLOSURE STATEMENT

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

1. HCA Healthcare, Inc., a publicly traded company, owns 100% commons stock of HCA Inc. which owns 100% commons stock of HealthTrust, Inc. – The Hospital Trust Company which owns 100% interest of Southern Hills Medical Center, LLC, which owns and operated Petitioner Southern Hills Hospital and Medical Center.

2. Hall Prangle & Schoonveld, LLC represents the Petitioner in the underlying district court proceedings. Nathan R. Reinmiller, Esq. and Michael Prangle, Esq. of Hall Prangle & Schoonveld, LLC represent the Petitioner in the underlying action.

ROUTING STATEMENT

The Nevada Supreme Court has original jurisdiction over this matter pursuant to NRAP 17(a)(11) and (12) as the Petition presents an issue of first impression (Whether the 2015 amendment of NRS 41A.071 abrogated the standard announced in *Zohar*), the standard is being applied inconsistently by the District Courts and the writ presents an issue of state-wide importance.

PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

Petitioner SOUTHERN HILLS MEDICAL CENTER, LLC, doing business as SOUTHERN HILLS HOSPITAL AND MEDICAL CENTER ("Petitioner"), by and through its attorneys of record, HALL PRANGLE & SCHOONVELD, LLC, hereby petitions this Honorable Court for a writ of mandamus or prohibition. The underlying action is presently pending in the Eighth Judicial District Court, Clark County, before the Honorable Judge Erika Ballou in Department 24.

The underlying action is based upon Real Party in Interest, Plaintiff Emmanuel Garcia's allegations of professional negligence arising from the development of a pressure wound while in Petitioner's care. Petitioner filed a motion to dismiss due to the failure of the Declaration attached to the Complaint to satisfy the requirements of NRS 41A.071. On March 14, 2022 the District Court entered an Order finding that the Complaint and Declaration together satisfied the requirements of the statute, pursuant to *Zohar v. Zbiegien*, 130 Nev. 733, 334 P.3d 402 (2014). Because the amendment of NRS 41A.071 abrogated *Zohar* and because even under *Zohar* the affidavit was insufficient, this Petition seeks an order from this Court directing the District Court to grant Petitioner's Motion to Dismiss based on Real Party in Interest's failure to comply with NRS 41A.071.

DATED this 28th day of April, 2022.

HALL PRANGLE & SCHOONVELD, LLC

/s/ Nathan R. Reinmiller, Esq.

By: _____

NATHAN REINMILLER
Nevada Bar No. 6793
HALL PRANGLE & SCHOONVELD, LLC
1140 North Town Center Drive, Suite. 350
Las Vegas, Nevada 89144
Phone: 702-889-6400
Facsimile: 702-384-6025
efile@hpslaw.com
Attorneys for Petitioner
Southern Hills Medical Center, LLC
d/b/a Southern Hills Hospital and Medical Center

VERIFICATION

The undersigned SHANNON HURST, as the Director of Patient Safety & Risk of Southern Hills Medical Center, LLC d/b/a Southern Hills Hospital and Medical Center declares that she is the Petitioner herein and knows the contents thereof; that this pleading is true of her own knowledge, except as to those matters stated on information and belief, and that as to such matters she believes to be true. I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.

EXECUTED this 27 day of April, 2022.

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I. SYNOPSIS OF WRIT AND STATEMENT OF FACTS

Plaintiff and Real Party in Interest filed the instant lawsuit alleging "Professional Negligence and Medical/Nursing Malpractice" against named Petitioner "Southern Hills Medical Center, LLC d/b/a Southern Hills Hospital and Medical Center" (hereafter "SHMC"), "Michael Allen Engler, D.O." as well as various DOE and ROE defendants.[1] The purported negligence centers on Plaintiff's development of a pressure ulcer while hospitalized at SHMC from December 26, 2020 through January 7, 2021, and the negligent discharge of Plaintiff while he had an infected pressure ulcer by the Defendant doctor Michael Allen Engler, D.O. Plaintiff's attempt to satisfy NRS 41A.071 consisted solely of a declaration by Christopher Davey, M.D.

On January 20, 2022, SHMC filed a motion to dismiss the Complaint arguing, inter alia, that the Declaration in question failed to comply with the specificity required by NRS 41A.071 because it failed to (1) support the allegations in the Complaint, (3) identify by name or conduct "each" provider alleged to be negligent and (4) set forth factually a specific act [. . .] separately as to each defendant in

[1] Attached hereto as Exhibit "A"

simple, concise, and direct terms."[2] Anticipating that Plaintiff would argue that *Zohar*[3] required the Court to review the Complaint and Declaration together to determine that Declaration's compliance with the statute, Defendant provided the history of NRS 41A.071 including its amendment *after* the decision in *Zohar*, the absence of reported cases applying *Zohar* to the amended statute and this Court's acknowledgment in *Baxter* that the new version of the statute would "impose additional **affidavit requirements** beyond those in the version considered in *Zohar*."[4] As anticipated, Plaintiff and Real Party in Interest argued that *Zohar* was still applicable and the Affidavit had to be considered in conjunction with the Complaint, and that the two together were sufficient.[5] In spite of Petitioner's Reply[6] which demonstrated that no published case from this Court has ever applied *Zohar*'s requirements to cases under the amended version of NRS 41A.071 and that *Baxter* dealt with the prior version of the statute, the District Court improperly concluded that *Zohar* and *Baxter* applied and denied the Motion without oral argument, finding:

> *The court agrees with the Plaintiff s interpretation and reading of the NRS 41A.071 standard. Additionally, the case law in both Zohar and Baxter are clear in that in a Motion to Dismiss the Court must examine the complaint along with the expert affidavit. Zohar v. Zbiegien, 334 P.3d 402, 406 (Nev. 2014); Baxter v. Dignity Health, 357 P.3d 927, 931 (Nev. 2015). Here, the*

[2] Motion attached hereto as Exhibit "B"
[3] *Zohar v. Zbiegien*, 130 Nev. 733, 334 P.3d 402 (2014)
[4] *Baxter v. Dignity Health*, 131 Nev. 759, 764 n.4, 357 P.3d 927, 930 (2015) [emphasis added].
[5] Opposition attached hereto as Exhibit "C"
[6] Reply attached hereto as Exhibit "D"

> *information that Defendant claims is not included in the affidavit alone can be found in the accompanying complaint. Without conducting some form of discovery, Plaintiff cannot name all parties in the case. The affidavit, once read along with the complaint, provides the Defendant with fair notice of the nature and bases for the claims against them. Therefore Defendant's Motion is DENIED.*[7][8]

The District Court's reliance on *Zohar* and *Baxter* was improper because the amendment to NRS 41A.071 clarified exactly what was to be present in the four corners of the supporting Declaration, removing the ambiguity that was the basis for *Zohar*'s holding. By acknowledging that the Declaration is missing the information required by the statute and relying on the Complaint to satisfy the Affidavit requirements, the District Court committed clear error and dismissal was mandated by the plain language of the statute.

Based on the above, writ relief is proper because:

1. It appears to be an issue of first impression, although the absence of reported decisions applying *Zohar* to the current version of NRS 41A.071 substantiates Petitioner's position that the standard is inapplicable to the amended statute;

2. Statutory interpretation is reviewed by this Court de novo, and there are no factual disputes to be resolved;

3. Application of the *Zohar* decision appears to conflict with the plain language of NRS 41A.071,which presents an important issue of law which

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[7] Minute Order, attached hereto as Exhibit "E"

[8] Plaintiff's Order, attached hereto as Exhibit "F" essentially mirrored the minute Order.

requires clarification in the interests of judicial economy and consistency; and

4. Petitioner has no plain, speedy, or adequate remedy at law to prevent the burden of defending against a complaint that was void *ab initio*.

Petitioner therefore requests that this Honorable Court issue an Order requiring the District Court judge to follow NRS 41A.071 and dismiss Plaintiff's Complaint as to Petitioner.

II. ARGUMENT

A. STANDARDS REQUIRED FOR A WRIT OF MANDAMUS AND PROHIBITION

This court has original jurisdiction to issue writs of mandamus and prohibition. Nev. Const. art. 6, § 4. *MountainView Hosp. v. Dist. Ct.*, 128 Nev. 180, 184, 273 P.3d 861, 864 (2012). A writ of mandamus is available to compel the performance of an act which the law requires as a duty resulting from an office, trust or station, NRS 34.160, or to control an arbitrary or capricious exercise of discretion.[9] Based on NRS 41A.071, the District Court had a mandatory duty to dismiss Real Party in Interest's Complaint because it was filed without an Declaration that complied with NRS 41A.071. Alternatively, this Court has held that a writ of prohibition is available to arrest the proceedings of a court (or a person exercising judicial functions) when the proceedings exceed the jurisdiction of the

[9] *Round Hill Gen. Imp. Dist. V. Newman*, 97 Nev. 601, 637 P.2d 534 (1981).

court or person.[10] Petitioner believes that the District Court is without subject matter jurisdiction to conduct a trial in the underlying matter as the operative Complaint is void as to Petitioner. Thus, a writ of prohibition is an appropriate remedy.

As previously noted by this Court, "[n]ormally, this court will not entertain a writ petition challenging the denial of a motion to dismiss but ... may do so where ... the issue is not fact-bound and involves an unsettled and potentially significant, recurring question of law."[11] Additionally, "consideration of extraordinary writ relief is often justified where an important issue of law needs clarification and public policy is served by this court's invocation of its original jurisdiction."[12] Further, this Court has expressly recognized that writs are proper "where no disputed factual issues exist and, pursuant to clear authority under a statute or rule, the district court is obligated to dismiss an action."[13]

Here, writ consideration is appropriate because "an important issue of law requires clarification" and because "pursuant to clear authority under a statute or rule, the district court is obligated" to dismiss this action. Specifically, the Declaration attached to the Complaint fails to comply with NRS 41A.071, primarily

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[10] NRS 34.320; *State of Nevada v. District Court*, 108 Nev. 1030, 1033, 842 P.2d 733 (1992).

[11] *MountainView Hosp. v. Dist. Ct.*, 128 Nev. 180, 185, 273 P.3d 861, 864–65 (2012)[internal citations omitted]

[12] *MountainView* at 184, 864

[13] *Smith v. District Court*, 113 Nev. 1343, 1344, 950 P.2d 280, 281 (1997).

due to the lack of specificity as required by that statute. While both Plaintiff's Opposition and the Court Order essentially acknowledge this failure, both rely on this Court's superseded opinion in *Zohar* to assert that compliance with NRS 41A.071 is to be evaluated by reading both the Complaint and Declaration together. As set forth below, the amendment to NRS 41A.071 removed the basis for the opinion in *Zohar,* and therefore essentially overruled it abrogated *Zohar*'s announced standard.

B. PLAINTIFF'S COMPLAINT SHOULD HAVE BEEN DISMISSED PURSUANT TO NEVADA LAW

1. ZOHAR IS NOT APPLICABLE TO NRS 41A.071 AS AMENDED

Zohar was decided under the previous iteration of NRS 41A.071. As noted by this Court, the previous version of the statute required "that a medical malpractice action must be filed with "*an affidavit, supporting the allegations contained in the action.*"[14]

This Court found the statute ambiguous because "NRS Chapter **41A does not, however, define the level of detail required** to adequately "support[ ]" a plaintiff's allegations." "[W]e conclude that the term "support" in NRS 41A.071 is ambiguous

[14] *Zohar v. Zbiegien*, 130 Nev. 733, 737, 334 P.3d 402, 405 (2014) [Emphasis in original]

because it may reasonably be interpreted as merely providing some substantiation or foundation for the underlying facts within the complaint, **or it may also be interpreted to require that the affidavit corroborate every fact within the complaint, including individual defendant identities.**" *Id.* [emphasis added]. Based on this ambiguity the Court determined that the Declaration should be read with the Complaint. While the *Zohar* affidavit failed to identify the allegedly negligent medical providers, the Complaint specifically named them and therefore satisfied that NRS 41A.071 in "supporting the allegations."

Presumably with knowledge of the *Zohar* decision, the legislature amended NRS 41A.071. Instead of simply requiring an affidavit that supported the allegations by a practitioner in that field, it made "support" one of four express requirements and added others:

<< NV ST 41A.071 >>

If an action for ~~medical malpractice or dental malpractice~~ **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 ~~, supporting~~ **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 ~~malpractice.~~ **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.[15]

As summarized by Senator Roberson:

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[15] 2015 Nevada Laws Ch. 439 (S.B. 292)

> *Two items are added to the list of elements in an affidavit, the absence of which will require a district court to dismiss without prejudice an action for professional negligence. First, the supporting affidavit must identify by name or describe by conduct each alleged provider of health care who is alleged to be negligent. Second, the affidavit must set forth in concise and direct terms the specific act or acts of alleged negligence committed by each defendant.*

Nevada Senate Journal, 78th Sess. No. 109

The amendment by the Legislature expressly required the affidavit *itself* to be specific and had given the courts "the precise level of specificity that an expert affidavit must include in order to "support" the allegations in a medical malpractice claim under NRS 41A.071."[16] The legislature's amendment answered the *Zohar* Court's question by requiring that "the affidavit corroborate every fact within the complaint, including individual defendant identities" thus removing the "ambiguity" that forced the Court to consider *both* the Complaint and the affidavit. Given the legislature's intent to require specificity ***in the affidavits themselves***, the amendment effectively overturned *Zohar*. This is substantiated by the fact that the last reported case to utilize the *Zohar* standard was *Baxter*, and that case likewise dealt with a case subject to the prior version of NRS 41A.071.[17]

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[16] *Zohar* at 334, 406.

[17] *Baxter* at 764, 930 ("We analyze this appeal under the 2014 version of NRS 41A.071, since the 2015 amendments do not apply retroactively.")

As a result, the entire basis of Plaintiff's argument and the District Court's ruling, which expressly relies on *Zohar*, is legally incorrect, and warrants dismissal.

2. THE CURRENT VERSION OF NRS 41A.071 REQUIRES ALL INFORMATION TO BE CONTAINED WITHIN THE AFFIDAVIT

Statutory interpretation is an issue of law that the Court reviews de novo.[18] "When a statute is clear on its face, [the Court] will not look beyond the statute's plain language."[19] As recently reiterated by this Court[20]:

> *Our primary goal in construing a statute is to give effect to the Legislature's intent in enacting it. Thus, we first look to the statute's plain language to determine its meaning, and we will enforce it as written if the language is clear and unambiguous.*

Here, the Legislature clearly intended to increase the specificity required in the affidavits themselves. The plain language mandates dismissal "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

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[18] *Washoe Med. Ctr. v. Second Jud. Dist. Ct. of State of Nev. ex rel. Cty. of Washoe*, 122 Nev. 1298, 1302, 148 P.3d 790, 792–93 (2006)
[19] *Id*.
[20] *Ramos v. State*, 137 Nev. Adv. Op. 74, 499 P.3d 1178, 1180 (2021)[internal citations omitted].

4. Sets forth factually a specific act or acts of alleged negligence separately as to each defendant in simple, concise and direct terms.

Nev. Rev. Stat. Ann. § 41A.071 (West)[emphasis added]

A plain language reading of the introductory sentence ("an affidavit that") clearly mandates the affidavit itself must satisfy the four requirements. If the information cannot be found in the four corners of the affidavit, there is no compliance with the statute and dismissal is mandated. To read into the statute a requirement of looking to an unsworn complaint this is not authored or signed by a medical expert would be contrary to the plain language of the statute.

This is consistent with the Legislature's intent in enacting NRS 41A. As succinctly explained in *Zohar*, "NRS 41A.071 was enacted in 2002 as part of a special legislative session that was called to address a medical malpractice insurance crisis in Nevada."[21] NRS 41A.071's affidavit requirement was implemented "to lower costs, reduce frivolous lawsuits, and ensure that medical malpractice actions are filed in good faith ***based upon competent expert medical opinion***."[22] In amending the statute in 2015, the Legislature clarified the amount of information deemed necessary to be considered "competent expert medical opinion" by requiring (1) identification by name or specific conduct each allegedly negligent medical

[21] *Zohar* at 737, 405

[22] *Zohar* at 737-8, 405.[emphasis added, internal citations omitted].

provider, and (2) a description of each act of negligence *separately* in "simple, concise and direct terms." It was no longer sufficient to simply "support" the allegations in the Complaint with a simple declaration that the expert agrees with the allegations. If this was the intent, the Legislature could have required a medical expert's verification to simply be attached to a Complaint, just like the one required for this Writ.

As a result, a plain language reading of the 2015 version of NRS 41A.071 requires the affidavit itself to contain the information required by the statute, without reference to the Complaint to which it is attached. Failing that, dismissal is mandated.

The District Court's Order utilized an incorrect standard and the decision was based solely upon *Zohar* and *Baxter's* instruction to read both the Complaint and affidavit together to ascertain compliance with NRS 41A.071, and implicitly admits that the information required by the statute was not contained within the Affidavit, but instead in the Complaint. Because this ruling was premised on an erroneous interpretation of the statute, writ relief is appropriate.

3. THE DECLARATION IN THIS CASE FAILED TO COMPLY WITH NRS 41A.071

NRS 41A.071 requires an affidavit that (1) **supports** the allegations (2) **identifies** by name, or describes by conduct, each provider of health care who is

alleged to be negligent; and (3) sets forth factually a **specific act or acts** of alleged negligence separately as to each defendant in simple, concise and direct terms. The Affidavit attached to the Complaint fails to comply with any of these standards.

a. The Declaration Does Not Support The Allegations In The Complaint

The Complaint[23] asserts specific acts of negligence generically as against various unidentified employees of Petitioner:

> *12. The negligence of Defendant Southern Hills Medical Center, LLC, doing business as Southern Hills Hospital and Medical Center, includes, but is not limited to, the following:*
>
> *a. Failure to identify the patient Plaintiff Emmanuel Garcia as a patient who was at risk for developing pressure ulcer wounds;*
>
> *b. Failure to timely and adequately treat skin lesions, in order to prevent minor skin lesions from developing into serious pressure ulcer wounds;*
>
> *c. Failure to turn the patient every two (2) hours;*
>
> *d. Failure to put the patient on a specialized wound care bed;*
>
> *e. Failure to timely put the patient on a specialized wound care bed;*
>
> *f. Failure to provide necessary and proper skin care;*
>
> *g. Failure to timely and adequately treat the patient's developing skin wounds, in order to prevent the wounds from getting worse;*
>
> *h. Leaving the patient on a bedpan for extended periods of time.*

In contrast, the Affidavit states simply[24]:

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[23] Exhibit "A" at p. 2-3

[24] Exhibit "A," Declaration at p. 9 [paragraph numbers have been added for ease of reference]

> [8.] *The medical records from Southern Hills Hospital do not document that the hospital staff took necessary and appropriate measures to prevent pressure ulcer wounds from developing.*
>
> [9.] *Photographs of the wound show a straight line edge on the wound. The shape and edge of the wound indicate that the wound was most likely caused by a bedpan and indicate that the patient was almost certainly left on a bedpan for an extended period of time. This was below the standard of care for hospitals.*
> *[…]*
> [12] *It is my opinion to a reasonable degree of medical probability that the nurses and staff at Southern Hills Hospital acted below the standard of care for the prevention and treatment of pressure injuries.*
>
> [13] *It is my opinion to a reasonable degree of medical probability that the patient Emmanuel Garcia was caused to suffer injury and harm as a result of the breaches of the standard of care by Southern Hills Hospital and Michael Allen Engler, D.O.*

Unlike the Complaint, the Declaration alleges no actual standard of care, and no specific acts or omissions beyond the bedpan speculation (addressed below). Nowhere in the Davey Declaration does he discuss standards for, or why Plaintiff should have been identified as being "at risk." Nowhere does it state what was required to "timely and adequately treat skin lesions" or which providers failed to provide such care. In fact, the declaration does not address care for the wound – it only addresses the development of the wound**.** The declaration does not state that turning a patient every two hours is the standard of care or assert that it was not done. Likewise, the declaration does not even mention a "wound care bed," discuss the "necessary and proper skin care," or describe how and when the hospital staff failed

to treat the skin wounds (largely a repeat of "b" above). Nowhere does the Declaration set forth a standard of care regarding bed pan usage, simply that if a wound developed, and if it was because of a bed pan, it must have been too long and therefore below the standard of care. This *ipse dixit* based on rank speculation[25] does not satisfy the standard required. In short, the Declaration fails to substantiate the standards of care and alleged breaches which are alleged in the subparts a-g of paragraph 12 of the Complaint. As such, the Declaration does not "support" the allegations, which mandates dismissal pursuant to NRS 41A.071.[26]

b. The Declaration Fails To Satisfy The Specificity Requirement Of Elements (3), (4)

NRS41A.071(3) and (4) requires two separate elements, each focusing on the specificity of act and identity that is required to avoid dismissal. It requires that the affidavit:

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[25] Further, the speculation is unnecessary since they have access to the Plaintiff who would be able to provide information as to whether a bed pan was even used.

[26] Notably, Dr. Davey has previously authored reports with standard of care testimony, he simply failed to do so in this case. *See*, *Christus Spohn Health Sys. Corp. v. Lopez*, No. 13-13-00165-CV, 2014 WL 3542094, at *5 (Tex. App. July 17, 2014)(*"In his report, Dr. Davey set out the standard of care that Spohn was required to follow in treating and preventing the deceased's ulcers); Bay Oaks SNF, LLC v. Lancaster*, 555 S.W.3d 268, 280 (Tex. App. 2018) ("*Dr. Davey opined that, due to his poor health and limited mobility, Lancaster was actually at a high risk for developing pressure ulcers, and the Bay Oaks staff breached the standard of care by failing to implement aggressive interventions—such as frequent repositioning, use of a pressure-relieving mattress, and use of a pressure-relieving device…") Butler v. Chadwick Nursing & Rehab. Ctr.*, 223 So. 3d 835, 842 (Miss. Ct. App. 2017)

> 2. Identifies by name, or describes by conduct, each provider of health care who is alleged to be negligent; and
>
> 3. Sets forth factually a specific act or acts of alleged negligence separately as to each defendant in simple, concise and direct terms.

At its most basic, the statute at a minimum requires the expert report to say:

- *The standard of care is X.*
- *Medical Provider Y breached standard of care by doing (or failing to do) X.*
- *This failure caused Plaintiff harm.*

Every single piece of the required information above is absent here. Not a single "nurse" or "staff at Southern Hills Hospital" are named and are instead simply referenced generically as a group. The affidavit fails to reference a specific standard of care, and instead simply references "necessary and appropriate measures" or an unstated, unspecified "standard of care." To accept this type of blanket assertion as sufficient would be to allow every Complaint to be accompanied by a Declaration that simply stated that the named medical providers "fell below the standard of care." The "opinions" beg the question – what are those "necessary and appropriate measures" that make up the standard of care? Which of the providers failed in this regard? If the answer to those questions cannot be found in the Declaration, it is defective.

Even the speculation about the shape of the wound suggesting a mechanism of injury fails to satisfy the requirement, since it simply identifies an injury and presumes negligence from that fact alone. "The mere fact that an unfortunate or bad

condition resulted to the patient involved in this action is not sufficient of itself to predicate liability."[27]

Since there is no specific act or omission listed in the declaration that was performed by a specific or unknown individual, this affidavit fails element (3) and (4), rendering this Complaint as against SHMC void ab initio, and necessitating dismissal.

c. The Declaration Fails Even Under Zohar And Baxter

The District Court erred both in utilizing the improper standard and in the application to the Declaration. Even reading the Complaint and Declaration together, it fails to satisfy element number 3. In *Zohar*, the affidavit failed to name medical providers, but was saved by the Complaint which named them. The Complaint in this case does not do so. The Complaint and Declaration in this case fall far short of the dismissals in unreported cases where writs were issued by this Court, mandating dismissal due to declarations that were lacking. This Court has found Declarations to be insufficient where a Complaint named student doctors and asserted negligent performance of a cesarean section, but failed to set forth the standard of care breach

[27] *Carver v. El-Sabawi*, 121 Nev. 11, 16, 107 P.3d 1283, 1286 (2005)(mandating the above quote as a jury instruction in professional negligence cases even where res ipsa was asserted).

by those student doctors or identify their conduct, [28] and where an Affidavit asserted that a named doctor and members of the "surgical team" fell below the standard of care in positioning a patient, where the standard was asserted but the actual positioning of the patient was not attributed to any of the providers individually.[29] While these unpublished decisions have no precedential value, it demonstrates that writ relief is appropriate given the varying applications of the standards set forth in NRS 41A.071.

Here, the both the Declaration and Complaint fail to set forth the applicable standard of care applicable to hospital staff, and do not identify any provider which

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[28] *Alemi v. Eighth Jud. Dist. Ct. of State*, 132 Nev. 938 (2016) ***unpublished*** (finding "the complaint and affidavit failed to allege conduct of Drs. Alemi and Lafia that caused Ramirez's injuries. They also did not set forth the applicable standard of care allegedly breached by the student doctors."[28] Id. "Due to the failure of the complaint and affidavit to allege a standard of care and conduct attributable to Drs, Alemi and Lafia, NRS 41A.071's policy of ensuring that a medical expert has first validated the claim is not demonstrated. For these reasons, the complaint and affidavit were noncompliant.")

[29] Soong v. Eighth Jud. Dist. Ct. in & for Cty. of Clark, 490 P.3d 119 (Nev. 2021) ***unpublished***, (finding noncompliance where the affidavits "opine only that Dr. Soong, along with other named members of the "surgical team," acted below the standard of care when positioning Manukyan for surgery and approving her positioning for surgery." "And although one of those declarations describes the standard of care for positioning patients for bariatric surgery, it also concedes that the medical records do not indicate who positioned Manukyan for surgery, and that no evidence confirmed whether Dr. Soong followed those standards at the time of her surgery. Thus, the district court had an obligation under the strict language of NRS 41A.071 to dismiss the action against Dr. Soong, and it erred when it failed to do so."

was responsible for any act or omission that fell below that standard. As a result, even under *Zohar* the Complaint and Declaration are insufficient and the District Court erred in its application of that standard to this case, legally and analytically.

d. The Declaration Fails To State The Separate Standard Of Care For Nursing Or That Dr. Davey Is Qualified To Testify To That Standard

In addition to the complete lack of discussion of a standard of care in the Declaration, nothing in the Affidavit or CV indicates that Dr. Davey is qualified to testify as to the *nursing or hospitalist* standard of care. Specifically, his Declaration (which is essentially identical to his CV) states:

> My expert qualifications are as follows. I am a medical doctor. I specialize in **wound care.** I am Board Certified by the American Board of **Wound Management** as a **Wound Specialist.** I have practiced medicine in skin and **wound care** in hospital and nursing home settings. I am familiar with the standard of care for physicians, hospitals, and nursing homes for **skin and wound care.**

In short, Dr. Davey indicates that he is familiar with the standard of care as applied to physicians in these various settings, and primarily as a "wound care" specialist. However, the claims against Petitioner require testimony regarding standards of care applicable to "nursing and staff" at the hospital. This is separate and distinct from that standard which applies to doctors.[30] Nurses cannot be held to the same standard

[30] See, *Pendley v. Southern Reg'l Health Sys., Inc.*, 307 Ga.App. 82, 704 S.E.2d 198, 203 (2010) (holding that the court did not abuse its discretion in excluding a physician-expert's testimony on the standard of care for the treating nurse where

as physicians, who can direct treatment, prescribe medications, and otherwise do things that nurses are only allowed to do *once instructed by a physician. See, Staccato v. Valley Hosp.*, 123 Nev. 526, 532, 170 P.3d 503, 507 (2007) (recognizing that "nurses generally are prohibited from providing medical diagnoses and provide treatment only under physician directives or in emergency situations.")

And while Dr. Davey may be an expert in "wound care," nothing in the Declaration criticizes any care by "nursing and staff" as it relates to *treatment* of the wound once it developed. The only critiques relate to prevention of the wound, and then only generically referring to an unidentified standard of care. As a result, the Declaration fails to establish that he is an "expert who practices or has practiced in an area that is substantially similar" to nursing or hospital staff services. As such,

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the doctor "did not train or practice as a nurse, did not train nurses, did not supervise nurses outside of normal nurse—physician interactions, and did not hold himself out to be an expert in nursing or in the standard of care of nurses"); *Simonson v. Keppard*, 225 S.W.3d 868, 873–74 (Tex.App.2007) (concluding that the district court abused its discretion in allowing the doctor to testify as to the standard of care for a nurse practitioner where the doctor's affidavit showed that he was not familiar with the standard of care*); De Adder v. Intermountain Healthcare, Inc.*, 2013 UT App 173, 17-18, 308 P.3d 543, 550 (finding that although "Dr. Jackson states that he is familiar with the standard of care applicable to the nurses who attended to De Adder, nowhere in his verified expert report or in his deposition[5] does Dr. Jackson set out any facts that establish that he has either training or experience to support that conclusion or that the applicable nursing standard of care is the same or similar to the standard applicable to his own specialty).

the Declaration fails element 2, rendering the Complaint void *ab initio* as to Petitioner.

III. CONCLUSION

The District Court's reliance on *Zohar* and Baxter in spite of the clear dictates of the amended version of NRS 41A.071was clearly erroneous and Petitioner is now without any other adequate remedy at law to prevent the case from proceeding to trial in the District Court, Petitioner respectfully requests that this Honorable Court issue a writ of mandamus or prohibition to correct the erroneous ruling of the District Court below.

While it is possible for this Court to grant the Writ, correct the standard and remand for further proceedings under the proper standard, Petitioner urges this Honorable Court to consider this petition on its merits. The refusal to do so will result in expense and delay, and a complete frustration of NRS 41A.071. It would be a waste of judicial resources to remand when the information is present, and the District Court's own findings establish that it was the Complaint, and not the declaration, that contained the information required by NRS 41A.071.

Petitioner respectfully requests that this Court issue a writ directing the District Court to grant its Motion to Dismiss as to Petitioner.

DATED this 28th day of April, 2022.

HALL PRANGLE & SCHOONVELD, LLC

By: */s/ Nathan R. Reinmiller, Esq.*

NATHAN REINMILLER
Nevada Bar No. 6793
HALL PRANGLE & SCHOONVELD, LLC
1140 North Town Center Drive, Suite. 350
Las Vegas, Nevada 89144
Phone: 702-889-6400
Facsimile: 702-384-6025
efile@hpslaw.com
Attorneys for Petitioner
Southern Hills Medical Center, LLC
d/b/a Southern Hills Hospital and Medical Center

NRAP 28.2/32(a)(9) ATTORNEY'S CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

This brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman, size 14 font;

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is:

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3. Finally, I hereby certify that I have read this appellate 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 28th day of April, 2022.

HALL PRANGLE & SCHOONVELD, LLC

By: */s/ Nathan R. Reinmiller, Esq.*

NATHAN REINMILLER
Nevada Bar No. 6793
HALL PRANGLE & SCHOONVELD, LLC
1140 North Town Center Drive, Suite. 350
Las Vegas, Nevada 89144
Phone: 702-889-6400
Facsimile: 702-384-6025
efile@hpslaw.com
Attorneys for Petitioner
Southern Hills Medical Center, LLC
d/b/a Southern Hills Hospital and Medical Center

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of HALL PRANGLE & SCHOONVELD, LLC; that on the 28th day of April 2022, I served a true and correct copy of the foregoing **PETITION FOR WRIT OF MANDAMUS OR PROHIBITION** via electronic mail to all parties on the current service list:

Andrew J. Thomas, Esq.
BURRIS & THOMAS, LLC
2810 W. Charleston Blvd., Ste F-58
Las Vegas, Nevada 89102
at@steveburrislaw.com
Attorney for Real Party in Interest

/s/ Camie DeVoge
An employee of HALL PRANGLE & SCHOONVELD, LLC

I did cause a true and correct copy of the above and foregoing **PETITION FOR WRIT OF MANDAMUS OR PROHIBITION** to be mailed to the following:

Judge Erika Ballou
Department 24
Eighth Judicial District Court
Dc24inbox@clarkcountycourts.us
wrightch@clarkcountycourts.us
200 Lewis Avenue
Las Vegas, NV 89155

/s/ Camie DeVoge

_____

An Employee of Hall Prangle & Schoonveld, LLC