

**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:

Electronically Filed  
Apr 28 2022 01:51 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

**PETITIONER'S APPENDIX TO PETITION FOR WRIT OF MANDAMUS**  
**VOLUME I**

NATHAN REINMILLER

Nevada Bar No. 6793

HALL PRANGLE & SCHOONVELD, LLC

1140 North Town Center Drive, Suite. 350

Las Vegas, Nevada 89144

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*Attorneys for Petitioner*

*Southern Hills Medical Center, LLC*

*d/b/a Southern Hills Hospital and Medical Center*

## INDEX TO PETITIONER'S APPENDIX – VOLUME I

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B	Defendant's Motion to Dismiss	01/20/2022	I	21-34
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I am an employee of HALL PRANGLE & SCHOONVELD, LLC; that on the 28<sup>th</sup> day of April, 2022, I served a true and correct copy of the foregoing **PETITIONER’S APPENDIX TO PETITION FOR WRIT OF MANDAMUS VOLUME I** 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  
**PETITIONER'S APPENDIX TO PETITION FOR WRIT OF MANDAMUS**  
**VOLUME I** to be mailed to the following:

Judge Erika Ballou  
Department 24  
Eighth Judicial District Court  
[Dc24inbox@clarkcountycourts.us](mailto:Dc24inbox@clarkcountycourts.us)  
[wrightch@clarkcountycourts.us](mailto:wrightch@clarkcountycourts.us)  
200 Lewis Avenue  
Las Vegas, NV 89155

*/s/ Camie DeVoge*

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An Employee of Hall Prangle & Schoonveld, LLC



Exhibit “A”

Exhibit “A”



CASE NO: A-21-845741-C  
Department 4

1 **COMP**  
2 **ANDREW J. THOMAS, ESQ.**  
3 Nevada Bar No. 000017  
4 at@steveburrislaw.com  
5 **BURRIS & THOMAS, LLC**  
6 2810 W. Charleston Boulevard, Suite F-58  
7 Las Vegas, Nevada 89102  
8 (702) 258-6238 - Telephone  
9 (702) 258-8280 - Facsimile  
10 *Attorneys for Plaintiffs*

DISTRICT COURT  
CLARK COUNTY, NEVADA

\* \* \*

11 EMMANUEL GARCIA,  
12 Plaintiff,

13 vs.

14 SOUTHERN HILLS MEDICAL CENTER,  
15 LLC, doing business as SOUTHERN HILLS  
16 HOSPITAL AND MEDICAL CENTER;  
17 MICHAEL ALLEN ENGLER, D.O.; and  
18 DOES 1 through 10, inclusive; and ROE  
19 CORPORATIONS 1through 10, inclusive;  
20 Defendants.

CASE NO.:  
DEPT. NO.:

ARBITRATION EXEMPTION CLAIMED:  
Medical Malpractice

COMPLAINT

21 Plaintiff Emmanuel Garcia, by and through his attorneys, of the Law Offices of Burris &  
22 Thomas, LLC, for his causes of action against Defendants, and each of them, complains and alleges  
23 as follows:

I.

FIRST CLAIM FOR RELIEF

(Professional Negligence and Medical / Nursing Malpractice)

- 24 1. At all times relevant herein, Plaintiff Emmanuel Garcia is and was a resident of Clark  
25 County, Nevada.
- 26 2. At all times relevant herein, Defendant Southern Hills Medical Center, LLC is and was  
27 a limited liability company organized and existing under the laws of the State of Nevada.  
28

1           3.     At all times relevant herein, Defendant Southern Hills Medical Center, LLC is and  
2 was doing business as a hospital known as Southern Hills Hospital and Medical Center in Las Vegas,  
3 Clark County, Nevada.

4           4.     At all times relevant herein, Defendant Michael Allen Engler, D.O. is and was an  
5 osteopathic physician licensed to practice medicine in the State of Nevada by the Nevada State  
6 Board of Osteopathic Medicine.

7           5.     Plaintiff Emmanuel Garcia was a patient at Southern Hills Hospital and Medical  
8 Center from December 26, 2020 until January 7, 2021.

9           6.     Defendant Southern Hills Medical Center, LLC, doing business as Southern Hills  
10 Hospital and Medical Center, provided medical and nursing care to Plaintiff Emmanuel Garcia .

11          7.     Defendant Southern Hills Medical Center, LLC, doing business as Southern Hills  
12 Hospital and Medical Center, had a hospital - patient relationship with Plaintiff Emmanuel Garcia.

13          8.     Defendant Michael Allen Engler, D.O. provided medical care to Plaintiff Emmanuel  
14 Garcia while Mr. Garcia was a patient at Southern Hills Hospital and Medical Center.

15          9.     Defendant Michael Allen Engler, D.O. had a physician - patient relationship with  
16 Plaintiff Emmanuel Garcia.

17          10.    Defendant Southern Hills Medical Center, LLC, doing business as Southern Hills  
18 Hospital and Medical Center, owed a duty to Plaintiff Emmanuel Garcia to exercise reasonable care  
19 for his health and safety.

20          11.    Defendant Southern Hills Medical Center, LLC, doing business as Southern Hills  
21 Hospital and Medical Center, negligently breached its duty of care to Plaintiff Emmanuel Garcia  
22 and thereby caused Plaintiff Emmanuel Garcia to suffer injury and harm.

23          12.    The negligence of Defendant Southern Hills Medical Center, LLC, doing business  
24 as Southern Hills Hospital and Medical Center, includes, but is not limited to, the following:

- 25               a.     Failure to identify the patient Plaintiff Emmanuel Garcia as a patient who was  
26                       at risk for developing pressure ulcer wounds;
- 27               b.     Failure to timely and adequately treat skin lesions, in order to prevent minor  
28                       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.

13. Defendant Michael Allen Engler, D.O. owed a duty to Plaintiff Emmanuel Garcia to exercise reasonable care for his health and safety.

14. Defendant Michael Allen Engler, D.O. negligently breached his duty of care to Plaintiff Emmanuel Garcia and thereby caused Plaintiff Emmanuel Garcia to suffer injury and harm.

15. The negligence of Defendant Michael Allen Engler, D.O. includes, but is not limited to, the following:

- a. Discharging the patient from the hospital when the patient had an actively infected hospital acquired pressure ulcer wound.

16. Jurisdiction is proper in Clark County, Nevada.

17. The true names, identities and capacities of those individuals named herein as DOES I through X are presently unknown to Plaintiffs, who therefore sue said Defendants by such fictitious names. Plaintiffs are informed and believe and therefore allege that each of the Defendants designated herein as DOE is legally responsible in some manner for the events and happenings herein referred to and caused damages proximately to Plaintiffs as herein alleged and Plaintiffs will ask leave of the Court to amend the Complaint to insert the true names and identities of DOES I through X when the same have been ascertained.

18. That the true names or capacities of those individuals, corporations, associates, business entities or otherwise, of the Defendants named herein as ROE ENTITIES I through X, inclusive, are presently unknown to Plaintiffs, who therefore sue said Defendants by such fictitious names. Plaintiffs are informed and believe and therefore allege that each of the Defendants designated herein as ROE ENTITIES are the owners, operators, managers, employers, agents, business entities

1 or otherwise of the medical facility and medical and health care providers identified herein, and  
2 therefore vicariously and/or legally responsible in some manner for the events and happenings referred  
3 to and caused damages proximately to Plaintiff as herein alleged, and Plaintiffs will ask leave of the  
4 Court to amend the Complaint to insert the true names and capacities of ROE ENTITIES I through  
5 X, inclusive, when the same have been ascertained, and to join such Defendants in the action.

6 19. At all relevant times alleged herein, Defendants, and each of them, were the agents,  
7 ostensible agents, servants, employees, employers, partners, co-owners and/or joint venturers of each  
8 other and of the co-defendants, and were acting within the color, purpose and scope of their  
9 employment, agency, ostensible agency, ownership, and/or joint ventures, and by reason of such  
10 relationships Defendants, and each of them, are vicariously and jointly and severally responsible and  
11 liable for the acts and/or omissions of their co-defendants.

12 20. At all times relevant herein, Defendants DOES I through X, and each of them, were  
13 the employees, agents, or ostensible agents of Defendant Southern Hills Medical Center, LLC, doing  
14 business as Southern Hills Hospital and Medical Center and/or ROE CORPORATIONS I through  
15 X, and were acting within the scope and course of their employment and agency relationships with  
16 Defendant Southern Hills Medical Center. Defendant Southern Hills Medical Center, LLC, doing  
17 business as Southern Hills Hospital and Medical Center, and Defendant ROE I through X are  
18 vicariously responsible under the doctrine of *respondeat superior* for the professional negligence of  
19 Defendants DOES I through X, and for the injuries and damages to Plaintiff Emmanuel Garcia as  
20 alleged herein.

21 21. In the event that Plaintiff has incorrectly stated the name of the owner or operator of  
22 Southern Hills Hospital and Medical Center, then Plaintiff does not know the true and correct name  
23 of the owner or operator of Southern Hills Hospital and Medical Center. Plaintiff therefore sues the  
24 owner or operator of Southern Hills Hospital and Medical Center as Defendant DOE I. When the  
25 true name and identity of the owner or operator of Southern Hills Hospital and Medical Center is  
26 ascertained, Plaintiff will request leave of the Court to amend his Complaint to substitute the correct  
27 name of the owner or operator of Southern Hills Hospital and Medical Center in place and instead of  
28 Defendant DOE I.

1           22.     At all times alleged herein, Defendant Southern Hills Medical Center, LLC, doing  
2     business as Southern Hills Hospital and Medical Center, , is and was vicariously liable under the  
3     legal doctrine of *respondeat superior* for the negligent actions and inactions of its employees, agents,  
4     officers, managers and contractors including, but not limited to, the DOE and ROE Defendants. Many  
5     of said actors are not 'health care professionals' with in the definition of NRS 41A. In addition,  
6     Defendant Southern Hills Medical Center, is and was liable for various other acts of negligence, as  
7     set forth herein and above.

8           23.     The Declaration of Christopher Davey, M.D. is attached hereto as **Exhibit "1"**  
9     and is incorporated fully by reference herein. The medical records reviewed by Christopher Davey,  
10    M.D. are provided on the CD attached hereto as **Exhibit "2"** and are incorporated by reference herein.

11          24.     As a direct and proximate result of negligence by Defendant Southern Hills Medical  
12    Center, LLC, doing business as Southern Hills Hospital and Medical Center, and Defendant Michael  
13    Allen Engler, D.O., Plaintiff Emmanuel Garcia was caused to suffer serious bodily injury and great  
14    pain of mind and body, some or all of which may be permanent, all to his general damage in an  
15    amount in excess of Fifteen Thousand Dollars (\$15,000.00).

16          25.     As a further direct and proximate result of negligence by Defendant Southern Hills  
17    Medical Center, LLC, doing business as Southern Hills Hospital and Medical Center, and Defendant  
18    Michael Allen Engler, D.O., Plaintiff Emmanuel Garcia has been caused, and may in the future be  
19    caused, to incur medical bills and expenses incidental thereto, in an amount in excess of Fifteen  
20    Thousand Dollars (\$15,000.00), in an amount to be proven at the time of trial.

21          WHEREFORE, Plaintiff, expressly reserving the right to amend this Complaint at the time of  
22    trial of the action herein to include all items of damages not yet ascertained, demands judgment against  
23    Defendants, and each of them, as follows:

- 24           1.     General damages for pain and suffering, in an amount in excess of Fifteen Thousand  
25                 Dollars (\$15,000.00);
- 26           2.     Special damages for medical expenses in an amount in excess of Fifteen Thousand  
27                 Dollars (\$15,000.00);
- 28           3.     Attorneys fees and costs of suit;

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4. For such other and further relief as this Court deems just and proper.

DATED this 21<sup>st</sup> day of December, 2021.

**BURRIS & THOMAS, LLC**

By: /s/ Andrew J. Thomas

Andrew J. Thomas, Esq.

Nevada Bar No. 000017

at@steveburrislaw.com

2810 W. Charleston Boulevard, Suite F-58

Las Vegas, Nevada 89102

*Attorneys for Plaintiff*

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**EXHIBIT 1**  
**to Complaint**

**EXHIBIT 1**  
**to Complaint**



**DECLARATION OF EXPERT CHRISTOPHER DAVEY, M.D.**

I, Christopher Davey, M.D., declare under penalty of perjury laws in the State of Nevada that the following is true and correct:

1. 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.
2. My Curriculum Vitae is attached hereto as Exhibit One and is incorporated herein.
3. My opinions stated in this Declaration are stated to a reasonable degree of medical probability.
4. I have been provided, and have reviewed, the following medical or other records regarding Emmanuel Garcia:

1. Medical records from Southern Hills Hospital
2. Complaint to HHS with photographs
3. Complaint to HHS with response from Southern Hills Hospital
4. Medical records from St. Rose Dominican Hospital – San Martin Campus

An electronic disk containing these records is attached to my Declaration as Exhibit 2, and the information and data contained thereon is incorporated herein.

The medical records from Southern Hills Hospital indicate that Emmanuel Garcia was a patient at Southern Hills Hospital from December 26, 2019 to January 7, 2020.

The medical records from Southern Hills Hospital contain wound documentation notes dated December 30, 2019 and January 3, 2020. Both notes document that Emmanuel Garcia had an unstageable pressure injury ulcer wound on his sacrum. The wound was measured on January 3, 2020 as 10.8 cm long by 9.1 cm wide x 0.10 cm deep. The wound documentation notes state that the wound was not present on admission.

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.

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.

The medical records from Southern Hills Hospital indicate that Michael Allen Engler, D.O. discharged the patient from the hospital on January 7, 2020. The patient still had an actively infected pressure ulcer wound on his sacrum.

It is my opinion to a reasonable degree of medical probability that Michael Allen Engler, D.O. acted below the standard of care for physicians by discharging the patient from Southern Hills Hospital when the patient had an actively infected, hospital-acquired pressure injury.

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.

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.

My opinions are based on currently available data and are subject to supplementation as other subsequently supplied data may become known by me.

The above is declared by me, under penalty of perjury laws in the state of Nevada, to be true and correct.

Dated: Dec. 17th. 2021

Signed: Christopher Davey  
Christopher Davey, M.D.

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# EXHIBIT 1

# EXHIBIT 1

## Curriculum Vitae



### **Christopher M. Davey, M.D., P.A.**

PO Box 56419  
St. Petersburg, FL 33732

(727) 800.6918 Telemedicine

(727) 800.9897 Fax

(727) 641-4501 Cell

[drchrisdavey@outlook.com](mailto:drchrisdavey@outlook.com)

Dr. Davey trained as a pathologist at Mount Sinai Medical Center in Miami, Florida, but since 1987 has practiced in Family Practice and Geriatric Medicine in office, hospital, and nursing home settings. Dr. Davey has a special interest in wound diagnosis, prevention and treatment and is board certified by the American Board of Wound Management. He is also a trained Hyperbaric Specialist. (Hyperbaric medicine is the treatment of severe wounds and other conditions using high pressure oxygen chambers). He was the Medical Director of Hyperbaric Medicine, as well as an active physician at the Edward White Center for Wound Care and Hyperbaric Medicine until October 2014. He has also been a consultant for American Medical Technologies in Irvine, CA on wound care dressings. Dr. Davey is also a senior member of the Wound Healing Society in Bethesda, Maryland.

Dr. Davey holds a current active medical license in the state of Florida.

Dr. Davey is currently doing telemedicine wound care during the Covid-19 crisis.

Dr. Davey also works with Professional Health Care in St. Petersburg, Florida (PHC) as a wound care consultant for a busy Primary Care clinic and nursing home practice with several physicians and multiple nurse practitioners. This large practice is run under the supervision of Dr. Fadi Saba. Dr. Davey works in the clinic and multiple nursing homes approximately every three months in direct patient care, and also does remote consulting for the practice. This arrangement has been in place for several years, involving direct clinic and nursing home patient interaction. It is currently on hold due to Covid-19 safety precautions. It is expected to resume in 2022.

### **Personal:**

Place of Birth: London, England

Citizenship: United States

Fla. Medical License Number: ME-034037

DEA Number: AD8602371

Languages Spoken: English, French, German and Japanese

### **Areas of expertise:**

- Wound causation, care and treatment.
- Nursing Home and Hospital Standard of Care including preventable falls or bedsores and nursing home / hospital acquired infections.
- Cause of death related to above.

### **Forensic experience:**

I have testified extensively for both Plaintiff and Defense since 1998 involving Geriatric issues, falls, bedsores, pressure ulcers, complex medical cases and hospital and nursing home Standards of Care. I also have the expertise to render opinions on cause of death issues, including death from Covid-19 infections in nursing and care homes due to my pathology background.

### **Education:**

#### **Medical School:**

1968-1972

St. Mary's Hospital, University of London  
(Now: Imperial College, School of Medicine  
University of London)  
London, England. United Kingdom)

#### **Internships:**

1972-1973

Northwick Park Hospital and Research  
Center Harrow, Middlesex, England

- 1). Interventional Cardiology
- 2). General Surgery

#### **British Government Aid Program:**

1973-1977

Princess Margaret Hospital, Nassau,  
Bahamas

-Internal Medicine with special interest in Marine Medicine and Tuberculosis

**U.S. Residency:**

1977-1980

Mt. Sinai Hospital Miami,  
Florida

-Pathology: Anatomical and Clinical

**Professional Experience:**

2021- Dr Davey has been invited to give a lecture on wound care at the "5th International Conference on Wound Care, Tissue Repair and Regenerative Medicine", in Paris, France in Sept 2021. The meeting has been deferred to 2022 due to ongoing Covid concerns.

February 2019- Dr. Davey Presented a paper that he co-authored on infected wounds at the Boswick Burn and Wound care symposium in Maui, HI.

2018-2019- Dr. Davey was co-chair of the International Consolidated Wound Infection Guideline (ICW IG) task force, which evaluates current evidence-based guidelines, which are then submitted to AHRQ (Agency for Healthcare Research and Quality) for inclusion in the national guidelines which are available to hospitals and healthcare practitioners throughout the country. Hospitals frequently use the AHRQ guidelines in their policies and procedures.

April 2018- Dr. Davey presented at the Wound Healing Society conference in Charlotte, NC.

1987-October 24th, 2014- Private Practice

2191 9th Ave. North, Ste 115

Saint Petersburg, Florida 33713

-Adult and Geriatric Medicine

-Special Interest in Skin and Wound Care, on staff at the Center for Wound Care and Hyperbaric Medicine at HCA Edward White Hospital. Medical Director of Hyperbaric Medicine at HCA Edward White Hospital.

1981-1987

Columbia Edward White Hospital

2323 9th Avenue North

Saint Petersburg, Florida 33713

-Emergency Medicine: including three years as Emergency Room Director.

## **Recent Publications:**

### ***Wound Management and Prevention journal articles;***

April 2021-Basics of Wound Care- Wound Assessment

May 2021- Wound Bed Preparation

June 2021-Debridement

July 2021-Guaze, Hydrocolloid, and Hydrogel Dressings

August 2021- Foam, Alginate, Collagen, and Transparent dressings

Sept. 2021- Vascular Wounds

October 2021- Pressure Injuries (currently under review)

### ***Video lectures recorded for Health Volunteers Overseas;***

1. Vascular Wounds

2. Pressure Ulcers

3. Surgical Site Infections

(At least 2 more video lectures will be recorded this year)

“The development and content validation of a Multidisciplinary, Evidence-Based Wound infection Prevention and Treatment Guideline”.

Lead Authors, Dr. Davey and Sammy Zakhary, MD

Index: Ostomy Wound Management-November 2017; 63 (11): 18-29

## **Volunteer Work:**

Dr. Davey spent December 2016 in Cambodia working at two charity hospitals as a volunteer doctor, teaching and doing wound care. This was organized by Health Volunteers Overseas in Washington DC. The two hospitals were the *Sihanouk Hospital of Hope*, and the *Angkor Hospital for Children*. Cambodia is one of the poorest countries in the world and is still trying to recover from its brutal civil war.

While in St. Petersburg, Florida, Dr. Davey spent 20% of his work time volunteering at the *St. Petersburg Free Clinic*. The St. Petersburg Free Clinic is a proud member of the Florida Association of Free and Charitable clinics, which runs over 100 free clinics in the state of Florida, the most of any state.

### **Hospital Affiliations:**

#### **1987 to end of 2014:**

##### **Dept. of Family Practice**

St. Anthony's Hospital  
1200 7th Avenue North  
Saint Petersburg, FL 33705

HCA Edward White Hospital  
2323 9<sup>th</sup> Avenue North  
Saint Petersburg, FL 33713

### **Board Certification:**

Board certified by the American Academy of Wound Management as a Certified Wound Specialist (CWS) in 2003. Recertified as "Certified Wound Specialist Physician" (CWSP) by the American Board of Wound Management in September 2013 valid through 9/24/2023.

### **Most Current Education:**

July 24<sup>th</sup>-26<sup>th</sup> 2020- Dr. Davey attended the Symposium on Advanced Wound Care/ Wound Healing Society conference in July 2020. This year it was a virtual conference due to Covid-19 Concerns.

April 25<sup>th</sup>-29<sup>th</sup> 2018- Dr. Davey did a poster presentation for the Wound Healing Society annual meeting in Charlotte, NC entitled "Pearls from a Multidisciplinary Wound Infection Guideline".

July 19, 2017- Dr. Davey addressed the Maui Medical Society, and gave a talk entitled "Wound Care and the Importance of Evidence-Based Guidelines".

Dr. Davey attended the 38th annual John A Boswick Burn and Wound Care Symposium from February 14th through February



18, 2016. This symposium was well attended by burn and wound care physicians from multiple countries. Dr. Davey was able to address the symposium on the ICW IG research, specifically looking for collaboration with other interested wound and burn professionals.

February 18-22, 2013- 35th Annual John A. Boswick, MD Burn and Wound Care Symposium.  
Wailea, Maui, Hawaii

April 30-May 1, 2013-Symposium on Advanced Wound Care (SAWC) and Wound Healing Society (WHS) Annual Meeting.  
-Denver, Colorado

-Orlando, FL  
April 23- April 27, 2014  
-Charlotte, NC  
April 25-April 29, 2018

### **Memberships and Positions Held:**

#### **Editorial Board Membership**

Dr. Davey is currently a member of the Editorial Board of the Journal of Wound Management and Prevention, which is a monthly peer-reviewed medical journal covering all aspects of wound care, skincare as well as nutritional related issues.

Current:  
Member of the American Academy of Wound Care (AAWC).

Current:  
Senior member of the Wound Healing Society in Bethesda, Maryland.

Current:  
Member of Association for Advancement of Wound Care (national organization).

Current:  
Member of the Society of University Founders of the University of Miami, Coral Gables, Florida.

Past:  
Member of the AAWC task force on current evidence-based guidelines for pressure ulcers.

Past:

Medical Director for Hyperbaric Medicine, Center for Wound Care and Hyperbaric Medicine  
HCA Edward White Hospital.

Director of Wound Care at this facility from approximately 2000-2005.

Director of Hyperbaric Medicine 2005 to 2014

Past:

Utilization Review and Quality Assurance Committee member at HCA Edward White Hospital.

Past:

Member of the Medical/Surgical Care Evaluation Committee at HCA Edward White Hospital.

Past:

Member of the Infectious Control Committee representing the Center for Wound Care, HCA  
Edward White Hospital.

Past:

Member of the Medical Quality and Education Committee at St. Anthony's Hospital.

1989-1994:

Member of the Board of Trustees, Columbia Edward White Hospital.

Previous:

Board Member of the Florida Medical Directors Association.

Previous:

Medical Director of Sunrise Northshore, Assisted Living Facility and Nursing Home.

Previous:

Utilization Review and Quality Assurance Committee member at St. Anthony's Hospital.

Previous:

Member of Florida Medical Directors Association.

Previous:

Certified Medical Director (AMDA).

**Nursing Home Medical Directorships, Past:**

**(Dates approximate)**

Coquina Key Nursing & Rehabilitation Center: 2000-2007

Westminster ALF: 2001-2005  
Northshore ALF: 1998-2002  
Abbey Nursing Home: 1998-2000  
Huber Nursing Home: 1992-2000  
Green Brook Nursing Home: 1994-1999  
Heartland Nursing Home: 1988-1999  
Shore Acres Nursing Home: 1996-1998  
Alpine Nursing Home: 1995-1998  
Carrington Place Nursing Home: 1995-1997  
St. Pete Health Care Center: 1992- 2008

# EXHIBIT 2

# EXHIBIT 2

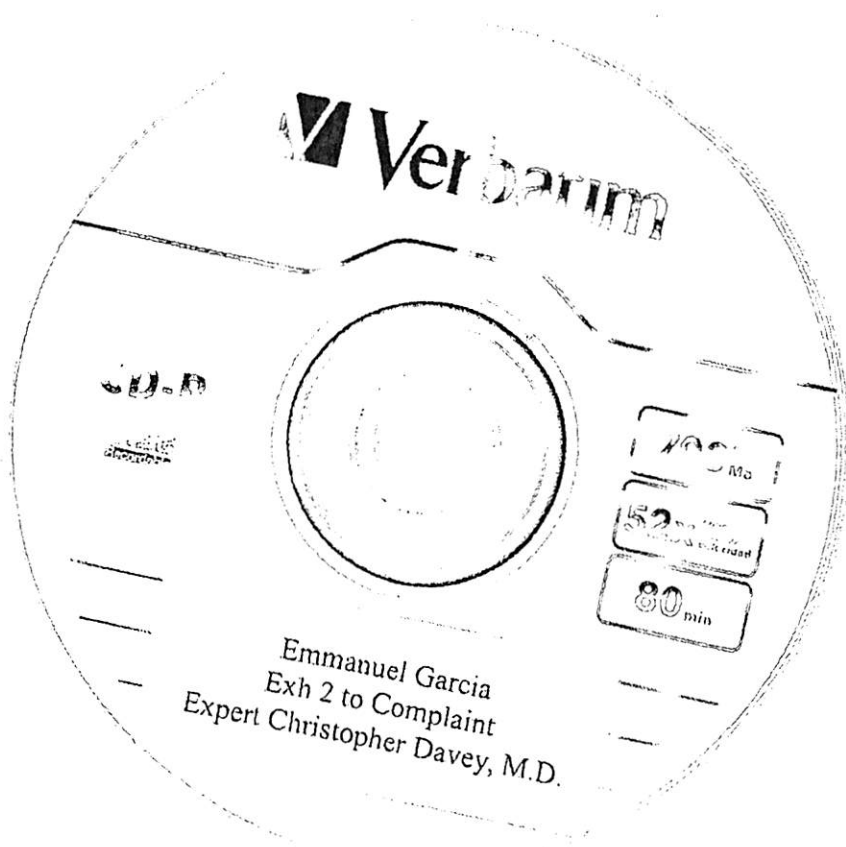
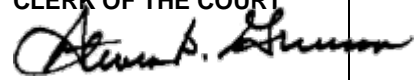


Exhibit “B”

Exhibit “B”



**MOT**  
MICHAEL E. PRANGLE, ESQ.  
Nevada Bar No. 8619  
NATHAN R. REINMILLER, ESQ.  
Nevada Bar No. 6793  
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[efile@hpslaw.com](mailto:efile@hpslaw.com)  
*Attorneys for Defendant*  
*Southern Hills Medical Center, LLC dba*  
*Southern Hills Hospital and Medical Center*

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

EMMANUEL GARCIA,  
Plaintiff,

vs.

SOUTHERN HILLS MEDICAL CENTER,  
LLC, doing business as SOUTHERN HILLS  
HOSPITAL AND MEDICAL CENTER;  
MICHAEL ALLEN ENGLER, D.O.; and,  
DOES 1 through 10, inclusive, and ROE  
CORPORATIONS 1 through 10, inclusive,

Defendants.

CASE NO. A-21-845741-C  
DEPT NO. 24

**DEFENDANT SOUTHERN HILLS  
MEDICAL CENTER, LLC dba  
SOUTHERN HILLS HOSPITAL AND  
MEDICAL CENTER'S MOTION TO  
DISMISS AND STRIKE PURSUANT TO  
NRCP 12**

**HEARING REQUESTED**

Comes Now, Defendant Southern Hills Medical Center, LLC dba Southern Hills Hospital and Medical Center by and through its attorneys of record, the law firm of Hall Prangle & Schoonveld, LLC, hereby submits this Motion to Dismiss.

This Motion is made and based upon the papers and pleadings on file herein, the points and authorities attached hereto, and any argument of counsel which may be allowed at the time of the hearing on this matter.

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**MEMORANDUM OF POINTS AND AUTHORITIES**

**I.**

**INTRODUCTION**

NRS 41.071A requires that a Complaint for professional negligence be supported by a medical affidavit or it is void *ab initio* and must be dismissed in whole or in part. That affidavit must (1) be by a medical expert in the same field that the report seeks to criticize and (2) set forth specifically the identity of the medical provider and the specific conduct which allegedly breached of the standard of care. Here, Plaintiff's non-nursing expert attempts to provide an opinion regarding the nursing standard of care. More importantly, only one specific act of professional negligence is alleged as against the unnamed "hospital staff" and therefore at a minimum the remaining allegations in the Complaint not supported by the expert must be stricken, if not all claims against this Defendant, Southern Hills Medical Center, LLC.

**II.**

**STATEMENT OF ALLEGED FACTS**

Plaintiff has filed the instant lawsuit alleging "Professional Negligence and Medical/Nursing Malpractice" against named Defendants "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. No other cause of action is alleged. 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.

Because the claim is solely one for professional negligence/medical malpractice, the Complaint is subject to the strict requirements of NRS 41A.071. As the medical declaration of Christopher Daveny, MD is insufficient to satisfy the requirements of NRS 41.071, the declaration must be stricken either as a whole, or at a minimum, in part. If stricken as a whole as to this Defendant, the claim against SHMC must be dismissed.

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III.

**STANDARD OF REVIEW**

Nevada Rule of Civil Procedure 12(b)(5) provides that a defendant is entitled to dismissal when the plaintiff's complaint fails "to state a claim upon which relief can be granted." NRCP 12(b)(5). 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 is appropriate where a plaintiff's allegations "are insufficient to establish the elements of a claim for relief." *Hampe v. Foote*, 118 Nev. 405, 408, 47 P.3d 438, 439 (2002), *overruled in part on other grounds by Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008). To survive dismissal under NRCP 12(b)(5), a complaint must contain "facts, which if true, would entitle the plaintiff to relief." *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008). When courts review pleadings, nonmoving parties are only entitled to **reasonable** inferences to be drawn in their favor—not unreasonable inferences. *Id* (emphasis added); *see also Bergmann v. Boyce*, 109 Nev. 670, 675, 856 P.2d 560, 563 (1993).

Hence, in analyzing the validity of a claim the court is to accept plaintiff's factual allegations "as true and draw all inferences in the Plaintiff's favor." *Id*. However, the court is not bound to accept as true 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, 129 S.Ct. 1937 (2009) (analyzing the federal counterpart to NRCP 12(b)(5)). A complaint must be dismissed where "it appears to a certainty that the plaintiff is not entitled to relief under any set of facts which could be proved to support this claim." *Hale v. Burkhardt*, 104 Nev. 632, 636, 764 P.2d 866, 868 (1998).

Further, Nevada Rule of Civil Procedure 12(f) allows the Court to "strike from a pleading [...] any redundant, immaterial, impertinent, or scandalous matter." NRCP 12(f). As discussed below, the allegations in the Complaint are not supported by an expert medical affidavit, and therefore must be stricken from the Complaint as immaterial and impertinent since they are void *ab initio*.

IV.

**LEGAL ARGUMENT**

Plaintiff has acknowledged that his Complaint is subject to NRS 41A.071 expressly by identifying his single cause of action as ““Professional Negligence and Medical/Nursing Malpractice” and by attaching what purports to be an expert medical affidavit. As set forth below, the affidavit fails 3 of the 4 elements required by NRS 41A.071, all of which must be satisfied or the claim is void *ab initio*.

**A. HISTORY OF NRS 41A.071**

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.” *Zohar v. Zbiegien*, 130 Nev. 733, 737, 334 P.3d 402, 405 (2014). “The Legislature addressed the medical malpractice insurance crisis, in part, by capping noneconomic damages, requiring settlement conferences, and supplanting the existing malpractice screening panels with the expert affidavit requirement under NRS 41A.071. 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.’” *Id* at 737-8, 405.[internal citations omitted]. The version in effect at the time of this decision simply required “*an affidavit, supporting the allegations contained in the action.*” NRS 41A.071 (2002)

In *Zohar*, the District Court had dismissed a claim for failing to comply with NRS 41A.071. The Nevada Supreme 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.” *Id*. In that matter, the affidavit in question did specify the act of purported negligence – dressing a wound too tightly. According to the Court, the report stated:

to a reasonable degree of medical probability, the medical staff in the emergency department at Summerlin Hospital breached the standard of care when Max's finger was dressed too tightly. Dr. Bentley chronologically described Max's treatment and summarized the relevant medical records and photos that were the basis of his opinions. The affidavit specified the allegedly negligent activities of

several individuals, as well as the activities of "the staff of the emergency department of Summerlin Hospital Medical Center, including but not limited to the responsible physician or physicians, nurse or nurses, and/or ancillary emergency department staff."

Id at 334, 404.

Because the "affidavit did not identify Zbiegien, Lovera, or the EmCare entities by name," those defendants moved for dismissal, which was granted. Plaintiffs argued that because the Complaint named them individually, reading the affidavit and the Complaint together were sufficient to satisfy NRS 41A.071. The Nevada Supreme Court ruled that because "legislative history does not reveal, however, 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" that the Complaint did have to be read in conjunction with the Complaint to determine whether, as a whole, the Complaint and affidavit were sufficient. *Id.* at 334, 406. They ruled that here, the two were sufficient. *Id.*

Presumably partially in response to this decision, the legislature amended NRS 41A.071. Instead of simply requiring an affidavit that supported the allegations contained within the action by a practitioner in that field, it made the "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.**<sup>1</sup>

As summarized by Senator Roberson:

*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*

<sup>1</sup> 2015 Nevada Laws Ch. 439 (S.B. 292)

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

Now the Legislature had 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.” *Zohar* at at 334, 406. Given the legislatures intent to require specificity *in the affidavits themselves*, the amendment effectively overturned *Zohar*. Now, the statute reads in whole:

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.

Nev. Rev. Stat. Ann. § 41A.071 (West)

In summary, the affidavit itself must (1) support the allegations in the Complaint, (2) identify by name or conduct “each” provider alleged to be negligent and (3) set forth factually a specific act [ . . . ] separately as to each defendant in simple, concise, and direct terms.”

As set forth below, Plaintiff’s expert affidavit fails to satisfy these elements.

**B. APPLICATION TO AFFIDAVIT OF CHRISTOPHER DAVEY, M.D.**

The entirety of the Davey affidavit as it relates to the alleged professional negligence of Defendant SHMC is as follows (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.

Essentially, the opinion has three critiques: (1) insufficient documentation (para. 8); (2) speculation that because there is a straight edge to the pressure wound, (a) it must have come from a bed pan, and (b) if it was a bedpan, Plaintiff was left on it too long; and (3) “the nurses and staff acted below the standard of care for prevention and treatment of pressure injuries” without reference to which nurse, which staff, and what purported standard of care was breached and when. This sort of *ipse dixit* (it is because I say so) by an expert does not satisfy the specificity requirements of NRS 41A.071

### **1. The Affidavit Does Not “Support” The Allegations In The Complaint**

While the Davey affidavit contains no discussion of the proper standard of care for the hospital staff, the Complaint lists a number of very specific things which purport to be the standard of care which purportedly was breached:

*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;*

1 *f. Failure to provide necessary and proper skin care;*

2 *g. Failure to timely and adequately treat the patient's developing skin wounds, in order*  
3 *to prevent the wounds from getting worse;*

4 *h. Leaving the patient on a bedpan for extended periods of time.*

5 Complaint at pages 2-3.

6 **The only allegation in that list which is in the Davey affidavit is “h” regarding the**  
7 **bed pan speculation.** Nowhere in the Davey affidavit does he discuss standards for, or why  
8 Plaintiff should have been identified as being “at risk.” Nowhere does it state what was required  
9 to “timely and adequately treat skin lesions” or which providers failed to provide such care. Nor  
10 does the affidavit state that turning a patient every two hours is the standard of care. Likewise,  
11 the affidavit does not even mention a “wound care bed,” discuss the “necessary and proper skin  
12 care,” or describe how and when the hospital staff failed to treat the skin wounds (largely a  
13 repeat of “b” above). In other words, subparagraphs a-g purport to create a standard of care that  
14 the Defendant failed to meet, yet the expert medical affidavit says nothing about these alleged  
15 standards of care and therefore does not “support” the allegations in the Complaint.<sup>2</sup> These  
16 allegations must be stricken for lacking support in the medical expert affidavit.<sup>3</sup>

17 **2. The Affidavit Fails To Satisfy The Specificity Requirement Of Elements (3), (4)**

18 NRS41A.071(3) and (4) has two separate elements, both of which focus on the  
19 specificity of act and identity that is required to avoid dismissal. It requires that the affidavit:

20 3. Identifies by name, or describes by conduct, each provider of health care who is  
21 alleged to be negligent; and

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

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

- 25 • *The standard of care is \_\_\_\_\_.*

26 \_\_\_\_\_  
27 <sup>2</sup> While “h” would appear to “support” the allegations contained within the Complaint, it fails to satisfy the other  
elements of the statute and therefore should be stricken as well as set forth herein.

28 <sup>3</sup> Notably, Dr. Davey has previously authored reports with similar standards listed, he simply failed to do so in this case. *See*.  
Butler v. Chadwick Nursing & Rehab. Ctr., 223 So. 3d 835, 842 (Miss. Ct. App. 2017)

- *Medical Provider \_\_\_\_\_ breached standard of care by doing (or failing to do) \_\_\_\_\_.*
- *This failure caused Plaintiff harm.*

Every single piece of the required information above is absent here. The only name contained in the entirety of the affidavit is that of Dr. Michael Allen Engler. Not a single “nurse” or “staff at Southern Hills Hospital” are named and are instead simply referenced generically. They are not named individually in the Complaint either, so not even *Zohar*’s more liberal requirement to read the Complaint and affidavit in conjunction could save this Complaint. Since there is no specific act or omission listed in the affidavit that was performed by a specific individual, this affidavit fails element (3) and (4), rendering this Complaint as against SHMC void ab initio, and warranting dismissal.

### **3. The Davey Affidavit Is Not Submitted By A Nursing Or Hospitalist Practitioner**

The second element of the statute requires that the affidavit submitted :

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;

For purposes of this motion, SHMC does not challenge Dr. Davey’s competence to testify as to the standard of care for doctors in a similar practice. However, nothing in his CV or report indicates that he is qualified to testify regarding nursing standards of care. Instead, his “area” of practice appears to be surgical care for pressure ulcers after they have developed, not the *nursing* standard of care in preventing or addressing such ulcers:

*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.*

As such, it does not appear that he is qualified to discuss nursing documentation, required prevention or “treatment of pressure injuries” *as it applies to nurses and non-physician hospital staff*. As a result, the entirety of the affidavit should be stricken.

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**C. THE DOE AND ROE ALLEGATIONS SHOULD BE STRICKEN PURSUANT TO NRS 41A.071**

Plaintiff has included a number of generic DOE and ROE allegations. “[T]he effective utilization of Rule 10(a) requires: (1) pleading fictitious or doe defendants in the caption of the complaint; (2) pleading the basis for naming defendants by other than their true identity, and clearly specifying the connection between the intended defendants and the conduct, activity, or omission upon which the cause of action is based; and (3) exercising reasonable diligence in ascertaining the true identity of the intended defendants and promptly moving to amend the complaint in order to substitute the actual for the fictional *Nurenberger v. Virosteck*, 107 Nev. 873, 881, 822 P.2d 1100, 1106 (1991).

Because these requirements must be read in conjunction with NRS 41A.071, subsection (2) takes on added meaning. Here, Plaintiff has satisfied element (1) by pleading DOE and ROE defendants in the caption, and element (3)(“promptly moving”) is not yet ripe for consideration. However, requirement (2) in a professional liability context requires the specificity set forth in NRS 41A.071 identify “by name, or describes by conduct, each provider of health care who is alleged to be negligent” and “[s]et forth factually a specific act or acts of alleged negligence separately as to each defendant in simple, concise and direct terms.”

Instead, Plaintiff’s Complaint generically asserts:

*1 7. The true names, identities and capacities of those individuals named herein as DOES I through X are presently unknown to Plaintiffs, who therefore sue said Defendants by such fictitious names. Plaintiffs are informed and believe and therefore allege that each of the Defendants designated herein as DOE is **legally responsible in some manner** for the events and happenings herein referred to and caused damages proximately to Plaintiffs as herein alleged and Plaintiffs will ask leave of the Court to amend the Complaint to insert the true names and identities of DOES I through X when the same have been ascertained.*

*1 8. That the true names or capacities of those individuals, corporations, associates, business entities or otherwise, of the Defendants named herein as ROE ENTITIES I through X, inclusive, are presently unknown to Plaintiffs, who therefore sue said Defendants by such fictitious names. Plaintiffs are informed and believe and therefore allege that each of the Defendants designated herein as ROE ENTITIES are the owners, operators, managers, employers, agents, business entities or otherwise of the medical facility and medical and health care providers identified herein, and therefore vicariously and/or legally responsible in some manner for the events and happenings referred to and caused damages proximately to Plaintiff as herein alleged, and Plaintiffs*



will ask leave of the Court to amend the Complaint to insert the true names and capacities of ROE ENTITIES I through X, inclusive, when the same have been ascertained, and to join such Defendants in the action.

Complaint, paragraphs 17 and 18 [emphasis added]. These allegations fail under the Nurenberger test, and they certainly fail under NRS 41A.071 since they lack any discussion of specific negligent acts committed by some entity, with an explanation as to why Plaintiff cannot identify that party at the time of the filing of the Complaint. As discussed above, the affidavit fails to specify any act or omission done by some unknown medical provider.

Plaintiff essentially admits the proper manner to plead DOE/ROE, as it is done in paragraph 21:

21. In the event that Plaintiff has incorrectly stated the name of the owner or operator of Southern Hills Hospital and Medical Center, then Plaintiff does not know the true and correct name of the owner or operator of Southern Hills Hospital and Medical Center. Plaintiff therefore sues the owner or operator of Southern Hills Hospital and Medical Center as Defendant DOE I. When the true name and identity of the owner or operator of Southern Hills Hospital and Medical Center is ascertained, Plaintiff will request leave of the Court to amend his Complaint to substitute the correct name of the owner or operator of Southern Hills Hospital and Medical Center in place and instead of Defendant DOE I.

As such, and pursuant to NRCP 10(d), Nurenberger, and NRS 41A.071, all DOE and ROE allegations other than paragraph 21 should be stricken as insufficient under Nurenberger and NRS 41A.071.

**D. THE “AGENCY” ALLEGATIONS SHOULD BE STRICKEN PURSUANT TO NRS 41A.071**

Plaintiff’s Complaint alleges various agency and vicarious liability theories, but with no factual assertions, just a recitation of the elements:

1 9. At all relevant times alleged herein, Defendants, and each of them, were the agents, ostensible agents, servants, employees, employers, partners, co-owners and/or joint venturers of each other and of the co-defendants, and were acting within the color, purpose and scope of their employment, agency, ostensible agency, ownership, and/or joint ventures, and by reason of such relationships Defendants, and each of them, are vicariously and jointly and severally responsible and liable for the acts and/or omissions of their co-defendants.

20. At all times relevant herein, Defendants DOES I through X, and each of them, were the employees, agents, or ostensible agents of Defendant Southern Hills Medical Center, LLC,

1 *doing business as Southern Hills Hospital and Medical Center and/or ROE*  
2 *CORPORATIONS I through X, and were acting within the scope and course of their*  
3 *employment and agency relationships with Defendant Southern Hills Medical Center.*  
4 *Defendant Southern Hills Medical Center, LLC, doing business as Southern Hills Hospital*  
5 *and Medical Center, and Defendant ROE I through X are vicariously responsible under the*  
6 *doctrine of respondeat superior for the professional negligence of Defendants DOES I*  
7 *through X, and for the injuries and damages to Plaintiff Emmanuel Garcia as alleged*  
8 *herein.*

9 However, “facts, as opposed to conclusory allegations or the formulaic recitation of elements of  
10 a cause of action” that “rise above the mere conceivability or possibility of unlawful conduct”  
11 are required to avoid dismissal under a Rule 12 challenge. Ashcroft v. Iqbal, 556 U.S. 662, 678  
12 (2009) (analyzing federal counterpart to NRC 12).

13 Since no facts are sufficiently alleged to know who exactly is the agent of whom, or for  
14 what purposes, this generic recitation of elements should be stricken as well.

#### 15 **E. AMENDMENT IS NOT PERMITTED**

16 Plaintiff alleges that the professional negligence took place from December 26, 2020 through  
17 January 7, 2021. Pursuant to NRS 41A.097, the one year statute of limitations has passed.  
18 Further, the Nevada Supreme Court has ruled that an affidavit or complaint may not be amended  
19 where it is does not comply with NRS 41A.071, because it is void *ab initio* and does not exist to  
20 be amended. Washoe Med. Ctr. v. Second Jud. Dist. Ct. of State of Nev. ex rel. Cty. of Washoe,  
21 122 Nev. 1298, 1306, 148 P.3d 790, 795 (2006) (Holding “that when a plaintiff has failed to  
22 meet NRS 41A.071's expert affidavit requirement, the complaint is void ab initio and must be  
23 dismissed, without prejudice, and no amendment to cure an NRS 41A.071 defect is allowed.”).  
24 Therefore neither the unsupported allegations in the Complaint, the declaration, or the  
25 DOE/ROE pleadings can be amended and therefore dismissal and striking of the offending  
26 claims is warranted.

#### 27 **V.**

#### 28 **CONCLUSION**

Based on the above points and authorities, SHMC respectfully requests that this Court either (1)  
dismiss SHMC entirely due to the failure of Plaintiff’s expert affidavit to:

1. Identify any employee or agent of SHMC by name or specific conduct that  
fell below the standard of care;

2. Set forth factually a specific act or acts of alleged negligence separately as to each employee or agent in simple, concise and direct terms.
3. Practice in the same field as the medical providers criticized (nursing)

Even if the Court determines that Dr. Davey is qualified to provide the affidavit as against the hospital staff, at a minimum, SHMC requests that the Court dismiss and strike all claims against SHMC but for Paragraph 12(h) (related to leaving the patient on a bed pan for an extended period), since that is the only specified act of professional negligence identified in the affidavit and complaint (in spite of failing to identify the actual medical provider responsible for this act or omission).

SHMC also requests that the Court enter an order to strike the DOE and ROE pleadings in paragraphs 17 ad 18 as insufficient under *Nurenberger* which requires description of specific acts and an explanation as to why the unknown defendant cannot be named, and NRS 41A.071 (which requires greater specificity than *Nurenberger*).

Finally, Defendant SHMC requests that the “agency” allegations in paragraphs 19 and 20 be stricken as legal conclusions with no factual support in the Complaint.

DATED this 20<sup>th</sup> day of January, 2022.

HALL PRANGLE & SCHOONVELD, LLC  
By: /s/ Nathan R. Reinmiller, Esq.  
MICHAEL E. PRANGLE, ESQ.  
Nevada Bar No. 8619  
NATHAN R. REINMILLER, ESQ.  
Nevada Bar No. 6793  
*Attorneys for Defendant*  
*Southern Hills Medical Center, LLC dba*  
*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 20<sup>th</sup> day of January, 2022, I served a true and correct copy of the foregoing **DEFENDANT SOUTHERN HILLS MEDICAL CENTER, LLC dba SOUTHERN HILLS HOSPITAL AND MEDICAL CENTER'S MOTION TO DISMISS AND STRIKE PURSUANT TO NRCP 12** as follows:

  X   the E-Service Master List for the above referenced matter in the Eighth Judicial District Court e-filing System in accordance with the electronic service requirements of Administrative Order 14-2 and the Nevada Electronic Filing and Conversion Rules;

       U.S. Mail, first class postage pre-paid to the following parties at their last known address;

       Receipt of Copy at their last known address:

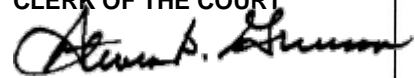
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*Attorney for Plaintiff*

/s/ Camie DeVoge

An employee of HALL PRANGLE & SCHOONVELD, LLC

Exhibit “C”

Exhibit “C”



1 **OPP**  
2 **ANDREW J. THOMAS, ESQ.**  
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10 *Attorneys for Plaintiffs*

11 **DISTRICT COURT**  
12 **CLARK COUNTY, NEVADA**

13 EMMANUEL GARCIA,  
14 Plaintiff,

15 vs.

16 SOUTHERN HILLS MEDICAL CENTER,  
17 LLC, doing business as SOUTHERN HILLS  
18 HOSPITAL AND MEDICAL CENTER;  
19 MICHAEL ALLEN ENGLER, D.O.; and  
20 DOES 1 through 10, inclusive; and ROE  
21 CORPORATIONS 1through 10, inclusive;

22 Defendants.

CASE NO.: A-21-845741-C

DEPT. NO.: 24

**PLAINTIFF EMMANUEL GARCIA'S**  
**OPPOSITION TO DEFENDANT**  
**SOUTHERN HILLS MEDICAL CENTER,**  
**LLC dba SOUTHERN HILLS HOSPITAL**  
**AND MEDICAL CENTER'S MOTION TO**  
**DISMISS AND STRIKE PURSUANT TO**  
**NRCP 12**

23 Plaintiff Emmanuel Garcia, by and through his attorneys, of the Law Offices of Burris &  
24 Thomas, hereby Opposes Defendant Southern Hills Medical Center, LLC, dba Southern Hills Hospital  
25 and Medical Center's Motion to Dismiss and Strike Pursuant to NRCP 12.

26 This Opposition is made and based upon the papers and pleadings on file herein, the following  
27 Memorandum of Points and Authorities, and such argument of counsel which may be made at the time  
28 of the hearing of this Motion

DATED this 3<sup>rd</sup> day of February, 2022.

**BURRIS & THOMAS, LLC**

By: /s/ Andrew J. Thomas  
ANDREW J. THOMAS, ESQ.  
Nevada Bar No. 000017  
at@steveburrislaw.com  
2810 W. Charleston Boulevard, Suite F-58  
Las Vegas, Nevada 89102  
*Attorneys for Plaintiff*

1 **LIST OF EXHIBITS**

- 2 1. Complaint  
3 2. Expert Declaration of Christopher Davey, M.D.  
4 3. Curriculum Vitae of Christopher Davey, M.D.

5 **MEMORANDUM OF POINTS AND AUTHORITIES**

6 **I.**

7 **INTRODUCTION**

8  
9 This case involves pressure ulcers (“bedsores”). Bedsores are a type of wound that often occur  
10 as a result of patients not being kept clean and/or not being repositioned frequently enough. At the  
11 time of filing his complaint, Plaintiff included an expert declaration from Dr. Christopher Davey,  
12 M.D. supporting the merits of Plaintiff’s complaint (a.k.a. satisfying NRS 41A’s goal of ensuring this  
13 is not a “frivolous medical malpractice lawsuit”).  
14

15 Dr. Davey is a Hyperbaric Specialist, certified by the American Board of Wound Management  
16 (Hyperbaric medicine is the treatment of severe wounds). He is a practicing physician and was the  
17 director of a Hyperbaric Medicine program for much of his career. His area of expertise is wound  
18 prevention and wound management. Nurses receive orders on how to care for patients from doctors.  
19 In pressure ulcer cases, nurses receive those orders from doctors just like Dr. Davey. To argue that Dr.  
20 Davey is not an expert in the care and treatment necessary to prevent and treat pressure ulcers (like  
21 the nursing care in this case) is improper.  
22

23 Second, dismissal of Plaintiff’s complaint would be inappropriate as all Defendants received  
24 more than fair notice of the nature and basis of Plaintiff’s claims. Plaintiff’s complaint and the  
25 accompanying expert declaration must be read together when considering a motion to dismiss pursuant  
26 to NRS 41A.071 (as established by Zohar and Baxter). When read together, Defendants clearly  
27 received more than fair notice of the nature and basis of Plaintiffs claims against them. And dismissal  
28

1 would run afoul of: (1) NRS 41A.071's actual purpose (detering "frivolous medical malpractice  
2 suits"); and (2) Nevada's liberal notice pleading standard.

## 3 II.

### 4 LEGAL STANDARD

5  
6 An NRCP 12(b)(5) Motion to Dismiss is governed under Nevada's liberal notice pleading  
7 standards. Under those standards, when asserting a claim for relief, plaintiff need only state "a short  
8 and plain statement of the claim showing that the pleader is entitled to relief." NRCP 8(a)(2). The  
9 district court must accept the nonmoving party's factual allegations as true and draw every fair factual  
10 inference from them. *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 635, 137 P.3d 1171, 1180 (2006).  
11 "The test for determining whether the allegations of a complaint are sufficient to assert a claim for  
12 relief is whether the allegations give fair notice of the nature and basis of a legally sufficient claim and  
13 the relief requested." *Vacation Village, Inc. v. Hitachi America, Ltd.*, 110 Nev. 481, 484, 874 P.2d  
14 744, 746 (1994). "The complaint cannot be dismissed for failure to state a claim unless it appears  
15 **beyond a doubt** that the plaintiff could prove no set of facts which, if accepted by the trier of fact,  
16 would entitle him to relief." *Edgar v. Wagner*, 101 Nev. 226, 228, 699 P.2d 110, 112 (1985)  
17 (emphasis added). Furthermore, "**the court may take into account . . . exhibits attached to the**  
18 **complaint** when ruling on a motion to dismiss for failure to state a claim upon which relief can be  
19 granted." *Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 847, 858 P.2d 1258, 1261 (1993)  
20 (emphasis added).  
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III.

LEGAL ARGUMENT

A. Zohar is Still Valid Case Precedent; and as such Plaintiff's Complaint and the  
Accompanying Expert Declaration Must be Read and Construed Together

Despite Defendant's lengthy and strained attempts to try to improperly invalidate/overturn Zohar v. Zbiegien, 130 Nev. 733, 334 P.3d 402 (2014), Zohar remains valid case precedent. Defendant would like to invalidate Zohar because Zohar unequivocally established that in medical malpractice suits, the complaint and accompanying expert declaration must be read and construed together when considering a motion to dismiss under NRS 41A.071. This practice ensures that both NRS 41A.071's protections are afforded to "providers of healthcare", but at the same time ensures plaintiffs' complaints are considered in light of Nevada's liberal notice-pleading jurisprudence.

We conclude that reason and public policy dictate that **courts should read the complaint and the plaintiffs NRS 41A.071 expert affidavit together when determining whether the expert affidavit meets the requirements of NRS 41A.071.**

...

Such a reading ensures that our courts are dismissing only frivolous cases, [and] further the purposes of our notice-pleading standard, and comports with Nevada's Rules of Civil Procedure.

...

As we have previously acknowledged, the NRS 41A.071 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 is consistent with our NRCPP 12 jurisprudence."

Zohar v. Zbiegien, 130 Nev. 733, 739, 334 P.3d 402, 406 (2014) (emphases added).

According to Defendant, Zohar was "effectively overturned" by an amendment to NRS 41A.071 in 2015. *Def's Mot. to Dismiss p. 6 ln 8*. However, this argument can be quickly disposed of by considering several things. First, the Nevada Supreme Court has never actually stated that Zohar was overruled by NRS 41A.071's amendment in 2015. In fact, the Nevada Supreme Court has

1 explicitly doubled-down on Zohar's holding in subsequent cases following NRS 41A.071's 2015  
2 amendment.

3 In Baxter—an opinion issued after the 2015 NRS 41A.071 amendment—the Nevada Supreme  
4 Court addressed the very argument Defendant advances in its motion to dismiss. **After discussing**  
5 **Zohar and specifically acknowledging the 2015 amendment to NRS 41A.071 (see footnote 4),** the  
6 Nevada Supreme Court affirmed its holding in Zohar: that a complaint and its accompanying affidavit  
7 must be read and construed together when considering a motion to dismiss pursuant to NRS 41A.071.  
8 Doing this ensures an adequate balance is struck between the conflicting objectives of NRS 41A.071  
9 and Nevada's longstanding notice-pleading jurisprudence.

12 **Under NRCP 8(f), “[a]ll pleadings shall be so construed as to do substantial**  
13 **justice.”** [*Internal Citation Omitted*].

14 **Treating Baxter's pleadings as comprising the complaint and the declaration the**  
15 **complaint incorporates comports with NRCP 8(f) and case law interpreting the**  
16 **federal analog to NRCP 12(b)(5),** see 5B Charles Alan Wright & Arthur Miller,  
supra, § 1357, **and does not disserve the substantive policies the Legislature**  
17 **established in NRS 41A.071.**

18 This action was not brought without the prior expert medical review NRS 41A.071  
19 demands, consistent with [NRS 41A.071's] **overall purpose: to ensure that**  
20 **plaintiffs file non-frivolous medical malpractice actions “in good faith based**  
**upon competent expert medical opinion.”** Zohar, — Nev. at —, 334 P.3d at  
405 (internal citations omitted).

21 **Substantial justice is done by reading the complaint as incorporating the**  
22 **declaration in deciding dismissal.**

23 Baxter v. Dignity Health, 131 Nev. 759, 765–66, 357 P.3d 927, 931 (2015) (emphases added).

24 In 2016—again after the 2015 amendment to NRS 41A.071—the Nevada Supreme Court  
25 reaffirmed Baxter's affirmation of Zohar's holding; that in cases seeking dismissal under NRS 41A,  
26 courts must read and construe a complaint and its accompanying expert declaration together. *See S.*  
27 *Nevada Adult Mental Health Servs. v. Eighth Jud. Dist. Ct. of State, ex rel. Cty. of Clark*, 132 Nev.  
28

1 1031 (2016) (citing to Baxter for the method of “reading together the plaintiff’s complaint and  
2 affidavit of merit . . .”).

3 Not to mention, federal district courts continue to cite Zohar and Baxter as the precedential  
4 sources for reading and construing a complaint and its expert declaration together when considering  
5 a motion to dismiss under NRS 41A.071.  
6

7 Courts are required to read a plaintiff’s complaint and expert affidavit together when  
8 determining whether the affidavit meets the requirements of NRS 41A.071 and to  
construe the affidavit requirement “liberally.”

9 Zanon v. Beauty By Design, No. 220CV02080JCMEJY, 2021 WL 2168910, at \*3 (D. Nev. Mar. 15,  
10 2021) (quoting Zohar v. Zbiegien, 334 P.3d 402, 406 (Nev. 2014)).  
11

12 Clearly, as demonstrated by multiple Nevada Supreme Court cases following the 2015  
13 amendment to NRS 41A.071, and even a federal district court case, Zohar’s requirement of reading  
14 and construing the Plaintiff’s complaint and accompanying expert declaration together has not been  
15 “effectively overturned” as Defendant argues. Reading and construing the two together ensures both  
16 at-issue concerns are met: (1) deterring “baseless medical malpractice suits” under NRS 41A; and (2)  
17 maintaining Nevada’s liberal notice-pleading jurisprudence.  
18

19 In this case when Plaintiff’s complaint is read and construed together with Dr. Davey’s expert  
20 declaration, Defendants received more than fair notice of the nature and basis of the claims against  
21 them. And clearly, Dr. Davey’s—a pressure ulcer specialist—declaration of merit supports the  
22 allegations in the complaint, and proves that this is not the type of “frivolous malpractice claim” that  
23 NRS 41A intended to weed out. This is a legitimate case that should be decided on its merits, not  
24 some improperly applied procedural rigidity.  
25

26 ///

27 ///

1           **B.     Plaintiff's Expert Dr. Davey is Qualified to Opine on Standards of Care in this**  
2                               **Case**

3           Dr. Davey's expert declaration complies with the requirements of NRS 41A.

4           Dr. Davey is a wound care specialist who spent his career: (1) studying how to prevent and  
5 treat wounds (including bedsores); (2) became a hyperbaric specialist (wound care specialist); (3)  
6 received board certification from the American Board of Wound Management; (4) oversaw and  
7 directed wound care programs and the treatment therein (including the nursing care); and (5) gave  
8 nurses orders—daily—to prevent pressure ulcers from developing and to prevent existing bedsores from  
9 worsening. Dr. Davey is qualified to testify as an expert regarding the standard of care in preventing  
10 and handling the Plaintiff's bedsores in this case—both as to doctors and nurses.

11           In Borger, the Nevada Supreme Court clarified the meaning of NRS 41A.071's requirement  
12 of having a declaration from a “medical expert who practices or has practiced in **an area that is**  
13 **substantially similar** to the type of practice engaged in at the time of the alleged professional  
14 negligence.” NRS 41A.071(2).

15           In Borger, the defendants included general surgeon Dr. James Lovett. Plaintiff attached to his  
16 Complaint an affidavit from a gastroenterologist, Marc Kudisch, M.D. Borger v. Eighth Jud. Dist.  
17 Court, 120 Nev. 1021,1028, 102 P.3d 600, 605 (2004). Dr. Kudisch opined that Dr. Lovett performed  
18 the wrong gastrointestinal surgical procedure on Mr. Borger. Id. at 102 P.3d 603. Dr. Lovett moved  
19 for dismissal, asserting that Borger was required to supply an affidavit from a general surgeon; the  
20 district court agreed with Lovett's argument and granted the dismissal. Id. On appeal, the Nevada  
21 Supreme Court overturned the district court's overly narrow interpretation of “substantially similar,”  
22 emphasizing the analysis on the “substantially similar” nature of the practice, not the narrow,  
23 formalistic title of the expert offering the opinion. Id.

1 Applying the Nevada statute to the matter at hand, we conclude that the district court  
2 erred in its dismissal of the action below. **First, the statute does not require that the**  
3 **affiant practice in the same area of medicine as the defendant; rather, it requires**  
4 **that the affiant practice in an area “substantially similar” to that in which the**  
**defendant engaged**, giving rise to the malpractice action.

5 Second, the district court erred in its determination that Dr. Kudisch's area of practice  
6 was not substantially similar to that in which Dr. Lovett engaged with respect to this  
7 particular patient. **The diagnosis and treatment rendered by Dr. Lovett implicates**  
8 **Dr. Kudisch's area of expertise, the practice of gastroenterology.** Thus, 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.

9 **Third, because NRS 41A.071 governs the threshold requirements for initial**  
10 **pleadings in medical malpractice cases, not the ultimate trial of such matters, we**  
11 **must liberally construe this procedural rule of pleading in a manner that is**  
**consistent with our NRCP 12 jurisprudence.**

12 In light of the above, the attachment of Dr. Kudisch's affidavit to Borger's amended  
13 complaint for medical malpractice met the requirements of NRS 41A.071.

14 Borger v. Eighth Jud. Dist. Ct. ex rel. Cty. of Clark, 120 Nev. 1021, 1028, 102 P.3d 600, 605 (2004)  
15 (emphases added).

16 In reaching its holding, the Borger Court also endorsed a Connecticut Court's analysis of a  
17 similarly worded Connecticut testimonial requirement.

18 **[t]he threshold question of admissibility is governed by the scope of the witness'**  
19 **knowledge and not the artificial classification of the witness by title.”**

20 Borger, 120 Nev. at 1027–28 (quoting Marshall v. Yale Podiatry Group, 5 Conn.App. 5, 496 A.2d 529,  
21 531 (1985)) (emphasis added).

22 The Nevada Court of Appeals recently affirmed and applied Borger's application of the  
23 “substantially similar” prong. In Estate of Orschel v. Valley Health Systems, 2019 WL 3337092 (Nev.  
24 Ct. App. 2019) (unpublished) the affidavit of a Dr. Hashim was attached to the Complaint. Two  
25 defendant doctors moved to dismiss on the basis that Hashim's did not practice in area “substantially  
26 similar” to the moving doctors. Considering this issue, the Nevada Appellate Court held as follows:  
27  
28

1 **Initially, we dispel the notion that NRS 41A.071 requires Dr. Hashim to have**  
2 **the same title or exact credentials as respondents.** *Borger*, 120 Nev. at 1028, 102  
3 P.3d at 605 (“[T]he statute does not require that the affiant practice in the same area  
4 of medicine as the defendant.”).

4 Although NRS 41A.071 does not define the testimonial requirement of  
5 “substantially similar,” the supreme court in *Borger* approvingly cited a Connecticut  
6 court's interpretation of a similarly worded statute in holding “that [t]he threshold  
7 question of admissibility is governed by the scope of the witness' knowledge  
8 and not the artificial classification of the witness by title.” Id. at 1027-28, 102  
9 P.3d at 605 (alteration in original) (internal quotation marks omitted); see *Marshall*  
10 *v. Yale Podiatry Grp.*, 496 A.2d 529, 531 (Conn. App. Ct. 1985).

9 This is also consistent with Nevada case law interpreting an expert's  
10 qualifications to testify at trial. See, e.g., *Staccato v. Valley Hosp.*, 123 Nev. 526,  
11 530, 170 P.3d 503, 506 (2007) (“[T]here is no requirement that the expert  
12 medical witness be from the same specialty as the defendant; the issue is simply  
13 one of the witness'[s] actual knowledge.”) (second alteration in original) (internal  
14 quotation marks omitted).

13 Thus, in *Staccato*, a physician was permitted to testify as to the applicable standard  
14 of care for a nurse when administering intramuscular injections because both were  
15 qualified to administer them. Id. at 530-31, 170 P.3d at 505-06.

16 Id.

17 Clearly, the appropriate analysis does not turn on a narrow, overly-rigid comparison of the  
18 titles between the expert offering the declaration and the titles of negligent healthcare providers. The  
19 analysis focuses on: (1) the scope of the expert's knowledge; and (2) whether the diagnosis and  
20 treatment rendered by the negligent defendants “implicates” the expert's area of expertise; and (3)  
21 considers these issues in light of Nevada's liberal notice-pleading jurisprudence.

23 Here, Dr. Davey's scope of knowledge includes, and exceeds, everything nurses are expected  
24 to do in caring for patients to prevent and treat bedsores. Again, Dr. Davey has spent his career  
25 studying, overseeing, and providing nursing orders for the care of patients just like the Plaintiff in this  
26 case. This issue clearly falls within Dr. Davey's “scope of knowledge.” Furthermore, and even more  
27 obviously, the nursing practices that were negligently performed in this case clearly “implicate” Dr.  
28



1 Davey's area of expertise. Dr. Davey has devoted his career and specialization to treating and  
2 preventing the very types of wounds that Defendants' negligence caused the Plaintiff to develop in  
3 this case.  
4

5 **C. Dr. Davey's Expert Declaration Satisfies NRS 41A.071**

6 NRS 41A.071 has four requirements:

- 7 1. Supports the allegations contained in the action;
- 8 2. Is submitted by a medical expert who practices or has practiced in an area  
9 that is substantially similar to the type of practice engaged in at the time of  
10 the alleged professional negligence;
- 11 3. Identifies by name, or describes by conduct, each provider of health care  
12 who is alleged to be negligent; and
- 13 4. Sets forth factually a specific act or acts of alleged negligence separately as  
14 to each defendant in simple, concise and direct terms.

15 Nev. Rev. Stat. Ann. § 41A.071 (West)

16 Dr. Davey's expert declaration satisfies each of these requirements, and in the process  
17 accomplishes NRS 41A.071's actual purpose of ensuring this is not a "frivolous medical malpractice"  
18 lawsuit.  
19

20 *1. Dr. Davey's Declaration Satisfies NRS 41A.071(1)*

21 As explained at length above, when determining whether the expert affidavit "supports" the  
22 allegations in the complaint, the two must be read together (*See Zohar and Baxter*).

23 Here, Plaintiff's complaint contains numerous allegations against Southern Hills Hospital and  
24 its employees, including the following:  
25

26 The negligence of Defendant Southern Hills Medical Center, LLC, doing business  
27 as Southern Hills Hospital and Medical Center, includes, but is not limited to, the  
28 following:

- a. Failure to identify the patient Plaintiff Emmanuel Garcia as a patient

1 who was at risk for developing pressure ulcer wounds;

- 2 b. Failure to timely and adequately treat skin lesions, in order to  
3 prevent minor skin lesions from developing into serious pressure  
4 ulcer wounds;
- 5 c. Failure to turn the patient every two (2) hours;
- 6 d. Failure to put the patient on a specialized wound care bed;
- 7 e. Failure to timely put the patient on a specialized wound care bed;
- 8 f. Failure to provide necessary and proper skin care;
- 9 g. Failure to timely and adequately treat the patient's developing skin  
10 wounds, in order to prevent the wounds from getting worse;
- 11 h. Leaving the patient on a bedpan for extended periods of time.

12 Pl's Compl. pg 2-3, paragraph 12.

13  
14 Dr. Davey's expert declaration contains the following "support" as it relates to the allegations  
15 against Southern Hills Hospital:

16 The medical records from Southern Hills Hospital contain wound documentation  
17 notes dates December 30, 2019 and January 3, 2020. Both notes document that  
18 Emmanuel Garcia had an unstageable pressure injury ulcer wound on his sacrum.  
19 The wound was measured on January 3, 2020 as 10.8 cm long by 9.1 cm wide x  
0.10 cm deep. The wound documentation notes state that the wound was not present  
on admission.

20 The medical records from Southern Hills Hospital do not document that the hospital  
21 staff took necessary and appropriate measures to prevent pressure ulcer wounds  
22 from developing.

23 Photographs of the wound show a straight line edge on the wound. The shape and  
24 edge of the wound indicate that the wound was most likely caused by a bedpan and  
25 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.

26 It is my opinion to a reasonable degree of medical probability that the nurses and  
27 staff at Southern Hills Hospital acted below the standard of care for the prevention  
and treatment of pressure injuries.

28 ///



1 Exhibit 1 to Compl. Dr. Davey Expert Declaration pg 1-2.

2 Based on the above, it is clear Dr. Davey's expert declaration "supports" the allegations in the  
3 complaint. He states to a reasonable degree of medical probability his opinions that the treatment of  
4 the Plaintiff by Defendant Southern Hills' nurses and staff fell below the applicable standards of care  
5 in preventing and treating pressure injuries ("bedsores").

7 2. Dr. Davey's Declaration Satisfies NRS 41A.071(2)

8 NRS 41A.071's second prong requires the expert offering the declaration to "practice[] or  
9 ha[ve] practiced in an area that is substantially similar to the type of practice engaged in at the time  
10 of the alleged professional negligence."

12 As discussed at length above, under Borger and Orschel, Dr. Davey is qualified and has more  
13 than enough "knowledge" to testify to the standards of care involved in this case.

14 3. Dr. Davey's Declaration Satisfies NRS 41A.071(3)

15 Defendant takes issue with the fact that Plaintiff's complaint and accompanying expert  
16 affidavit do not name specific nurses or staff members, and merely reference them as Southern Hills'  
17 "nurses and staff" that cared for the Plaintiff.

19 As a preliminary matter, Defendants expectation that Plaintiff name everyone who was  
20 negligent in caring for the Plaintiff in the complaint and expert declaration is unrealistic. Without  
21 conducting discovery, Plaintiff has no way of knowing all the persons who actually cared for the  
22 Plaintiff. Furthermore, without discovery, Plaintiff has no idea to what extent any hospital nurses or  
23 staff actually treated the patient. As such, Defendant's expectation is unrealistic and certainly does  
24 not comport with Nevada's liberal notice-pleading jurisprudence.

26 Second, the Nevada Supreme Court addressed this same argument advanced by Defendant  
27 Southern Hills Hospital regarding specifically naming nurses and staff members. The Nevada  
28

1 Supreme Court held that too narrower of an interpretation of the third prong of NRS 41A.071 would  
2 be unfair and impractical.

3 Additionally, we are hesitant to adopt such a strict interpretation of NRS 41A.071 as  
4 is advocated by respondents because at this preliminary point in the proceedings, the  
5 parties have conducted little to no formal discovery. Such a harsh interpretation  
6 would undoubtedly deny many litigants the opportunity to recover against negligent  
7 parties when the medical records available to the plaintiff do not identify a negligent  
8 actor by name . . . .

9 Zohar v. Zbiegien, 130 Nev. 733, 739, 334 P.3d 402, 406 (2014).

10 Rather, the analysis should focus on whether the Defendants received fair notice of the nature  
11 and basis of the claims against them.

12 As a result, we conclude that the district court should have read Dr. Bentley's  
13 affidavit together with the Zohars' complaint to determine whether the affidavit  
14 satisfied the requirements of NRS 41A.071. Under such a reading, we conclude that  
15 the Zohars' complaint is not frivolous or filed in bad faith, and Zbiegien, Lovera, and  
16 the EmCare entities were on sufficient notice of the nature and basis of the Zohars'  
17 medical malpractice claims against them.

18 Id. at 740.

19 Here, as explained at length above, Defendant Southern Hills Hospital has received more than  
20 fair notice of the nature and basis of the claims against them when reading Plaintiff's complaint and  
21 the accompanying Dr. Davey's expert declaration together.

22 4. Dr. Davey's Declaration Satisfies NRS 41A.071(4)

23 Because this motion to dismiss was filed only by Souther Hills Hospital, and no joinder was  
24 filed by Defendant Dr. Engler, the analysis of NRS 41A.071's fourth prong will focus solely on  
25 Southern Hills Hospital.

26 Defendant claims that no specific act or acts of alleged negligence were pled as to Southern  
27 Hills specifically. However, when the complaint and expert affidavit are read and construed together  
28 as they must be, it is apparent that such a claim is incorrect.

1 Again, Plaintiff's complaint and accompanying expert declaration contain the following  
2 allegations:

3 The negligence of Defendant Southern Hills Medical Center, LLC, doing business  
4 as Southern Hills Hospital and Medical Center, includes, but is not limited to, the  
5 following:

- 6 a. Failure to identify the patient Plaintiff Emmanuel Garcia as a patient  
7 who was at risk for developing pressure ulcer wounds;
- 8 b. Failure to timely and adequately treat skin lesions, in order to  
9 prevent minor skin lesions from developing into serious pressure  
10 ulcer wounds;
- 11 c. Failure to turn the patient every two (2) hours;
- 12 d. Failure to put the patient on a specialized wound care bed;
- 13 e. Failure to timely put the patient on a specialized wound care bed;
- 14 f. Failure to provide necessary and proper skin care;
- 15 g. Failure to timely and adequately treat the patient's developing skin  
16 wounds, in order to prevent the wounds from getting worse;
- 17 h. Leaving the patient on a bedpan for extended periods of time.

18 Pl's Compl. pg 2-3, paragraph 12.

19 Dr. Davey's expert declaration contains the following "support" as it relates to the allegations  
20 against Southern Hills Hospital:

21 The medical records from Southern Hills Hospital contain wound documentation  
22 notes dates December 30, 2019 and January 3, 2020. Both notes document that  
23 Emmanuel Garcia had an unstageable pressure injury ulcer wound on his sacrum.  
24 The wound was measured on January 3, 2020 as 10.8 cm long by 9.1 cm wide x  
25 0.10 cm deep. The wound documentation notes state that the wound was not present  
on admission.

26 The medical records from Southern Hills Hospital do not document that the hospital  
27 staff took necessary and appropriate measures to prevent pressure ulcer wounds  
from developing.

28 Photographs of the wound show a straight line edge on the wound. The shape and

1 edge of the wound indicate that the wound was most likely caused by a bedpan and  
2 indicate that the patient was almost certainly left on a bedpan for an extended period  
3 of time. This was below the standard of care for hospitals.

4 It is my opinion to a reasonable degree of medical probability that the nurses and  
5 staff at Southern Hills Hospital acted below the standard of care for the prevention  
6 and treatment of pressure injuries.

7 Exhibit 1 to Compl. Dr. Davey Expert Declaration pg 1-2.

8 Given the above, Plaintiff is uncertain how he could have been more specific and/or laid out  
9 the Defendant's negligent actions in more "simple, concise, or direct terms." NRS 41A.071(4).

10 **D. DOE and ROE Allegations Should Not be Stricken**

11 Plaintiff's expert declaration from Dr. Davey states the following:

12 The medical records from Southern Hills Hospital do not document that the hospital staff took  
13 necessary and appropriate measures to prevent pressure ulcer wounds from developing.

14 Photographs of the wound show a straight line edge on the wound. The shape and edge of the  
15 wound indicate that the wound was most likely caused by a bedpan and indicate that the  
16 patient was almost certainly left on a bedpan for an extended period of time. This was below  
17 the standard of care for hospitals.

18 It is my opinion to a reasonable degree of medical probability that the nurses and staff at  
19 Southern Hills Hospital acted below the standard of care for the prevention and treatment of  
20 pressure injuries.

21 Again, without discovery having been conducted, Plaintiff cannot know the names of all the  
22 staff, nurses, administrators, etc., that were involved in, oversaw, and/or made decisions that  
23 impacted the care the Plaintiff received. As such, Dr. Davey's opinion, and the complaint itself,  
24 encompasses all of the care and decisions related to the care provided to the Plaintiff. DOE and ROE  
25 defendants were properly named in the complaint as acknowledged by the Defendant. Dismissing  
26 them at this pre-discovery stage of litigation would be premature and improper.

27 ///

28 ///



1 **CERTIFICATE OF SERVICE**

2 Pursuant to Nevada Rules of Civil Procedure 5(b), the amendment to the Eighth Judicial  
3 District Court Rule 7.26, and N.E.F.C.R. 9, I hereby certify that service of the foregoing **PLAINTIFF**  
4 **EMMANUEL GARCIA'S OPPOSITION TO DEFENDANT SOUTHERN HILLS MEDICAL**  
5 **CENTER, LLC dba SOUTHERN HILLS HOSPITAL AND MEDICAL CENTER'S MOTION**  
6 **TO DISMISS AND STRIKE PURSUANT TO NRCP 12** was made this date by electronic service  
7 via the Court's electronic filing and service system, addressed to the following:  
8

9  
10 Robert C. McBride, Esq.  
11 rmcbride@mcbridehall.com  
12 Chelsea R. Hueth, Esq.  
13 crhueth@mcbridehall.com  
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15 8329 West Sunset Rd., Suite 260  
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18 *Michael Allen Engler, D.O.*

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24 1140 North Town Center Drive, Suite. 350  
25 Las Vegas, Nevada 89144


26 *Attorneys for Defendant,*  
27 *Southern Hills Hospital & Medical Center*

28  
DATED this 3<sup>rd</sup> day of February, 2022.

\_\_\_\_\_  
/s/ Carmen A. Cherry  
An Employee of Burris & Thomas, LLC

# EXHIBIT 1

# EXHIBIT 1



**COMP**  
**ANDREW J. THOMAS, ESQ.**  
Nevada Bar No. 000017  
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*Attorneys for Plaintiffs*

CASE NO: A-21-845741-C  
Department 4

**DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

\* \* \*

EMMANUEL GARCIA,  
Plaintiff,

CASE NO.:  
DEPT. NO.:

vs.

SOUTHERN HILLS MEDICAL CENTER,  
LLC, doing business as SOUTHERN HILLS  
HOSPITAL AND MEDICAL CENTER;  
MICHAEL ALLEN ENGLER, D.O.; and  
DOES 1 through 10, inclusive; and ROE  
CORPORATIONS 1through 10, inclusive;  
Defendants.

**ARBITRATION EXEMPTION CLAIMED:**  
**Medical Malpractice**

**COMPLAINT**

Plaintiff Emmanuel Garcia, by and through his attorneys, of the Law Offices of Burris & Thomas, LLC, for his causes of action against Defendants, and each of them, complains and alleges as follows:

**I.**

**FIRST CLAIM FOR RELIEF**

**(Professional Negligence and Medical / Nursing Malpractice)**

1. At all times relevant herein, Plaintiff Emmanuel Garcia is and was a resident of Clark County, Nevada.
2. At all times relevant herein, Defendant Southern Hills Medical Center, LLC is and was a limited liability company organized and existing under the laws of the State of Nevada.



1           3.       At all times relevant herein, Defendant Southern Hills Medical Center, LLC is and  
2 was doing business as a hospital known as Southern Hills Hospital and Medical Center in Las Vegas,  
3 Clark County, Nevada.

4           4.       At all times relevant herein, Defendant Michael Allen Engler, D.O. is and was an  
5 osteopathic physician licensed to practice medicine in the State of Nevada by the Nevada State  
6 Board of Osteopathic Medicine.

7           5.       Plaintiff Emmanuel Garcia was a patient at Southern Hills Hospital and Medical  
8 Center from December 26, 2020 until January 7, 2021.

9           6.       Defendant Southern Hills Medical Center, LLC, doing business as Southern Hills  
10 Hospital and Medical Center, provided medical and nursing care to Plaintiff Emmanuel Garcia .

11          7.       Defendant Southern Hills Medical Center, LLC, doing business as Southern Hills  
12 Hospital and Medical Center, had a hospital - patient relationship with Plaintiff Emmanuel Garcia.

13          8.       Defendant Michael Allen Engler, D.O. provided medical care to Plaintiff Emmanuel  
14 Garcia while Mr. Garcia was a patient at Southern Hills Hospital and Medical Center.

15          9.       Defendant Michael Allen Engler, D.O. had a physician - patient relationship with  
16 Plaintiff Emmanuel Garcia.

17          10.      Defendant Southern Hills Medical Center, LLC, doing business as Southern Hills  
18 Hospital and Medical Center, owed a duty to Plaintiff Emmanuel Garcia to exercise reasonable care  
19 for his health and safety.

20          11.      Defendant Southern Hills Medical Center, LLC, doing business as Southern Hills  
21 Hospital and Medical Center, negligently breached its duty of care to Plaintiff Emmanuel Garcia  
22 and thereby caused Plaintiff Emmanuel Garcia to suffer injury and harm.

23          12.      The negligence of Defendant Southern Hills Medical Center, LLC, doing business  
24 as Southern Hills Hospital and Medical Center, includes, but is not limited to, the following:

- 25               a.       Failure to identify the patient Plaintiff Emmanuel Garcia as a patient who was  
26                       at risk for developing pressure ulcer wounds;
- 27               b.       Failure to timely and adequately treat skin lesions, in order to prevent minor  
28                       skin lesions from developing into serious pressure ulcer wounds;

1 c. Failure to turn the patient every two (2) hours;  
2 d. Failure to put the patient on a specialized wound care bed;  
3 e. Failure to timely put the patient on a specialized wound care bed;  
4 f. Failure to provide necessary and proper skin care;  
5 g. Failure to timely and adequately treat the patient's developing skin wounds, in  
6 order to prevent the wounds from getting worse;  
7 h. Leaving the patient on a bedpan for extended periods of time.

8 13. Defendant Michael Allen Engler, D.O. owed a duty to Plaintiff Emmanuel Garcia  
9 to exercise reasonable care for his health and safety.

10 14. Defendant Michael Allen Engler, D.O. negligently breached his duty of care to  
11 Plaintiff Emmanuel Garcia and thereby caused Plaintiff Emmanuel Garcia to suffer injury and harm.

12 15. The negligence of Defendant Michael Allen Engler, D.O. includes, but is not limited  
13 to, the following:

14 a. Discharging the patient from the hospital when the patient had an actively  
15 infected hospital acquired pressure ulcer wound.

16 16. Jurisdiction is proper in Clark County, Nevada.

17 17. The true names, identities and capacities of those individuals named herein as DOES  
18 I through X are presently unknown to Plaintiffs, who therefore sue said Defendants by such fictitious  
19 names. Plaintiffs are informed and believe and therefore allege that each of the Defendants designated  
20 herein as DOE is legally responsible in some manner for the events and happenings herein referred  
21 to and caused damages proximately to Plaintiffs as herein alleged and Plaintiffs will ask leave of the  
22 Court to amend the Complaint to insert the true names and identities of DOES I through X when the  
23 same have been ascertained.

24 18. That the true names or capacities of those individuals, corporations, associates,  
25 business entities or otherwise, of the Defendants named herein as ROE ENTITIES I through X,  
26 inclusive, are presently unknown to Plaintiffs, who therefore sue said Defendants by such fictitious  
27 names. Plaintiffs are informed and believe and therefore allege that each of the Defendants designated  
28 herein as ROE ENTITIES are the owners, operators, managers, employers, agents, business entities

1 or otherwise of the medical facility and medical and health care providers identified herein, and  
2 therefore vicariously and/or legally responsible in some manner for the events and happenings referred  
3 to and caused damages proximately to Plaintiff as herein alleged, and Plaintiffs will ask leave of the  
4 Court to amend the Complaint to insert the true names and capacities of ROE ENTITIES I through  
5 X, inclusive, when the same have been ascertained, and to join such Defendants in the action.

6 19. At all relevant times alleged herein, Defendants, and each of them, were the agents,  
7 ostensible agents, servants, employees, employers, partners, co-owners and/or joint venturers of each  
8 other and of the co-defendants, and were acting within the color, purpose and scope of their  
9 employment, agency, ostensible agency, ownership, and/or joint ventures, and by reason of such  
10 relationships Defendants, and each of them, are vicariously and jointly and severally responsible and  
11 liable for the acts and/or omissions of their co-defendants.

12 20. At all times relevant herein, Defendants DOES I through X, and each of them, were  
13 the employees, agents, or ostensible agents of Defendant Southern Hills Medical Center, LLC, doing  
14 business as Southern Hills Hospital and Medical Center and/or ROE CORPORATIONS I through  
15 X, and were acting within the scope and course of their employment and agency relationships with  
16 Defendant Southern Hills Medical Center. Defendant Southern Hills Medical Center, LLC, doing  
17 business as Southern Hills Hospital and Medical Center, and Defendant ROE I through X are  
18 vicariously responsible under the doctrine of *respondeat superior* for the professional negligence of  
19 Defendants DOES I through X, and for the injuries and damages to Plaintiff Emmanuel Garcia as  
20 alleged herein.

21 21. In the event that Plaintiff has incorrectly stated the name of the owner or operator of  
22 Southern Hills Hospital and Medical Center, then Plaintiff does not know the true and correct name  
23 of the owner or operator of Southern Hills Hospital and Medical Center. Plaintiff therefore sues the  
24 owner or operator of Southern Hills Hospital and Medical Center as Defendant DOE I. When the  
25 true name and identity of the owner or operator of Southern Hills Hospital and Medical Center is  
26 ascertained, Plaintiff will request leave of the Court to amend his Complaint to substitute the correct  
27 name of the owner or operator of Southern Hills Hospital and Medical Center in place and instead of  
28 Defendant DOE I.

1           22.     At all times alleged herein, Defendant Southern Hills Medical Center, LLC, doing  
2     business as Southern Hills Hospital and Medical Center, , is and was vicariously liable under the  
3     legal doctrine of *respondeat superior* for the negligent actions and inactions of its employees, agents,  
4     officers, managers and contractors including, but not limited to, the DOE and ROE Defendants. Many  
5     of said actors are not ‘health care professionals’ with in the definition of NRS 41A. In addition,  
6     Defendant Southern Hills Medical Center, is and was liable for various other acts of negligence, as  
7     set forth herein and above.

8           23.     The Declaration of Christopher Davey, M.D. is attached hereto as **Exhibit “1”**  
9     and is incorporated fully by reference herein. The medical records reviewed by Christopher Davey,  
10    M.D. are provided on the CD attached hereto as **Exhibit “2”** and are incorporated by reference herein.

11          24.     As a direct and proximate result of negligence by Defendant Southern Hills Medical  
12    Center, LLC, doing business as Southern Hills Hospital and Medical Center, and Defendant Michael  
13    Allen Engler, D.O., Plaintiff Emmanuel Garcia was caused to suffer serious bodily injury and great  
14    pain of mind and body, some or all of which may be permanent, all to his general damage in an  
15    amount in excess of Fifteen Thousand Dollars (\$15,000.00).

16          25.     As a further direct and proximate result of negligence by Defendant Southern Hills  
17    Medical Center, LLC, doing business as Southern Hills Hospital and Medical Center, and Defendant  
18    Michael Allen Engler, D.O., Plaintiff Emmanuel Garcia has been caused, and may in the future be  
19    caused, to incur medical bills and expenses incidental thereto, in an amount in excess of Fifteen  
20    Thousand Dollars (\$15,000.00), in an amount to be proven at the time of trial.

21          WHEREFORE, Plaintiff, expressly reserving the right to amend this Complaint at the time of  
22    trial of the action herein to include all items of damages not yet ascertained, demands judgment against  
23    Defendants, and each of them, as follows:

- 24           1.     General damages for pain and suffering, in an amount in excess of Fifteen Thousand  
25                 Dollars (\$15,000.00);
- 26           2.     Special damages for medical expenses in an amount in excess of Fifteen Thousand  
27                 Dollars (\$15,000.00);
- 28           3.     Attorneys fees and costs of suit;

1           4.       For such other and further relief as this Court deems just and proper.  
2

3           DATED this 21<sup>st</sup> day of December, 2021.  
4

5                               **BURRIS & THOMAS, LLC**

6                               By: /s/ Andrew J. Thomas  
7                               Andrew J. Thomas, Esq.  
8                               Nevada Bar No. 000017  
9                               at@steveburrislaw.com  
10                              2810 W. Charleston Boulevard, Suite F-58  
11                              Las Vegas, Nevada 89102  
12                              Attorneys for Plaintiff  
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# **EXHIBIT 1**

## **to Complaint**

# **EXHIBIT 1**

## **to Complaint**

**DECLARATION OF EXPERT CHRISTOPHER DAVEY, M.D.**

I, Christopher Davey, M.D., declare under penalty of perjury laws in the State of Nevada that the following is true and correct:

1. 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.
2. My Curriculum Vitae is attached hereto as Exhibit One and is incorporated herein.
3. My opinions stated in this Declaration are stated to a reasonable degree of medical probability.
4. I have been provided, and have reviewed, the following medical or other records regarding Emmanuel Garcia:

1. Medical records from Southern Hills Hospital
2. Complaint to HHS with photographs
3. Complaint to HHS with response from Southern Hills Hospital
4. Medical records from St. Rose Dominican Hospital – San Martin Campus

An electronic disk containing these records is attached to my Declaration as Exhibit 2, and the information and data contained thereon is incorporated herein.

The medical records from Southern Hills Hospital indicate that Emmanuel Garcia was a patient at Southern Hills Hospital from December 26, 2019 to January 7, 2020.

The medical records from Southern Hills Hospital contain wound documentation notes dated December 30, 2019 and January 3, 2020. Both notes document that Emmanuel Garcia had an unstageable pressure injury ulcer wound on his sacrum. The wound was measured on January 3, 2020 as 10.8 cm long by 9.1 cm wide x 0.10 cm deep. The wound documentation notes state that the wound was not present on admission.

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.

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.

The medical records from Southern Hills Hospital indicate that Michael Allen Engler, D.O. discharged the patient from the hospital on January 7, 2020. The patient still had an actively infected pressure ulcer wound on his sacrum.

It is my opinion to a reasonable degree of medical probability that Michael Allen Engler, D.O. acted below the standard of care for physicians by discharging the patient from Southern Hills Hospital when the patient had an actively infected, hospital-acquired pressure injury.

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.

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.

My opinions are based on currently available data and are subject to supplementation as other subsequently supplied data may become known by me.

The above is declared by me, under penalty of perjury laws in the state of Nevada, to be true and correct.

Dated: Dec. 17th. 2021

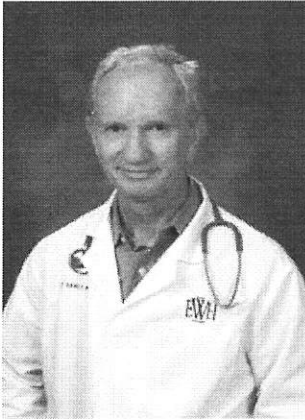
Signed: Christopher Davey  
Christopher Davey, M.D.



# EXHIBIT 1

# EXHIBIT 1

## Curriculum Vitae



### **Christopher M. Davey, M.D., P.A.**

PO Box 56419  
St. Petersburg, FL 33732

(727) 800.6918 Telemedicine  
(727) 800.9897 Fax  
(727) 641-4501 Cell  
**drchrisdavey@outlook.com**

Dr. Davey trained as a pathologist at Mount Sinai Medical Center in Miami, Florida, but since 1987 has practiced in Family Practice and Geriatric Medicine in office, hospital, and nursing home settings. Dr. Davey has a special interest in wound diagnosis, prevention and treatment and is board certified by the American Board of Wound Management. He is also a trained Hyperbaric Specialist. (Hyperbaric medicine is the treatment of severe wounds and other conditions using high pressure oxygen chambers). He was the Medical Director of Hyperbaric Medicine, as well as an active physician at the Edward White Center for Wound Care and Hyperbaric Medicine until October 2014. He has also been a consultant for American Medical Technologies in Irvine, CA on wound care dressings. Dr. Davey is also a senior member of the Wound Healing Society in Bethesda, Maryland.

Dr. Davey holds a current active medical license in the state of Florida.

Dr. Davey is currently doing telemedicine wound care during the Covid-19 crisis.

Dr. Davey also works with Professional Health Care in St. Petersburg, Florida (PHC) as a wound care consultant for a busy Primary Care clinic and nursing home practice with several physicians and multiple nurse practitioners. This large practice is run under the supervision of Dr. Fadi Saba. Dr. Davey works in the clinic and multiple nursing homes approximately every three months in direct patient care, and also does remote consulting for the practice. This arrangement has been in place for several years, involving direct clinic and nursing home patient interaction. It is currently on hold due to Covid-19 safety precautions. It is expected to resume in 2022.

### **Personal:**

Place of Birth: London, England

Citizenship: United States

Fla. Medical License Number:

ME-034037

DEA Number:

AD8602371

Languages Spoken:

English, French, German and Japanese

### **Areas of expertise:**

- Wound causation, care and treatment.
- Nursing Home and Hospital Standard of Care including preventable falls or bedsores and nursing home / hospital acquired infections.
- Cause of death related to above.

### **Forensic experience:**

I have testified extensively for both Plaintiff and Defense since 1998 involving Geriatric issues, falls, bedsores, pressure ulcers, complex medical cases and hospital and nursing home Standards of Care. I also have the expertise to render opinions on cause of death issues, including death from Covid-19 infections in nursing and care homes due to my pathology background.

### **Education:**

#### **Medical School:**

1968-1972

St. Mary's Hospital, University of London  
(Now: Imperial College, School of Medicine  
University of London)  
London, England. United Kingdom)

#### **Internships:**

1972-1973

Northwick Park Hospital and Research  
Center Harrow, Middlesex, England

- 1). Interventional Cardiology
- 2). General Surgery

#### **British Government Aid Program:**

1973-1977

Princess Margaret Hospital, Nassau,  
Bahamas

-Internal Medicine with special interest in Marine Medicine and Tuberculosis

**U.S. Residency:**

1977-1980

Mt. Sinai Hospital Miami,  
Florida

-Pathology: Anatomical and Clinical

**Professional Experience:**

2021- Dr Davey has been invited to give a lecture on wound care at the "5th International Conference on Wound Care, Tissue Repair and Regenerative Medicine", in Paris, France in Sept 2021. The meeting has been deferred to 2022 due to ongoing Covid concerns.

February 2019- Dr. Davey Presented a paper that he co-authored on infected wounds at the Boswick Burn and Wound care symposium in Maui, HI.

2018-2019- Dr. Davey was co-chair of the International Consolidated Wound Infection Guideline (ICW IG) task force, which evaluates current evidence-based guidelines, which are then submitted to AHRQ (Agency for Healthcare Research and Quality) for inclusion in the national guidelines which are available to hospitals and healthcare practitioners throughout the country. Hospitals frequently use the AHRQ guidelines in their policies and procedures.

April 2018- Dr. Davey presented at the Wound Healing Society conference in Charlotte, NC.

1987-October 24th, 2014- Private Practice

2191 9th Ave. North, Ste 115

Saint Petersburg, Florida 33713

-Adult and Geriatric Medicine

-Special Interest in Skin and Wound Care, on staff at the Center for Wound Care and Hyperbaric Medicine at HCA Edward White Hospital. Medical Director of Hyperbaric Medicine at HCA Edward White Hospital.

1981-1987

Columbia Edward White Hospital

2323 9th Avenue North

Saint Petersburg, Florida 33713

-Emergency Medicine: including three years as Emergency Room Director.

## **Recent Publications:**

### ***Wound Management and Prevention journal articles;***

April 2021-Basics of Wound Care- Wound Assessment

May 2021- Wound Bed Preparation

June 2021-Debridement

July 2021-Guaze, Hydrocolloid, and Hydrogel Dressings

August 2021- Foam, Alginate, Collagen, and Transparent dressings

Sept. 2021- Vascular Wounds

October 2021- Pressure Injuries (currently under review)

### ***Video lectures recorded for Health Volunteers Overseas;***

1. Vascular Wounds

2. Pressure Ulcers

3. Surgical Site Infections

(At least 2 more video lectures will be recorded this year)

“The development and content validation of a Multidisciplinary, Evidence-Based Wound infection Prevention and Treatment Guideline”.

Lead Authors, Dr. Davey and Sammy Zakhary, MD

Index: Ostomy Wound Management-November 2017; 63 (11): 18-29

## **Volunteer Work:**

Dr. Davey spent December 2016 in Cambodia working at two charity hospitals as a volunteer doctor, teaching and doing wound care. This was organized by Health Volunteers Overseas in Washington DC. The two hospitals were the ***Sihanouk Hospital of Hope***, and the ***Angkor Hospital for Children***. Cambodia is one of the poorest countries in the world and is still trying to recover from its brutal civil war.

While in St. Petersburg, Florida, Dr. Davey spent 20% of his work time volunteering at the ***St. Petersburg Free Clinic***. The St. Petersburg Free Clinic is a proud member of the Florida Association of Free and Charitable clinics, which runs over 100 free clinics in the state of Florida, the most of any state.

### **Hospital Affiliations:**

#### **1987 to end of 2014:**

##### **Dept. of Family Practice**

St. Anthony's Hospital  
1200 7th Avenue North  
Saint Petersburg, FL 33705

HCA Edward White Hospital  
2323 9<sup>th</sup> Avenue North  
Saint Petersburg, FL 33713

### **Board Certification:**

Board certified by the American Academy of Wound Management as a Certified Wound Specialist (CWS) in 2003. Recertified as "Certified Wound Specialist Physician" (CWSP) by the American Board of Wound Management in September 2013 valid through 9/24/2023.

### **Most Current Education:**

July 24<sup>th</sup>-26<sup>th</sup> 2020- Dr. Davey attended the Symposium on Advanced Wound Care/ Wound Healing Society conference in July 2020. This year it was a virtual conference due to Covid-19 Concerns.

April 25<sup>th</sup>-29<sup>th</sup> 2018- Dr. Davey did a poster presentation for the Wound Healing Society annual meeting in Charlotte, NC entitled "Pearls from a Multidisciplinary Wound Infection Guideline".

July 19, 2017- Dr. Davey addressed the Maui Medical Society, and gave a talk entitled "Wound Care and the Importance of Evidence-Based Guidelines".

Dr. Davey attended the 38th annual John A Boswick Burn and Wound Care Symposium from February 14th through February

18, 2016. This symposium was well attended by burn and wound care physicians from multiple countries. Dr. Davey was able to address the symposium on the ICW IG research, specifically looking for collaboration with other interested wound and burn professionals.

February 18-22, 2013- 35th Annual John A. Boswick, MD Burn and Wound Care Symposium.  
Wailea, Maui, Hawaii

April 30-May 1, 2013-Symposium on Advanced Wound Care (SAWC) and Wound Healing Society (WHS) Annual Meeting.  
-Denver, Colorado

-Orlando, FL  
April 23- April 27, 2014  
-Charlotte, NC  
April 25-April 29, 2018

## **Memberships and Positions Held:**

### **Editorial Board Membership**

Dr. Davey is currently a member of the Editorial Board of the Journal of Wound Management and Prevention, which is a monthly peer-reviewed medical journal covering all aspects of wound care, skincare as well as nutritional related issues.

Current:  
Member of the American Academy of Wound Care (AAWC).

Current:  
Senior member of the Wound Healing Society in Bethesda, Maryland.

Current:  
Member of Association for Advancement of Wound Care (national organization).

Current:  
Member of the Society of University Founders of the University of Miami, Coral Gables, Florida.

Past:  
Member of the AAWC task force on current evidence-based guidelines for pressure ulcers.

Past:

Medical Director for Hyperbaric Medicine, Center for Wound Care and Hyperbaric Medicine  
HCA Edward White Hospital.

Director of Wound Care at this facility from approximately 2000-2005.

Director of Hyperbaric Medicine 2005 to 2014

Past:

Utilization Review and Quality Assurance Committee member at HCA Edward White Hospital.

Past:

Member of the Medical/Surgical Care Evaluation Committee at HCA Edward White Hospital.

Past:

Member of the Infectious Control Committee representing the Center for Wound Care, HCA  
Edward White Hospital.

Past:

Member of the Medical Quality and Education Committee at St. Anthony's Hospital.

1989-1994:

Member of the Board of Trustees, Columbia Edward White Hospital.

Previous:

Board Member of the Florida Medical Directors Association.

Previous:

Medical Director of Sunrise Northshore, Assisted Living Facility and Nursing Home.

Previous:

Utilization Review and Quality Assurance Committee member at St. Anthony's Hospital.

Previous:

Member of Florida Medical Directors Association.

Previous:

Certified Medical Director (AMDA).

**Nursing Home Medical Directorships, Past:**  
**(Dates approximate)**

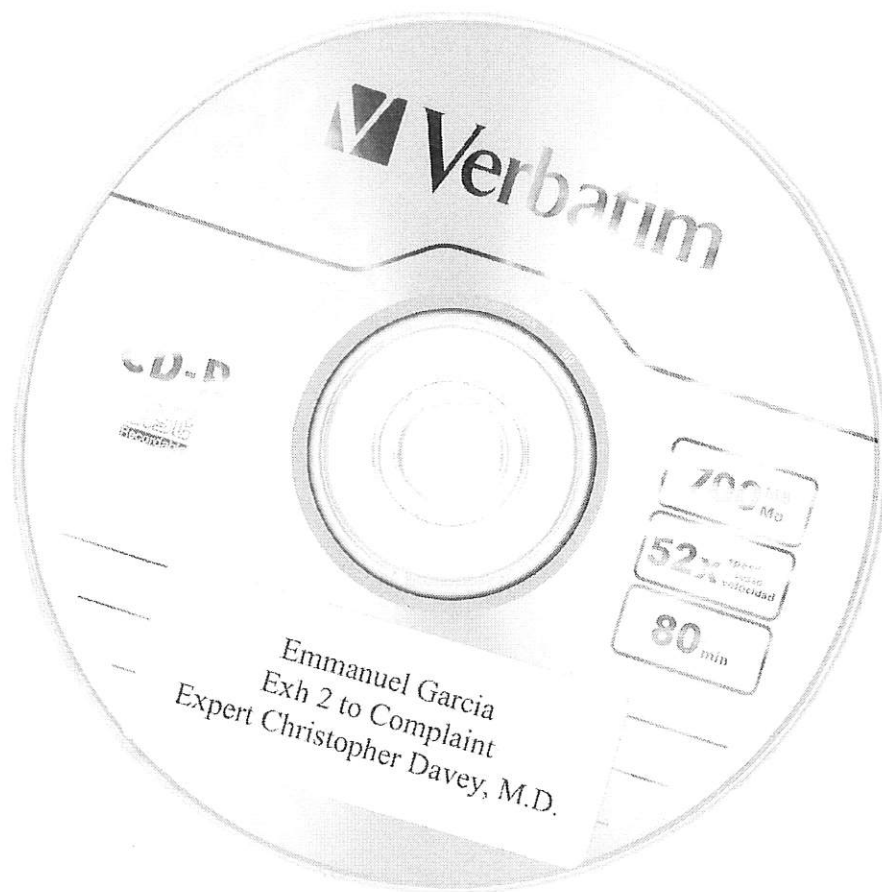
Coquina Key Nursing & Rehabilitation Center: 2000-2007



Westminster ALF: 2001-2005  
Northshore ALF: 1998-2002  
Abbey Nursing Home: 1998-2000  
Huber Nursing Home: 1992-2000  
Green Brook Nursing Home: 1994-1999  
Heartland Nursing Home: 1988-1999  
Shore Acres Nursing Home: 1996-1998  
Alpine Nursing Home: 1995-1998  
Carrington Place Nursing Home: 1995-1997  
St. Pete Health Care Center: 1992- 2008

# EXHIBIT 2

# EXHIBIT 2



# EXHIBIT 2

# EXHIBIT 2

**DECLARATION OF EXPERT CHRISTOPHER DAVEY, M.D.**

I, Christopher Davey, M.D., declare under penalty of perjury laws in the State of Nevada that the following is true and correct:

1. 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.
2. My Curriculum Vitae is attached hereto as Exhibit One and is incorporated herein.
3. My opinions stated in this Declaration are stated to a reasonable degree of medical probability.
4. I have been provided, and have reviewed, the following medical or other records regarding Emmanuel Garcia:

1. Medical records from Southern Hills Hospital
2. Complaint to HHS with photographs
3. Complaint to HHS with response from Southern Hills Hospital
4. Medical records from St. Rose Dominican Hospital – San Martin Campus

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patient was almost certainly left on a bedpan for an extended period of time. This was below the standard of care for hospitals.

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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.

My opinions are based on currently available data and are subject to supplementation as other subsequently supplied data may become known by me.

The above is declared by me, under penalty of perjury laws in the state of Nevada, to be true and correct.

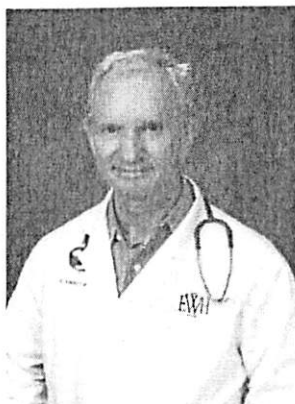
Dated: Dec. 17th. 2021

Signed: Christopher Davey  
Christopher Davey, M.D.

# EXHIBIT 3

# EXHIBIT 3

## Curriculum Vitae



**Christopher M. Davey, M.D., P.A.**

PO Box 56419

St. Petersburg, FL 33732

(727) 800.6918 Telemedicine

(727) 800.9897 Fax

(727) 641-4501 Cell

[drchrisdavey@outlook.com](mailto:drchrisdavey@outlook.com)

Dr. Davey trained as a pathologist at Mount Sinai Medical Center in Miami, Florida, but since 1987 has practiced in Family Practice and Geriatric Medicine in office, hospital, and nursing home settings. Dr. Davey has a special interest in wound diagnosis, prevention and treatment and is board certified by the American Board of Wound Management. He is also a trained Hyperbaric Specialist. (Hyperbaric medicine is the treatment of severe wounds and other conditions using high pressure oxygen chambers). He was the Medical Director of Hyperbaric Medicine, as well as an active physician at the Edward White Center for Wound Care and Hyperbaric Medicine until October 2014. He has also been a consultant for American Medical Technologies in Irvine, CA on wound care dressings. Dr. Davey is also a senior member of the Wound Healing Society in Bethesda, Maryland.

Dr. Davey holds a current active medical license in the state of Florida.

Dr. Davey is currently doing telemedicine wound care during the Covid-19 crisis.

Dr. Davey also works with Professional Health Care in St. Petersburg, Florida (PHC) as a wound care consultant for a busy Primary Care clinic and nursing home practice with several physicians and multiple nurse practitioners. This large practice is run under the supervision of Dr. Fadi Saba. Dr. Davey works in the clinic and multiple nursing homes approximately every three months in direct patient care, and also does remote consulting for the practice. This arrangement has been in place for several years, involving direct clinic and nursing home patient interaction. It is currently on hold due to Covid-19 safety precautions. It is expected to resume in 2022.

### **Personal:**

Place of Birth: London, England

Citizenship: United States

Fla. Medical License Number:

ME-034037

DEA Number:

AD8602371

Languages Spoken:

English, French, German and Japanese



### **Areas of expertise:**

- Wound causation, care and treatment.
- Nursing Home and Hospital Standard of Care including preventable falls or bedsores and nursing home / hospital acquired infections.
- Cause of death related to above.

### **Forensic experience:**

I have testified extensively for both Plaintiff and Defense since 1998 involving Geriatric issues, falls, bedsores, pressure ulcers, complex medical cases and hospital and nursing home Standards of Care. I also have the expertise to render opinions on cause of death issues, including death from Covid-19 infections in nursing and care homes due to my pathology background.

### **Education:**

#### **Medical School:**

1968-1972

St. Mary's Hospital, University of London  
(Now: Imperial College, School of Medicine  
University of London)  
London, England. United Kingdom)

#### **Internships:**

1972-1973

Northwick Park Hospital and Research  
Center Harrow, Middlesex, England

- 1). Interventional Cardiology
- 2). General Surgery

#### **British Government Aid Program:**

1973-1977

Princess Margaret Hospital, Nassau,  
Bahamas

-Internal Medicine with special interest in Marine Medicine and Tuberculosis

**U.S. Residency:**

1977-1980

Mt. Sinai Hospital Miami,  
Florida

-Pathology: Anatomical and Clinical

**Professional Experience:**

2021- Dr Davey has been invited to give a lecture on wound care at the "5th International Conference on Wound Care, Tissue Repair and Regenerative Medicine", in Paris, France in Sept 2021. The meeting has been deferred to 2022 due to ongoing Covid concerns.

February 2019- Dr. Davey Presented a paper that he co-authored on infected wounds at the Boswick Burn and Wound care symposium in Maui, HI.

2018-2019- Dr. Davey was co-chair of the International Consolidated Wound Infection Guideline (ICW IG) task force, which evaluates current evidence-based guidelines, which are then submitted to AHRQ (Agency for Healthcare Research and Quality) for inclusion in the national guidelines which are available to hospitals and healthcare practitioners throughout the country. Hospitals frequently use the AHRQ guidelines in their policies and procedures.

April 2018- Dr. Davey presented at the Wound Healing Society conference in Charlotte, NC.

1987-October 24th, 2014- Private Practice

2191 9th Ave. North, Ste 115

Saint Petersburg, Florida 33713

-Adult and Geriatric Medicine

-Special Interest in Skin and Wound Care, on staff at the Center for Wound Care and Hyperbaric Medicine at HCA Edward White Hospital. Medical Director of Hyperbaric Medicine at HCA Edward White Hospital.

1981-1987

Columbia Edward White Hospital

2323 9th Avenue North

Saint Petersburg, Florida 33713

-Emergency Medicine: including three years as Emergency Room Director.

## **Recent Publications:**

### ***Wound Management and Prevention journal articles;***

April 2021-Basics of Wound Care- Wound Assessment

May 2021- Wound Bed Preparation

June 2021-Debridement

July 2021-Guaze, Hydrocolloid, and Hydrogel Dressings

August 2021- Foam, Alginate, Collagen, and Transparent dressings

Sept. 2021- Vascular Wounds

October 2021- Pressure Injuries (currently under review)

### ***Video lectures recorded for Health Volunteers Overseas;***

1. Vascular Wounds

2. Pressure Ulcers

3. Surgical Site Infections

(At least 2 more video lectures will be recorded this year)

“The development and content validation of a Multidisciplinary, Evidence-Based Wound infection Prevention and Treatment Guideline”.

Lead Authors, Dr. Davey and Sammy Zakhary, MD

Index: Ostomy Wound Management-November 2017; 63 (11): 18-29

## **Volunteer Work:**

Dr. Davey spent December 2016 in Cambodia working at two charity hospitals as a volunteer doctor, teaching and doing wound care. This was organized by Health Volunteers Overseas in Washington DC. The two hospitals were the *Sihanouk Hospital of Hope*, and the *Angkor Hospital for Children*. Cambodia is one of the poorest countries in the world and is still trying to recover from its brutal civil war.

While in St. Petersburg, Florida, Dr. Davey spent 20% of his work time volunteering at the *St. Petersburg Free Clinic*. The St. Petersburg Free Clinic is a proud member of the Florida Association of Free and Charitable clinics, which runs over 100 free clinics in the state of Florida, the most of any state.

### **Hospital Affiliations:**

#### **1987 to end of 2014:**

##### Dept. of Family Practice

St. Anthony's Hospital  
1200 7th Avenue North  
Saint Petersburg, FL 33705

HCA Edward White Hospital  
2323 9<sup>th</sup> Avenue North  
Saint Petersburg, FL 33713

### **Board Certification:**

Board certified by the American Academy of Wound Management as a Certified Wound Specialist (CWS) in 2003. Recertified as "Certified Wound Specialist Physician" (CWSP) by the American Board of Wound Management in September 2013 valid through 9/24/2023.

### **Most Current Education:**

July 24<sup>th</sup>-26<sup>th</sup> 2020- Dr. Davey attended the Symposium on Advanced Wound Care/ Wound Healing Society conference in July 2020. This year it was a virtual conference due to Covid-19 Concerns.

April 25<sup>th</sup>-29<sup>th</sup> 2018- Dr. Davey did a poster presentation for the Wound Healing Society annual meeting in Charlotte, NC entitled "Pearls from a Multidisciplinary Wound Infection Guideline".

July 19, 2017- Dr. Davey addressed the Maui Medical Society, and gave a talk entitled "Wound Care and the Importance of Evidence-Based Guidelines".

Dr. Davey attended the 38th annual John A Boswick Burn and Wound Care Symposium from February 14th through February

18, 2016. This symposium was well attended by burn and wound care physicians from multiple countries. Dr. Davey was able to address the symposium on the ICW IG research, specifically looking for collaboration with other interested wound and burn professionals.

February 18-22, 2013- 35th Annual John A. Boswick, MD Burn and Wound Care Symposium.  
Wailea, Maui, Hawaii

April 30-May 1, 2013-Symposium on Advanced Wound Care (SAWC) and Wound Healing Society (WHS) Annual Meeting.  
-Denver, Colorado

-Orlando, FL  
April 23- April 27, 2014  
-Charlotte, NC  
April 25-April 29, 2018

### **Memberships and Positions Held:**

#### **Editorial Board Membership**

Dr. Davey is currently a member of the Editorial Board of the Journal of Wound Management and Prevention, which is a monthly peer-reviewed medical journal covering all aspects of wound care, skincare as well as nutritional related issues.

Current:  
Member of the American Academy of Wound Care (AAWC).

Current:  
Senior member of the Wound Healing Society in Bethesda, Maryland.

Current:  
Member of Association for Advancement of Wound Care (national organization).

Current:  
Member of the Society of University Founders of the University of Miami, Coral Gables, Florida.

Past:  
Member of the AAWC task force on current evidence-based guidelines for pressure ulcers.

Past:

Medical Director for Hyperbaric Medicine, Center for Wound Care and Hyperbaric Medicine  
HCA Edward White Hospital.

Director of Wound Care at this facility from approximately 2000-2005.

Director of Hyperbaric Medicine 2005 to 2014

Past:

Utilization Review and Quality Assurance Committee member at HCA Edward White Hospital.

Past:

Member of the Medical/Surgical Care Evaluation Committee at HCA Edward White Hospital.

Past:

Member of the Infectious Control Committee representing the Center for Wound Care, HCA  
Edward White Hospital.

Past:

Member of the Medical Quality and Education Committee at St. Anthony's Hospital.

1989-1994:

Member of the Board of Trustees, Columbia Edward White Hospital.

Previous:

Board Member of the Florida Medical Directors Association.

Previous:

Medical Director of Sunrise Northshore, Assisted Living Facility and Nursing Home.

Previous:

Utilization Review and Quality Assurance Committee member at St. Anthony's Hospital.

Previous:

Member of Florida Medical Directors Association.

Previous:

Certified Medical Director (AMDA).

**Nursing Home Medical Directorships, Past:**  
**(Dates approximate)**

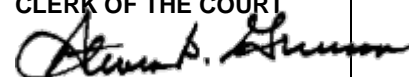
Coquina Key Nursing & Rehabilitation Center: 2000-2007

Westminster ALF: 2001-2005  
Northshore ALF: 1998-2002  
Abbey Nursing Home: 1998-2000  
Huber Nursing Home: 1992-2000  
Green Brook Nursing Home: 1994-1999  
Heartland Nursing Home: 1988-1999  
Shore Acres Nursing Home: 1996-1998  
Alpine Nursing Home: 1995-1998  
Carrington Place Nursing Home: 1995-1997  
St. Pete Health Care Center: 1992- 2008

Exhibit “D”

Exhibit “D”





**RIS**  
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*Southern Hills Medical Center, LLC dba*  
*Southern Hills Hospital and Medical Center*

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

EMMANUEL GARCIA,

Plaintiff,

vs.

SOUTHERN HILLS MEDICAL CENTER,  
LLC, doing business as SOUTHERN HILLS  
HOSPITAL AND MEDICAL CENTER;  
MICHAEL ALLEN ENGLER, D.O.; and,  
DOES 1 through 10, inclusive, and ROE  
CORPORATIONS 1 through 10, inclusive,

Defendants.

CASE NO. A-21-845741-C

DEPT NO. 24

**DEFENDANT SOUTHERN HILLS  
MEDICAL CENTER, LLC dba  
SOUTHERN HILLS HOSPITAL AND  
MEDICAL CENTER'S REPLY IN  
SUPPORT OF ITS MOTION TO  
DISMISS AND STRIKE PURSUANT TO  
NRCP 12**

Comes Now, Defendant Southern Hills Medical Center, LLC dba Southern Hills Hospital and Medical Center by and through its attorneys of record, the law firm of Hall Prangle & Schoonveld, LLC, hereby submits this Reply in Support of its Motion to Dismiss.

This Reply is made and based upon the papers and pleadings on file herein, the points and authorities attached hereto, and any argument of counsel which may be allowed at the time of the hearing on this matter.

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**MEMORANDUM OF POINTS AND AUTHORITIES**

**INTRODUCTION**

Plaintiff's Opposition essentially admits that the expert affidavit in this matter, standing alone, is insufficient to comply with the current version of NRS 41A.071. Instead, Plaintiff asks this Court to follow the holding in *Zohar* that was effectively superceded by the amendments to NRS 41A.071, but fails to cite to a single published case interpreting the *current* version of NRS 41A.071 and requiring that the Complaint and affidavit be read together. The only two cases actually cited (*Zohar* and *Baxter*) all interpret the prior version of the statute. Because a plain language reading of the statute defeats such an argument and no precedent has been cited to the contrary, dismissal<sup>1</sup> is appropriate pursuant to NRS 41A.071's mandate.

**I.**

**ISSUES PRESENTED**

**A. THE DAVEY AFFIDAVIT IS DEFECTIVE AND FAILS TO MEET NRS 41A.071 SPECIFICITY REQUIREMENTS**

- 1. THE PLAIN LANGUAGE OF THE STATUTE AS AMENDED REQUIRES THAT THE EXPERT AFFIDAVIT ITSELF MUST SATISFY THE SPECIFICITY MANDATES OF 41A.071**
- 2. PLAINTIFF'S ASSERTION THAT ZOHAR IS STILL GOOD LAW IN THE FACE OF THE AMENDMENT TO THE LANGUAGE FAILS UPON EVEN A CURSORY REVIEW OF THE AUTHORITY CITED**
- 3. ANALYZING THE DAVEY AFFIDAVIT PURSUANT TO THE CURRENT VERSION OF NRS 41A.071 ESTABLISHES THAT IT IS DEFECTIVE**
  - a. The specificity required by elements 3 and 4 are absent**
  - b. The affidavit does not support the allegations in the complaint**
- 4. EVEN UNDER ZOHAR, PLAINTIFF'S COMPLAINT FAILS TO ADEQUATELY IDENTIFY THE MEDICAL PROVIDERS ALLEGED TO BE NEGLIGENT**

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<sup>1</sup> Case law interpreting NRCP 12(b) is largely irrelevant since the dismissal is based on a statutory scheme.

1 **B. THE DAVEY AFFIDAVIT FAILS TO ADDRESS NURSING AND HOSPITALIST**  
2 **STANDARDS OF CARE AND SEEKS TO APPLY THE STANDARD OF CARE**  
3 **APPLICABLE TO PHYSICIANS**

4 **C. CASES SETTING FORTH NRCP 12(b) STANDARDS ARE NOT RELEVANT TO A**  
5 **NRS 41A.071 DISMISSAL**

6 **D. PLAINTIFF FAILS TO EXPLAIN HOW THE DOE/ROE PLEADINGS SATISFY**  
7 **NURENBERGER OR THE STRICTER REQUIREMENTS OF NRS 41A.071**

8 **E. PLAINTIFF'S ASSERTED IGNORANCE AS TO THE RELATIONSHIPS OF THE**  
9 **PARTIES ADMITS THAT THE GENERIC "AGENCY" ALLEGATIONS SHOULD**  
10 **BE STRICKEN**

11 **II.**

12 **STATEMENT OF FACTS**

13 Plaintiff's Opposition can be summarized as follows:

- 14 1. *Zohar*, which applies to a prior, *ambiguous* version of NRS 41A.071 applies to  
15 override the plain meaning of the amended statute;
- 16 2. Plaintiffs can disregard NRS 41A.071's requirement that each medical provider be  
17 specifically identified by name or act because discovery has not occurred, in spite of  
18 having the medical records and the fact that every case challenged under NRS  
19 41A.071 will be prior to discovery;
- 20 3. A doctor can always testify as to nursing standards of care because doctors have a  
21 higher standard of care; and
- 22 4. DOE allegations can be generic placeholders in case discovery identifies other  
23 negligent acts or parties, in spite of the requirement that the unknown party be  
24 specifically identified by act both under Nurenberger and the more stringent  
25 requirements of NRS 41A.071;

26 Because these are all demonstrably incorrect statements of law, Defendant's motion should be  
27 granted in total.

28 ///

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III.

**POINTS AND AUTHORITIES**

**A. THE DAVEY AFFIDAVIT IS DEFECTIVE AND FAILS TO MEET NRS 41A.071 SPECIFICITY REQUIREMENTS**

Because 41A.071 is jurisdictional, there is no discretion allowed under the statute. *we have recognized that a complaint alleging professional negligence is void ab initio when filed without the required supporting affidavit because it is defective and the courts are without authority to act upon it. See Washoe Med. Ctr., 122 Nev. at 1303-04, 148 P.3d at 793-94 (concluding NRS 41A.071's requirement that courts "shall dismiss" medical malpractice complaints filed without an expert affidavit evidenced the Legislature's intent that courts have no discretion with respect to a defective complaint's dismissal); Szydel v. Markman, 121 Nev. 453, 461, 117 P.3d 200, 205 (2005) (explaining that "NRS 41A.071 is jurisdictional in nature")*

Dekker/Perich/Sabatini Ltd. v. Eighth Jud. Dist. Ct. in & for Cty. of Clark, 137 Nev. Adv. Op. 53, 495 P.3d 519, 524 (2021).

Here, the affidavit is defective which mandates the "complaint's dismissal."

**1. THE PLAIN LANGUAGE OF THE STATUTE AS AMENDED REQUIRES THE EXPERT AFFIDAVIT ITSELF MUST SATISFY THE SPECIFICITY MANDATES OF 41A.071**

Plaintiff's entire argument is dependent on *Zohar's* instruction to read the Complaint and Affidavit together still being controlling law. It is not, by a plain reading of the express language of the amended statute. The statute itself requires 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
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]

There can be no argument that the statute itself is ambiguous as to *where* the four mandates must be met. The statute expressly delineates that the four elements must be in the affidavit's four corners. As recently stated by the Nevada Supreme Court:

*Our primary goal in construing a statute is to give effect to the Legislature's intent in enacting it. Hobbs v. State, 127 Nev. 234, 237, 251 P.3d 177, 179 (2011). 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. Id.*

Ramos v. State, 137 Nev. Adv. Op. 74, 499 P.3d 1178, 1180 (2021). Here, it could not be clearer that it is the affidavit, that must comply with the mandates enumerated in subsection 1-4. If it does not, it is defective and dismissal is necessary, as the Complaint is void *ab initio*.

**2. PLAINTIFF'S ASSERTION THAT ZOHAR IS STILL GOOD LAW IN THE FACE OF THE AMENDMENT TO THE LANGUAGE FAILS UPON EVEN A CURSORY REVIEW OF THE AUTHORITY CITED**

As set forth in the motion, Zohar was decided under the previous iteration of NRS 41A.071. As noted by the Supreme 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."* Zohar v. Zbiegien, 130 Nev. 733, 737, 334 P.3d 402, 405 (2014) [Emphasis in original]

The Court then went on to find that the statute was 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 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 purported "ambiguity" the Court determined that the affidavit should be read with the Complaint. Even though the affidavit failed to identify the names of the allegedly negligent medical provides, the Complaint specifically named them and therefore satisfied both NRCP 12 and NRS 41A.071.

After this decision, the legislature then amended the statute to "define the level of detail required" in a proper NRS 41A.071 affidavit. The legislature's amendment answered the *Zohar*

1 Court's question by requiring that "the affidavit corroborate every fact within the complaint,  
2 including individual defendant identities" thus removing the "ambiguity" that forced the Court  
3 to consider *both* the Complaint and the affidavit.

4 Plaintiff claims that other decisions establish the vitality of this precedent is misplaced at  
5 best and misleading at worst. In *Baxter v. Dignity Health*, 357 P.3d 927, 928, 931 (2015), the  
6 Nevada Supreme Court held that a complaint was not void for lack of a physically attached  
7 medical expert affidavit where that affidavit was filed the day after the complaint, and the  
8 complaint incorporated by reference the pre-existing affidavit. While Plaintiff's argument  
9 implies that the decision in *Baxter* cited to *Zohar* as it relates to the current version of NRS  
10 41A.071, the Court actually says the following in its footnotes:

11 *We analyze this appeal under the 2014 version of NRS 41A.071, since the 2015*  
12 *amendments do not apply retroactively. See id. at §§ 11, 13.*

13 *We note that the 2015 amendments to NRS 41A.071 impose additional affidavit*  
14 *requirements beyond those in the version of NRS 41A.071 considered in Zohar.*

15 *Baxter v. Dignity Health*, 131 Nev. 759, 764, 357 P.3d 927, 930 (2015). In other words, *Zohar*  
16 applied because the Court was considering the exact same version of NRS 41A.071 that *Zohar*  
17 was based on, and the Court acknowledges that the amendments to the statute would affect the  
18 analysis in *Zohar* and therefore presumably *Baxter*. Plaintiff's citation to the unpublished case  
19 of S. Nevada Adult Mental Health Servs. v. Eighth Jud. Dist. Ct. of State, ex rel. Cty. of Clark,  
20 132 Nev. 1031 (2016) is likewise unavailing as the decision had nothing to do with the  
21 sufficiency of an affidavit and **was also decided under the previous version of the statute**  
22 **having been filed in 2014.** ("On August 25, 2014, real party in interest, James Brown, filed a  
23 class action complaint. . .") *Id.* **Most tellingly, *Baxter* is the last published case since 2015**  
24 **that cites to *Zohar* for the proposition that the Complaint and affidavit have to be read**  
25 **together in evaluating the sufficiency of the affidavit.** In other words, there is no actual  
26 precedent applying *Zohar*'s analysis to cases subject to the current version of NRS 41A.071.  
27  
28

Because Plaintiff has failed to provide any published opinions that interpret the current version of NRS 41A.071 utilizing the *Zohar* rubric in contravention of the express language of the statute, his entire argument (and therefore Opposition) fails.

**3. ANALYZING THE DAVEY AFFIDAVIT PURSUANT TO THE CURRENT VERSION OF NRS 41A.071 ESTABLISHES THAT IT IS DEFECTIVE**

It is clear from the language of the statute that it is the affidavit, analyzed within its four corners, that must satisfy the specificity requirements of NRS 41A.071. To hold otherwise would be to allow the Complaint to set forth the standard of care and the alleged violations as long as it was accompanied by an affidavit that stated generically “I agree with the Complaint, to a reasonable degree of medical certainty.” This is not the type of “merit” based support envisioned by the clear language of the statute. The statute requires “an affidavit that” complies, not an “affidavit *and* complaint” that complies. Analyzed under this rubric, the affidavit fails to satisfy the four elements.

**a. The specificity required by elements 3 and 4 are absent**

NRS 41A.071(3) and (4) require that the affidavit:

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

These two prerequisites demand a level of specificity and preciseness (“specific act,” “concise and direct terms”) for factual allegations in the affidavit. It also requires that the medical provider be named or described by conduct. This level of specificity is missing in the Davey affidavit:

[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.*

*Emphasis added.*

Nowhere is a specific hospital medical provider identified by name. No provider is identified by conduct where the affidavit simply says “the nurses and staff at Southern Hills Hospital acted below the standard of care...” Eliminating paragraph 8, 12, and 13 with its generic claim of falling below the standard of care with no actor or specific act or omission identified, leaves only paragraph 9. That paragraph similarly fails by hypothesizing that some unidentified person that at some unidentified time *may have* left Plaintiff on a bed pan for an extended period of time. This opinion impermissibly attempts to establish negligence from the fact of an injury alone. However, the legislature has already explicitly described when injury is presumed to be negligent under NRS 41A.100. As a result, something more specific than the double conjecture (“wound was most likely caused” and “patient was almost certainly left..”) based solely on the development of a pressure wound does not provide the level of specificity required.

A very recent unpublished case demonstrates the level of necessity needed to satisfy the “strict language” of NRS 41A.071. In Soong v. Eighth Jud. Dist. Ct. in & for Cty. of Clark, 490 P.3d 119 (Nev. 2021), the Nevada Supreme Court granted a writ to require dismissal of a claim where the affidavit failed to specifically attribute the alleged acts of negligence to the named medical provider. Specifically, 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.” Id. “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



1 surgery. Thus, the district court had an obligation under the strict language of NRS 41A.071 to  
2 dismiss the action against Dr. Soong, and it erred when it failed to do so.”

3 Similarly, while the affidavit generically states a failure to comply with the standard of  
4 care and says someone on the hospital “team” may have left Plaintiff on a bed pan for an  
5 extended period of time, such an allegation is insufficient per *Soong*. Further, the argument that  
6 the “medical records do not indicate who positioned” Plaintiff (and arguably additional  
7 discovery was needed) was insufficient to save the defective affidavit. Plaintiff’s similar claim  
8 that further discovery is needed is defeated by this case.

9 While Plaintiff argues that he is not required to identify the hospital staff or nurses by  
10 name, such an argument has been rejected by the Nevada Supreme Court in an unpublished  
11 decision that closely mirrors this circumstance. See, Alemi v. Eighth Jud. Dist. Ct. of State, 132  
12 Nev. 938 (2016) (discussed more fully below).(finding that “Due to the failure of the complaint  
13 and affidavit to allege a standard of care and conduct attributable to Drs, Alemi and  
14 Lafia, NRS 41A.071's policy of ensuring that a medical expert has first validated the claim is not  
15 demonstrated” even where negligence was described in the affidavit and the complaint  
16 individually named the medical providers).

17 **b. The affidavit does not support the allegations in the complaint**

18 NRS 41A.971 requires that the affidavit “supports the allegations contained in the  
19 action.” In other words, the doctor has to factually support what the Complaint alleges. In this  
20 case, the Complaint attempts to provide the standard of care and instances of breach, but the  
21 Davey affidavit fails to “support” any of these very specific allegations, or even provide the  
22 standard of care which was allegedly breached. Lawyers, via a Complaint, are not allowed to  
23 assert the standard of care, breach and damages. The medical professional, through the affidavit,  
24 must do this. Plaintiff’s Complaint turns this idea on its head, which is why the Opposition  
25 focuses so heavily on erroneously asserting that *Zohar* is still the standard for reviewing  
26 affidavit compliance with NRS 41A.071. Since the standard of care must be set forth in the  
27  
28

1 affidavit, and it is not, Plaintiff's allegations in the Complaint are not "supported" and therefore  
2 the affidavit is defective. See, *Alemi, infra*.

3 The affidavit's generic discussion of some unidentified standard of care does not satisfy  
4 the specificity required by the statute:

6 *"the nurses and staff at Southern Hills Hospital acted below the standard of care for the*  
7 *prevention and treatment of pressure injuries."*

8 *"medical records from Southern Hills Hospital do not document that the hospital staff*  
9 *took necessary and appropriate measures to prevent pressure ulcer wounds from*  
10 *developing."*

11 Both "opinions" beg the question – what are those "necessary and appropriate measures" that  
12 make up the standard of care? Which of the providers failed in this regard? If the answer to those  
13 questions cannot be found in the affidavit, it is defective. Plaintiff's plea to consider the  
14 Complaint with the affidavit admits that the standard of care cannot be found in the affidavit.

15 The only opinion to discuss an actual act or omission that fell below the standard of care  
16 states:

18 *"This [leaving the patient on a bedpan for an extended period of time] was below the*  
19 *standard of care for hospitals.*

20 Even this, however, fails to identify any specific provider or discuss a standard of care (i.e.,  
21 patients should be left on a bed pan for less than X minutes) and a breach (Plaintiff was left on a  
22 bed pan for Y minutes). Instead, it takes the fact of injury to back into a presumed breach. This  
23 sort of circular argument where *development of pressure wound = must have been breach of*  
24 *standard of care* is not standard of care evidence, even where the actual provider is named.  
25 Where the provider is not named, such an assertion utterly fails the requirements of NRS  
26 41A.071.

27 Dr. Davey knows how to provide the standard of care in a proper affidavit when the facts  
28 support it. 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. He stated that the standards of care applicable to Spohn and its nurses and staff included, but were not limited to the following: (1) "The standard of care required [Spohn] to monitor and treat the pressure ulcer documented on [the deceased's] left heel"; and (2) "The standard of care required [Spohn] to institute standard and recognized precautionary measures for [the deceased] to prevent the development of pressures sores, including those that might lead to a severe ischio-rectal abscess." (Emphasis added). Dr. Davey claimed that Spohn breached the standards of care by: (1) "failing to institute standard and recognized precautionary measures for [the deceased] to prevent the development of pressures sores"; (2) failing to place the deceased "on an air mattress with padding to areas of boney prominence"; and (3) failing to reposition the deceased "every two hours to relieve the pressure on areas of boney prominence."

and 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 in Lancaster's wheelchair—early in Lancaster's residency to prevent pressure ulcers from developing. Dr. Davey further opined that Bay Oaks staff breached the standard of care by failing to perform consistent skin assessments, failing to perform incontinence care and repositioning every two hours, and failing to measure, describe, and document pressure ulcers as they formed. Dr. Davey stated, "Without proper assessments, development of and changes in the ulcer cannot be communicated to the physician and proper interventions such as those listed above cannot be implemented."

Clearly this type of "standard of care" information is missing in the current affidavit with no good reason. As such, the affidavit is woefully defective in comparison and fails to satisfy NRS 41A.071, rendering the complaint void *ab initio*.

#### **4. EVEN UNDER ZOHAR, PLAINTIFF'S COMPLAINT FAILS TO ADEQUATELY IDENTIFY THE MEDICAL PROVIDERS ALLEGED TO BE NEGLIGENT**

The Davey Affidavit fails to identify any name, much like the affidavit in *Zohar*. However, in *Zohar*, these individuals were named in the Complaint. Therefore, reading the two together, the entirety of the Complaint was deemed sufficient under the old version of NRS 41A.071.

Here, even reading the Complaint together with the affidavit fails to “identify” a single provider, and instead lumps all “staff and nurses” of the hospital together.<sup>2</sup>

The unpublished case of Alemi v. Eighth Jud. Dist. Ct. of State, 132 Nev. 938 (2016) is illuminating on this issue. “[Plaintiff] alleged that the defendants negligently performed her cesarean section, causing ureteral damage. She attached to the complaint an affidavit from a medical doctor that did not separately name student doctors Alemi and Lafia as parties responsible for the alleged conduct.” Id. The Court found that “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.”<sup>3</sup> 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. Thus, they were void ab initio and the district court was required to dismiss without leave to amend.” Id.

In other words, even where the conduct (negligent performance of a c-section) is generally alleged by the affidavit and complaint, and the other medical providers are individually named in the Complaint, that was insufficient under *Zohar* to avoid dismissal. Certainly here, where no “hospital staff or nurse” is individually named, the affidavit is defective and therefore the complaint is void ab initio.

**B. THE DAVEY AFFIDAVIT FAILS TO ADDRESS NURSING AND HOSPITALIST STANDARDS OF CARE AND SEEKS TO APPLY THE STANDARD OF CARE APPLICABLE TO PHYSICIANS**

As stated above, the Davey affidavit fails to actually identify any nursing or hospitalist standard of care. This is likely because Dr. Davey is not qualified to testify as to the nursing and hospitalist standard of care. To save the affidavit, Plaintiff claims, without support, that Dr.

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<sup>2</sup> While Plaintiff claims that additional discovery is necessary, he has attached the medical records from Plaintiff’s treatment to the expert affidavit. In other words, all treatment and identity of treating nurses and staff are already in Plaintiff’s possession, as well as his expert’s. Further discovery would not change the information available.

<sup>3</sup> The Complaint was filed on July 15, 2014, therefore the prior version of the statute applied, and therefore *Zohar*.

Davey is qualified to testify to the standards which apply to nurses and hospitalists *in the prevention of pressure ulcers*.<sup>4</sup> However, a review of his affidavit includes only a bald assertion that he is “familiar with the standard of care for physicians, hospitals and nursing homes for skin and wound care” with no further support for how he would be familiar with the standard of care for nurses or hospital staff. Further, his CV demonstrates that he may be qualified to testify as to treatment of wounds and prevention of infections once these wounds develop, but says nothing about implementing protocols at the hospital level to prevent such wounds, or anything about supervising or overseeing nurses or hospital staff in this regard. The Opposition seems to assert, with no support, that simply being a doctor is sufficient for opining on nursing standards of care. This is incorrect. 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 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<sup>5</sup> 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).

There is a good reason that a doctor is not presumed to know the standard of care for nurses – it is a different standard. Nurses cannot be held to the same standard as physicians, who can direct treatment, prescribe medications, and otherwise do things that nurses are only allowed

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<sup>4</sup> While one paragraph says “prevention and treatment of pressure injuries,” there is no discussion of what should have been done to “treat” the pressure injuries, and therefore this argument focuses solely on prevention.

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.”) Plaintiff’s own argument acknowledges that Dr. Davey may be attempting to assert a higher than appropriate standard:

“Dr. Davey’s scope of knowledge includes, **and exceeds**, everything nurses are expected to do in caring for patients and to prevent and treat bedsores.

Instead of citing to something in Dr. Davey’s CV, or providing precedential authority that somehow his expertise qualifies him to testify to the standard of care for nurses and hospital staff, Plaintiff makes unsupported claims of qualifications with no citation, and then cites first to an unpublished opinion by the Nevada Supreme Court, then to an unpublished opinion<sup>5</sup> from the Appellate Court that cannot be cited to for any reason. *NRAP\_36(c)(3)* (Except to establish issue or claim preclusion or law of the case as permitted by subsection (2), unpublished dispositions issued by the Court of Appeals **may not be cited in any Nevada court for any purpose**.) In short, Plaintiff has failed to provide factual or legal support that Dr. Davey is qualified to render opinions on the standard of care for nurses and unidentified hospital staff positions.

**C. CASES SETTING FORTH NRCP 12(b) STANDARDS ARE NOT RELEVANT TO A NRS 41A.071 DISMISSAL**

NRS 41A.071 has the purpose of “detering frivolous claims” whereas NRCP 12(b)(5) has the purpose of requiring complaints to provide “defendants with notice of the claims against them.” In short, they are very different standards – one measures merit, the other measures notice.<sup>6</sup> They cannot be substituted for each other. NRCP 12 has a forgiving standard, NRS 41A.071 is a strict standard<sup>7</sup>. Compare *Nutton v. Sunset Station, Inc.*, 131 Nev. 279, 291, 357

<sup>5</sup> Est. of Orschel v. Valley Health Sys., LLC, No. 75556-COA, 2019 WL 3337092, at \*3 (Nev. App. July 24, 2019)

<sup>6</sup> Zohar v. Zbiegien, 130 Nev. 733, 739, 334 P.3d 402, 406 (2014)(“the purpose of the expert affidavit is to further enable the trial court to determine whether the medical malpractice claims within the complaint have merit”)

<sup>7</sup> Soong v. Eighth Jud. Dist. Ct. in & for Cty. of Clark, 490 P.3d 119 (Nev. 2021)(“the district court had an obligation under the **strict language** of NRS 41A.071 to dismiss the action”)[emphasis added]

P.3d 966, 974 (Nev. App. 2015) (“Nevada is a “notice pleading” state, which means that the ultimate facts alleged within the pleadings **need not be recited with particularity**”) with NRS 41A.071 (“the district court shall dismiss the action, without prejudice, if the action is filed without an affidavit that [...] **Sets forth factually a specific act or acts** of alleged negligence.”)

As such, the case law interpreting NRCP 12(b) under “notice pleading” standards is inapplicable to an inquiry under NRS 41A.071 regarding merit. Therefore Plaintiff’s arguments regarding “notice” and “sufficiency of pleading” are irrelevant here, in light of the fact that Zohar’s requirement to read the complaint and affidavit together to determine adequacy of the affidavit has been overruled by statute.

**D. PLAINTIFF FAILS TO EXPLAIN HOW THE DOE/ROE PLEADINGS SATISFY NURENBERGER OR THE STRICTER REQUIREMENTS OF NRS 41A.071**

*Plaintiff cannot know the names of all the staff, nurses, administrators, etc, that were involved in oversight, and /or made decisions that impacted the are the Plaintiff received.*

While this is belied by the fact that the expert reviewed all of the hospital records and attached them to his report, it still fails to explain why the appropriate language was not used for the DOE/ROE allegations. All that is alleged is that the DOE or ROE is “**legally responsible in some manner for the events and happenings herein referred to and caused damages proximately to Plaintiffs as herein alleged.**” That phrase could apply to anything and therefore fails in “clearly specifying the connection between the intended defendants and the conduct, activity, or omission upon which the cause of action is based.”<sup>8</sup> Nor can it be argued that the phrase “*describes by conduct, each [DOE] provider of health care who is alleged to be negligent*” or “*Sets forth factually a specific act or acts of alleged negligence separately as to each [Doe] defendant.*”<sup>9</sup>

<sup>8</sup> Nurenberger v. Virosteck, 107 Nev. 873, 881, 822 P.2d 1100, 1106 (1991).

<sup>9</sup> NRS 41A.071

As such, Plaintiff has failed to adequately avail himself of the safe harbor of NRCP 10, and therefore the DOE/ROE pleadings should be stricken, other than Paragraph 21.

**E. PLAINTIFF’S ASSERTED IGNORANCE AS TO THE RELATIONSHIPS OF THE PARTIES ADMITS THAT THE GENERIC “AGENCY” ALLEGATIONS SHOULD BE STRICKEN**

By admitting he has no idea what the relationships of the various parties are, Plaintiff has essentially admitted that the allegations cannot possibly put Defendant on notice of what is being pled. It is non-sensical to claim that each Defendant was an agent of the other. One must be a principal, one must be an agent. Therefore not only does the allegation lack any factual assertion to save it, it is legally incorrect. If Plaintiff wanted to allege that Dr. Engler or any other medical provider was an “agent” of this Defendant, he could have so alleged. He did not, and this generic place holder should be stricken.

**IV.**

**CONCLUSION**

NRS 41A.071 raises the standard of pleading for cases alleging professional liability, which precludes a Plaintiff from relying on the minimum “notice” standard of NRCP 12. Because NRS 41A.071 is more specific as to the requirements of an affidavit (versus a complaint), it governs the analysis of a motion to dismiss. Plaintiff’s Opposition fails to refute this standard, and therefore the motion should be granted in its entirety.

DATED this 1<sup>st</sup> day of March, 2022.

HALL PRANGLE & SCHOONVELD, LLC

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

MICHAEL E. PRANGLE, ESQ.

Nevada Bar No. 8619

NATHAN R. REINMILLER, ESQ.

Nevada Bar No. 6793

*Attorneys for Defendant*

*Southern Hills Medical Center, LLC dba*

*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 1<sup>st</sup> day of March, 2022, I served a true and correct copy of the foregoing **DEFENDANT SOUTHERN HILLS MEDICAL CENTER, LLC dba SOUTHERN HILLS HOSPITAL AND MEDICAL CENTER'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS AND STRIKE PURSUANT TO NRCP 12** as follows:

  X   the E-Service Master List for the above referenced matter in the Eighth Judicial District Court e-filing System in accordance with the electronic service requirements of Administrative Order 14-2 and the Nevada Electronic Filing and Conversion Rules;

       U.S. Mail, first class postage pre-paid to the following parties at their last known address;

       Receipt of Copy at their last known address:

Andrew J. Thomas, Esq.  
BURRIS & THOMAS, LLC  
2810 W. Charleston Blvd., Ste F-58  
Las Vegas, Nevada 89102  
[at@steveburrislaw.com](mailto:at@steveburrislaw.com)  
*Attorney for Plaintiff*

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

Exhibit “E”

Exhibit “E”

A-21-845741-C

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

**Malpractice - Medical/Dental**

**COURT MINUTES**

**March 07, 2022**

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A-21-845741-C      Emmanuel Garcia, Plaintiff(s)  
vs.  
Southern Hills Medical Center, LLC., Defendant(s)

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**March 07, 2022      7:00 AM      Minute Order**

**HEARD BY:** Ballou, Erika      **COURTROOM:** Chambers

**COURT CLERK:**  
Ro'Shell Hurtado

**RECORDER:**

**REPORTER:**

**PARTIES  
PRESENT:**

**JOURNAL ENTRIES**

- The Court having considered all papers and pleadings and determining that no hearing is necessary hereby VACATES the hearing scheduled for March 8, 2022. Defendant Southern Hills Medical Center, LLC dba Southern Hills Hospital and Medical Center's Motion to Dismiss and Strike Pursuant to NRCP 12 is DENIED without prejudice at this early stage of discovery. 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 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. Plaintiff's counsel is to prepare a proposed order and to circulate it to opposing counsel for approval as to form and content before submitting it to chambers for signature. Plaintiff's Counsel is directed to email a word and pdf copy of the proposed order to DC24inbox@clarkcountycourts.us as

PRINT DATE: 03/07/2022

Page 1 of 2

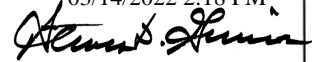
Minutes Date: March 07, 2022

soon as possible.

CLERK S NOTE: This Minute Order was electronically served by Courtroom Clerk, Ro Shell Hurtado, to all registered parties for Odyssey File & Serve./ /rh

Exhibit “F”

Exhibit “F”

  
CLERK OF THE COURT

**ORDR**  
**ANDREW J. THOMAS, ESQ.**  
Nevada Bar No. 000017  
[at@steveburrislaw.com](mailto:at@steveburrislaw.com)  
**BURRIS & THOMAS, LLC**  
2810 W. Charleston Boulevard, Suite F-58  
Las Vegas, Nevada 89102  
(702) 258-6238 - Telephone  
(702) 258-8280 - Facsimile  
*Attorneys for Plaintiffs*

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

EMMANUEL GARCIA,  
Plaintiff,

CASE NO.: A-21-845741-C  
DEPT. NO.: 24

vs.

SOUTHERN HILLS MEDICAL CENTER,  
LLC, doing business as SOUTHERN HILLS  
HOSPITAL AND MEDICAL CENTER;  
MICHAEL ALLEN ENGLER, D.O.; and  
DOES 1 through 10, inclusive; and ROE  
CORPORATIONS 1through 10, inclusive;

Defendants.

**ORDER DENYING DEFENDANT SOUTHERN HILLS MEDICAL CENTER,  
LLC, doing business as SOUTHERN HILLS HOSPITAL AND MEDICAL CENTER'S  
MOTION TO DISMISS AND STRIKE PURSUANT TO NRCP 12, WITHOUT  
PREJUDICE**

This matter having come on regularly for hearing on the 7<sup>th</sup> day of March, 2022, in Department 24, the Honorable Erika Ballou presiding. The Court having considered all papers and pleadings and determining that no hearing is necessary hereby VACATES the hearing scheduled for March 8, 2022. Defendant Southern Hills Medical Center, LLC dba Southern Hills Hospital and Medical Center's Motion to Dismiss and Strike Pursuant to NRCP 12 is DENIED without prejudice at this early stage of discovery. 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

1 402, 406 (Nev. 2014); Baxter v. Dignity Health, 357 P.3d 927, 931 (Nev. 2015).

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

8 IT IS SO ORDERED.

Dated this 14th day of March, 2022



DISTRICT COURT JUDGE

C7A A29 D4AB 4133

Erika Ballou

District Court Judge

12 RESPECTFULLY SUBMITTED BY:

13 **BURRIS & THOMAS, LLC**

14 By /s/ Andrew J. Thomas

15 ANDREW J. THOMAS, ESQ.

16 at@steveburrislaw.com

17 2810 W. Charleston Blvd., Suite F-58

18 Las Vegas, Nevada 89102

Attorneys for Plaintiff

19 APPROVED AS TO FORM AND CONTENT:

20 DATED this 14<sup>th</sup> day of March, 2022.

21 **HALL PRANGLE & SCHOONVELD, LLC**

22 By: /s/ Nathan Reinmiller

23 Nathan R. Reinmiller Esq.

24 Nevada Bar No. 6793

25 1140 North Town Center Dr., Suite 350

26 Las Vegas, Nevada 89144

Attorneys for Defendant,

Southern Hills Medical Center, LLC dba

27 Southern Hills Hospital and Medical  
28 Center

## Carmen Cherry

---

**From:** Nathan R. Reinmiller <nreinmiller@HPSLAW.COM>  
**Sent:** Monday, March 14, 2022 8:25 AM  
**To:** Carmen Cherry  
**Cc:** Priscilla Zoccole; Andrew Thomas  
**Subject:** RE: Emmanuel Garcia v. Southern Hills, et al.

**AmicusId:** 434144  
**AmicusStatus:** Saved  
**AmicusFileName:** Garcia, Emmanuel 466A  
**AmicusFileIds:** 2568

The Order is fine, you can affix my e-signature to it.

Thanks,

Nathan



1140 North Town Center Dr.  
Las Vegas, NV 89144

**Nathan Reinmiller**  
*Of Counsel*  
O: 702.889.6400  
Email: nreinmiller@HPSLAW.COM

**Legal Assistant:** Camie DeVoge  
O: 702.212.1473  
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**NOTICE:** The information contained in this electronic message is intended only for the personal and confidential use of the designated recipient(s) named above. This message may be attorney-client communication, and as such, is privileged and confidential. If the reader of this message is not the intended recipient or an agent responsible for delivering it to the intended recipient, you are hereby notified that you have received this document in error, and that any review, dissemination, distribution, or copying of this message is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone or return e-mail and permanently destroy all original messages. Thank you.

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**From:** Carmen Cherry <cc@steveburrislaw.com>  
**Sent:** Thursday, March 10, 2022 4:09 PM  
**To:** Nathan R. Reinmiller <nreinmiller@HPSLAW.COM>  
**Cc:** Priscilla Zoccole <pz@steveburrislaw.com>; Andrew Thomas <at@steveburrislaw.com>  
**Subject:** Emmanuel Garcia v. Southern Hills, et al.

---

[External Email] CAUTION!.

Good afternoon counsel; please find attached Order for your review. If do you not have any changes please let me know if I can a-fix your e-signature.



1 **CSERV**

2  
3 DISTRICT COURT  
4 CLARK COUNTY, NEVADA

5  
6 Emmanuel Garcia, Plaintiff(s)

CASE NO: A-21-845741-C

7 vs.

DEPT. NO. Department 24

8 Southern Hills Medical Center,  
9 LLC., Defendant(s)

10  
11 **AUTOMATED CERTIFICATE OF SERVICE**

12 This automated certificate of service was generated by the Eighth Judicial District  
13 Court. The foregoing Order was served via the court's electronic eFile system to all  
recipients registered for e-Service on the above entitled case as listed below:

14 Service Date: 3/14/2022

15 E-File Admin

efile@hpslaw.com

16 Chelsea Hueth

crhueth@mcbridehall.com

17 Robert McBride

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Carmen Cherry	cc@steveburrislaw.com
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