

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

VALLEY HEALTH SYSTEMS, LLC dba  
SPRING VALLEY HOSPITAL,

Petitioner,

v.

THE EIGHTH JUDICIAL DISTRICT  
COURT OF THE STATE OF NEVADA  
ex rel. THE COUNTY OF CLARK, AND  
THE HONORABLE VERONICA  
BARISICH,

Respondent,

and

KURTISS HINTON,

Real Party In Interest,

and

MICHAEL SCHNEIER, M.D., an  
individual; MICHAEL SCHNEIER  
NEUROSURGICAL CONSULTING,  
P.C., a Nevada Corporation.

Additional Parties In Interest.

Supreme Court No.:

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District Court No.

A-19-800263-C  
Elizabeth A. Brown  
Clerk of Supreme Court

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**PETITION FOR WRIT OF MANDAMUS**

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## **NRAP 26.1 DISCLOSURE**

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

1. All parent corporations and publicly held companies owning 10 percent or more of the party's stock: Universal Health Services, Inc.
2. Names of all law firms whose attorneys have appeared for the party or amicus in this case (including proceedings in the district court or before an administrative agency) or are expected to appear in this court: Lewis Brisbois Bisgaard & Smith LLP; Injury Lawyers of Nevada; McBride Hall.
3. If litigant is using a pseudonym, the litigant's true name: N/A

DATED: June 23, 2022.

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/s/ Adam Garth

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## **RELIEF SOUGHT**

Petitioner Valley Health Systems LLC d/b/a Spring Valley Hospital (“SVH”) hereby petitions for a writ of mandamus requiring the district court (“Respondent”) to vacate its order of April 5, 2022<sup>1</sup> denying co-defendant Michael Schneier M.D., and Michael Schneier Neurosurgical Consulting P.C.’s (“Schneier Defendants”) motion to dismiss Plaintiff’s Second Amended Complaint and SVH’s joinder thereto for Plaintiff’s failure to conduct a timely Early Case Conference (“ECC”) in accordance with NRCP 16.1(e)(1), and the order denying SVH’s motion for reconsideration of said decision dated June 15, 2022<sup>2</sup> in the case of KURTISS HINTON, Plaintiff, vs. MICHAEL SCHNEIER, M.D., an individual; MICHAEL SCHNEIER NEUROSURGICAL CONSULTING, P.C., a Nevada Corporation; KHAVKIN CLINIC, PLLC; VALLEY HEALTH SYSTEMS, LLC dba SPRING VALLEY HOSPITAL; DOE NURSE; I through X; DOE HOSPITAL EMPLOYEE; I through X; DOE MEDICAL DOCTOR; I through X; ROE HOSPITAL, XI through XX; ROE COMPANIES, XI through XX; and ROES, XI, through XX, inclusive, Clark County Case No. A-19-800263-C. Respondent’s orders reflected a manifest abuse of discretion, in light of the extensive improprieties engaged in by Plaintiff’s predecessor and current counsel in flagrantly defying statutes, court rules and court

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<sup>1</sup> Petitioner’s Appendix, pp. 190-198

<sup>2</sup> Petitioner’s Appendix, pp. 475-484

orders on a multitude of occasions in this case, and based upon the fact that the delay in conducting the ECC was occasioned solely as a result of Plaintiff's counsel's conscious decision to disregard the rules, and failing to conduct an early case conference for more than a year after an answer was interposed.

This petition is based upon the ground that the district court's order is without legal and factual bases, and Respondent manifestly abused her discretion by denying the original motion to dismiss, and after a clear demonstration of the law and facts of this case, denying Petitioner's motion for reconsideration of that same decision. SVH is a defendant in this case based solely on an ostensible agency theory, and dismissal of the underlying case against the co-defendants requires dismissal of Plaintiff's ostensible agency case against SVH, as a case predicated solely on vicarious liability cannot be successfully maintained on its own. This petition is also based upon the ground that SVH does not have a plain, speedy, and adequate remedy in the ordinary course of law.

### **ROUTING STATEMENT**

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

The Petition raises the issue of whether it was clearly erroneous for Respondent to find that Plaintiff had good cause for not timely conducting an ECC for six months beyond the outside deadline for doing so as the excuse proffered by



Plaintiff was utterly false and manufactured. Even more problematic is that Plaintiff precipitated the very delays in this case, prejudicing the respective defendants due to extraordinary delays in commencing discovery, now five years after the alleged acts giving rise to this matter. This issue has been raised throughout this Petition.

### **ISSUE PRESENTED**

Should a case be dismissed when a plaintiff fails to conduct an ECC for more than six months beyond the outside deadline for doing so in direct violation of NRCP 16.1(e)(1), when the excuse proffered has no bearing on any truth or reality in this case where the actions of plaintiff's counsel throughout the pendency of the litigation directly contradict the proffered excuse.

### **INTRODUCTION**

SVH respectfully petitions this Court for the issuance of a Writ of Mandamus pursuant to Nev. Rev. Stat. § 34.150 et seq., Nev. R. App. P. 21 and Nev. Const. art. VI, § 4, directing Respondent to issue an Order granting the Schneier Defendants' Motion to Dismiss Plaintiff's Second Amended Complaint for Failure to Timely Conduct an Early Case Conference Per NRCP 16.1(e)(1) and SVH's Joinder Thereto and/or alternatively direct Respondent to issue an Order granting SVH's Motion for Reconsideration of same.

In the wake of overwhelming contradictory evidence, Respondent found good cause to exist why Plaintiff failed to timely conduct an ECC. The excuse Plaintiff proffered was untrue and lacked any factual basis in light of the contradictory

evidence demonstrating that Plaintiff's counsel engaged in substantial litigation in this case and many others, but just carelessly failed to conduct a timely ECC. The delay exceeded the 180 day deadline for conducting the ECC by more than 6 months. As a result, Plaintiff delayed discovery in the case and due to multiple practice failures and shenanigans perpetrated by Plaintiff's predecessor counsel, delayed the case for five years beyond the occurrence of the facts giving rise to the alleged malpractice. Respondent was made fully aware of the case history and the disingenuous excuse proffered by Plaintiff, yet chose to overlook every misstep perpetrated by Plaintiff's counsel time and again, resulting in prejudice to the all defendants.

Respondent's decision to deny co-defendant's motion to dismiss and SVH's joinder thereto, as well as SVH's motion for reconsideration was clearly erroneous in light of the factors Respondent needed to consider which relate to the purpose of the rule requiring a timely ECC. A non-exhaustive list of such factors includes the length of the delay, whether the defendant induced or caused the delay, whether the delay has otherwise impeded the timely prosecution of the case, general considerations of case management such as compliance with any case scheduling order or the existence or postponement of any trial date, or whether the plaintiff has provided good cause for the delay. A considered examination of the aforesaid factors can lead to no other conclusion (1) that Plaintiff's counsel's actions in this case, either predecessor or current counsel, lead to the delay itself, (2) that the delay

exceeded the maximum time to conduct the conference by nearly six months, (3) that discovery was not permitted to proceed due to the failure to timely conduct the conference, (4) that none of the defendants were responsible for the delay in scheduling the early case conference, (5) that the timely prosecution of this case was severely hampered by Plaintiff's own failures (case delayed 2 ½ years from its filing), and (6) that Plaintiff's excuse was a falsely contrived attempt to utilize COVID-19 as leverage when Plaintiff's predecessor counsel not only participated in multiple motions attendant to this case alone, but during which time they filed a considerable number of unrelated lawsuits, dispelling any notion that they lacked the five or ten minutes to participate in an ECC which would have allowed discovery to timely proceed.<sup>3</sup> Thus, the delays in this case have been precipitated by Plaintiff's counsel. The allegations stem from medical treatment which occurred **five years ago**. Affording Plaintiff another "pass" when his counsel's actions improperly delayed this case making discovery even more stale was clearly erroneous, as defendants in this matter have been severely prejudiced by Plaintiff's own actions.

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<sup>3</sup> During the one year time within which the ECC was not conducted, on this case alone: (1) All parties attended hearing on February 11, 2021 on motions to dismiss Plaintiff's Second Amended Complaint, (2) Plaintiff moved to reconsider said motions to dismiss on March 15, 2021, (3) Plaintiff opposed a motion by newly named Khavkin Clinic to dismiss which motion was heard and granted on March 11, 2021, (4) Plaintiff opposed SVH's Rule 11 motion which was filed on April 16, 2021, (5) Plaintiff improperly filed a Third Amended Complaint, (6) Plaintiff interposed opposition to multiple motions to strike Third Amended Complaint on June 18, 2021, and (7) all parties attended hearing on August 5, 2021 on the respective motions to strike Plaintiff's Third Amended Complaint. Moreover, Plaintiff failed to timely draft multiple orders his counsel was directed to prepare and circulate in accordance with EDCR 7.21.

**A. Procedural History**

This action has an extensive history. Plaintiff commenced his action by filing his Complaint on August 14, 2019. SVH filed a motion to dismiss Plaintiff's Complaint on November 1, 2019, followed by defendant Nuvasive, Inc.'s ("Nuvasive") motion to dismiss on November 13, 2019. The Schneier Defendants joined SVH's motion to dismiss on November 19, 2019. All motions and joinders were heard on December 17, 2019. SVH's Motion and Schneier Defendants' joinder thereto were denied on December 26, 2019 without prejudice. Nuvasive's motion to dismiss was granted, but permitted Plaintiff to amend his Complaint as to Nuvasive to address claims made against it with more specificity.

Plaintiff filed a Second Amended Complaint by stipulation of the parties on December 1, 2020. On December 9, 2020, SVH filed a Motion to Dismiss and Strike Plaintiff's Second Amended Complaint and Prayer for Punitive Damages. Defendant Nuvasive filed another motion to dismiss Plaintiff's Second Amended Complaint on December 9, 2020 as well.

While the respective motions to dismiss Plaintiff's Second Amended Complaint were pending, the Schneier Defendants interposed their answer to Plaintiff's Second Amended Complaint on December 15, 2020.

In Plaintiff's Second Amended Complaint, Plaintiff named a new defendant, Khavkin Clinic PLLC, which filed a motion to dismiss on February 4, 2021, which motion was granted on March 11, 2021.

A hearing was held on SVH's and Nuvasive's respective motions to dismiss on February 11, 2021. Thereafter, Respondent issued an order of dismissal on March 2, 2021, granting SVH's motion to dismiss all claims against it and to strike Plaintiff's prayer for punitive damages in its entirety, thus initially terminating Plaintiff's case against SVH.

Plaintiff moved this Court to reconsider its decision granting SVH's motion to dismiss on March 15, 2021, which motion partially granted said relief to the extent that Plaintiff's claim against SVH was limited only to ostensible agency as it pertained to Schneier Defendants, but denied Plaintiff's motion with respect to all remaining claims against SVH. Therefore, Plaintiff has no direct claims of negligence as against SVH and is limited solely to an ostensible agency claim.

SVH moved on April 16, 2021 for sanctions pursuant to NRCP Rule 11 pertaining to Plaintiff's interposition of materials SVH alleges were in Plaintiff's possession at the time of the original motion to dismiss which were being interposed on a motion for reconsideration and which were not limited to the face of the pleadings. After not having interposed timely opposition to SVH's motion, and over SVH's objection, this Court permitted the late filing of opposition thereto, and thereafter denied SVH's motion for sanctions.

Nuvasive again moved for dismissal of Plaintiff's claims against it, which motion was granted and costs imposed upon Plaintiff stemming therefrom.

Plaintiff thereafter filed a Third Amended Complaint without having obtained

a stipulation to do so or having moved this Court for leave to amend his Complaint. On June 18, 2021, SVH and the Schneier Defendants independently moved this Court to strike Plaintiff's Third Amended Complaint. In addition to striking the Third Amended Complaint, SVH also requested costs and fees in its motion.

A hearing was held on the respective motions to strike Plaintiff's Third Amended Complaint on August 5, 2021 as well as SVH's request for costs and fees. Respondent granted the respective defendants' motions to strike Plaintiff's Third Amended Complaint, but denied SVH's request for costs and fees and cautioned Plaintiff that future failures to comply with Respondent's Orders would result in an award of fees against Plaintiff. Despite Respondent's admonition for any future failure to comply with court orders, no such sanction was imposed despite the continued failure by Plaintiff to comply with rules or orders. In fact, not only has Plaintiff not been sanctioned in any way, but Plaintiff and his counsel continue to receive Respondent's every deference in the wake of continued violations of the court rules and orders.

On September 22, 2021, SVH interposed its answer to Plaintiff's Second Amended Complaint.

**B. Respondent's Order Giving Rise to Petition**

On December 9, 2021, Schneier Defendants moved this Court to dismiss for

Plaintiff's failure to conduct an ECC within the time permitted by NRCP 16.1(e)(1).<sup>4</sup> SVH joined the motion as the only remaining claim against SVH was based upon ostensible agency.<sup>5</sup> Plaintiff interposed his opposition to the motion and joinder.<sup>6</sup> The Schneier Defendants thereafter interposed their reply in further support of the motion to dismiss.<sup>7</sup>

A hearing was conducted on January 27, 2022,<sup>8</sup> during which time SVH's counsel was cut off from making a record of the Plaintiff's repeated failures to comply with statutes, orders and rules, the multiple improperly interposed pleadings in this case, the extensive motion practice ensuing from the Plaintiff's improper conduct, and the repeated deference accorded to Plaintiff and his counsel in defiance of proper practice, all while exponentially increasing the costs of litigation for the defense of this case.<sup>9</sup>

What is more, in opposition to the Schneier Defendants' Motion to Dismiss in this case, Plaintiff interposed the declaration of Kimball Jones, Esq.<sup>10</sup> In that

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<sup>4</sup> Petitioner's Appendix, pp. 2-57

<sup>5</sup> Petitioner's Appendix, pp. 59-62

<sup>6</sup> Petitioner's Appendix, pp. 64-111

<sup>7</sup> Petitioner's Appendix, pp. 113-152

<sup>8</sup> Petitioner's Appendix, pp. 154-176

<sup>9</sup> Exhibit "F" hereto, pp. 157:22 – 160:17

<sup>10</sup> Jared Anderson, Esq., Plaintiff's current counsel, represented that Mr. Jones is no longer Plaintiff's counsel and that he has been substituted as counsel and is no longer merely associated Plaintiff's counsel. Despite repeated requests for months to obtain evidence of this arrangement, as late as March 29, 2022, during a telephone call with Plaintiff's counsel regarding EDCR 2.34 issues of discovery, Mr. Anderson represented that he was still awaiting Mr. Jones' signature on the stipulation of substitution of counsel. Again, months have elapsed and Plaintiff's counsel cannot even get as much as a stipulation together as to who is piloting the ship for this Plaintiff.

declaration, Mr. Jones made multiple representations that due to staffing issues relating to COVID-19, he was unable to schedule an ECC in accordance with NRCP 16.1 for a year.<sup>11</sup> Despite Mr. Jones' assertion being completely incredible on its face, the Schneier Defendants' counsel pointed out that Mr. Jones' firm filed a bevy of lawsuits in that intervening years' time, with no COVID-19 issues associated therewith,<sup>12</sup> but when it came time to putting aside 5 minutes to schedule and conduct a required ECC, he was somehow prevented from doing so.

After the hearing on January 27, 2022, this Court issued an oral decision denying the Schneier Defendants' Motion to Dismiss and with it, SVH's Joinder thereto, struck the Plaintiff's ICC and ordered that an ECC be conducted within 14 days of the hearing to be arranged by Plaintiff and a JCCR be filed within 14 days thereof.<sup>13</sup> Moreover, Respondent further stated that Plaintiff's failure to comply with the Court's new order will be met with a less permissive Court.<sup>14</sup>

Respondent directed Plaintiff to prepare an order reflective of the Court's decision.<sup>15</sup> In accordance with EDCR 7.21, Plaintiff's counsel had 14 days within which to submit the order to the Court, i.e., by February 10, 2022. As has been the pattern in this case, Plaintiff's counsel failed to circulate any order, again in defiance

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<sup>11</sup> Petitioner's Appendix, pp. 108-111, ¶¶ 4-7

<sup>12</sup> Petitioner's Appendix, pp. 166:16 – 167:17

<sup>13</sup> Exhibit "F", pp. 171:24 – 172:9

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at p. 172:10-14



of the Court's rules and counsel's obligations. Therefore, SVH's counsel undertook the responsibility of preparing an order reflective of Respondent's decision and the history of the litigation leading up to the motion, circulating it among all counsel. Schneier Defendants' counsel approved our order. Instead of addressing the order we prepared, Plaintiff's counsel, for the first time, having recognized their failure to again comply with a Court order, circulated a different order to which the defendants could not agree to accept. Therefore, on March 14, 2022, SVH provided Respondent with its order and a letter of explanation reflecting the rationale for having to interpose same.<sup>16</sup> Plaintiff's counsel thereafter submitted his own order for the Court's consideration. Despite the numerous warnings by Respondent to Plaintiff's counsel that further defiance of court orders and rules will not be tolerated, Respondent rewarded Plaintiff's counsel once again, signing the order he failed to timely prepare and circulate.<sup>17</sup>

What has been most concerning is the level of deference Plaintiff's counsel and his predecessor have been accorded by Respondent at every turn, irrespective of their repeated defiance of procedures, orders and rules. Plaintiff's failure to timely conduct an ECC is not an isolated incident in this case. It represents a repeated pattern of disregard for the law by Plaintiff which made Respondent's decision to deny the Schneier Defendants' Motion to Dismiss and SVH's joinder thereto all the

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<sup>16</sup> Petitioner's Appendix, pp. 178-188

<sup>17</sup> Petitioner's Appendix, pp. 190-198

more egregious. It is that decision, in light of the mountain of procedural improprieties precipitated by Plaintiff's counsel in this case alone, which rises to the level of an abuse of discretion warranting this Court's intervention.

There was no COVID-19 reason for delay here. The sole reason for not conducting the ECC for a year was Plaintiff's counsel's sheer incompetence or disregard for the law. In fact, Plaintiff's counsel was required to attend multiple hearings on multiple motions in this matter alone, precipitated by his own improprieties. Somewhere in that time he could have and should have conducted the ECC but failed to do so. Thus, the finding that "plaintiff's counsel has experienced extreme disruption in the operation of their law firm as a result of the Covid-19 pandemic and other unforeseeable occurrences which constitute compelling and extraordinary circumstances"<sup>18</sup> was clearly erroneous, crying out for a remedy.

A Writ of Mandamus is proper to compel the performance of acts by Respondent from the office held by Respondent. Petitioner has no plain, speedy, or adequate remedy at law to compel the Respondent to perform its duty.

Petitioner's request for a Writ of Mandamus is necessary to compel Respondent to comply with the dictates of its office, to prevent further harm and injury to Petitioner and to compensate Petitioner for his damages. Petitioner requests

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<sup>18</sup> Petitioner's Appendix p. 193:18-20

the issuance of a Writ of Mandamus directing Respondent to issue an Order granting the Schneier Defendants' Motion to Dismiss for Plaintiff's Failure to Conduct A Timely ECC Per NRCP 16.1(e)(1) and SVH's Joinder thereto, and/or granting SVH's motion for reconsideration thereof.

This Petition is made and based upon the Affidavit following this Petition, the Petitioner's Appendix filed herewith, and the Memorandum of Points and Authorities filed herewith.

### **STATEMENT OF FACTS**

Plaintiff's underlying case alleges that on or about June 22, 2017, he was admitted to SVH with complaints of low back pain radiating to his left leg which followed multiple falls in the days preceding his admission.<sup>19</sup> He was specifically directed to SVH by Michael Schneier, M.D., ("Dr. Schneier") who saw Plaintiff in his personal office outside of SVH for purposes of undergoing surgery by Dr. Schneier.<sup>20</sup> Plaintiff further alleges that on June 22, 2017, Dr. Schneier performed a lumbar interbody fusion with posterior decompression and lumbar fixation on Plaintiff at L3-L4 and L4-L5 at SVH but claims that Dr. Schneier failed to advise him of the risks associated with the surgery he was to perform and that alternative

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<sup>19</sup> Petitioner's Appendix, pp. 82-83, ¶16.

<sup>20</sup> Petitioner's Appendix, p. 83, ¶17.

procedures were available which allegedly had lower rates of complication.<sup>21</sup> Plaintiff alleges that after surgery, he experienced extreme lower left extremity weakness.<sup>22</sup>

Plaintiff claims that he continued to treat with Dr. Schneier and proceeded to consult with two additional surgeons.<sup>23</sup> One surgeon, Kevin Debiparshad, M.D., Plaintiff alleges, stated that three of the six screws implanted by Dr. Schneier were malpositioned and recommended a surgery to reposition them.<sup>24</sup> Plaintiff asserts that it was only on August 14, 2018, after meeting with Dr. Debiparshad, that he first suspected alleged medical negligence by Dr. Schneier.<sup>25</sup>

Plaintiff's case against SVH is limited solely to an ostensible agency theory. Therefore, dismissal of Plaintiff's case against the Schneier Defendants automatically results in the dismissal of his case against SVH.

The remaining facts and procedural history giving rise to the instant Petition have been fully articulated above.

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<sup>21</sup> Petitioner's Appendix, p. 83, ¶18 and p. 84, ¶25.

<sup>22</sup> Petitioner's Appendix, p. 83, ¶20.

<sup>23</sup> Petitioner's Appendix, pp. 83-84, ¶¶22-23.

<sup>24</sup> Petitioner's Appendix, p. 84, ¶23.

<sup>25</sup> Petitioner's Appendix, p. 84, ¶24.

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

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

A writ of mandamus is an extraordinary remedy that may be issued to compel an act that the law requires. *Cote H. v. Eighth Judicial Dist. Court*, 175 P.3d 906, 907-08, 124 (Nev. 2008). A writ of mandamus may also issue to control or correct a manifest abuse of discretion. *Id.* A writ shall issue when there is no plain, speedy and adequate remedy in the ordinary course of law. Nev. Rev. Stat. § 34.170; *Sims v. Eighth Judicial Dist. Court*, 206 P.3d 980, 982 (Nev. 2009). This Court has complete discretion to determine whether a writ will be considered. *Halverson v. Miller*, 186 P.3d 893 (Nev. 2008) (“the determination of whether to consider a petition is solely within this court’s discretion.”); *Sims*, 206 P.3d at 982 (“it is within the discretion of this court to determine whether these petitions will be considered.”).

This Court should exercise its discretion to consider and issue a Writ of Mandamus in this case directing Respondent to grant the Schneier Defendants’ motion to dismiss and SVH’s joinder thereto and/or SVH’s motion to reconsider in its entirety due to Plaintiff’s unjustified failure to follow the dictates of NRCP 16.1(e)(1) by more than 6 months in the wake of years of abuse of the litigation process by Plaintiff’s counsel. The Respondent manifestly abused its discretion when it denied the Schneier Defendants motion, SVH’s joinder thereto and SVH’s motion for reconsideration when factoring all of the considerations the law requires. This clear error of law has and continues cause SVH to proceed with extensive

discovery, and the extraordinary expenses associated therewith, as well as trial on a case in which Plaintiff repeatedly failed to follow the law and proffered a false excuse for not having done so. For Respondent to once again defer to Plaintiff and accept his counsel's repeated contrived excuses, runs directly counter to the holdings of this Court on such an issue. There is no adequate, speedy remedy available at law to address this continuing injury to SVH.

SVH is aware that this Court may exercise its discretion to decline to hear these issues unless they are brought before it on appeal. However, these issues are better addressed at the current time. This issue is appropriate for interlocutory review because it involves (1) an issue, if decided in favor of SVH, that is entirely case dispositive, and (2) upholds this Court's holdings on compliance with NRCP 16.1(e)(1).

Additionally, it addresses a recurring and important issue of the statutory scheme regarding professional negligence as well as pressing public policy issues regarding the protection of medical providers in this state. This Court has repeatedly stated that a writ of mandamus is an appropriate remedy for important issues of law that need clarification or that implicate important public policies. *Lowe Enters. Residential Ptnrs., L.P. v. Eighth Judicial Dist. Court*, 118 Nev. 92, 97 (2002) ("We have previously stated that where an important issue of law needs clarification and public policy is served by this court's invocation of its original jurisdiction, our consideration of a petition for extraordinary relief may be justified."); *Business*

*Comput. Rentals v. State Treasurer*, 114 Nev. 63, 67 (1998) (“Additionally, where an important issue of law needs clarification and public policy is served by this court’s invocation of its original jurisdiction, our consideration of a petition for extraordinary relief may be justified.”).

Thus, in accordance with the above authorities, Petitioner respectfully requests that this Court choose to accept this Petition for Writ of Mandamus for review.

**B. Respondent Manifestly Abused its Discretion by Denying the Motion to Dismiss and Joinder Thereto As Well as SVH’s Motion for Reconsideration of Same**

NRCP 16.1 (b) states that , "all parties who have filed a pleading in the action must participate in an early case conference." "The early case conference must be held within 30 days after service of an answer by the first answering defendant." NRCP 16.1(b)(2)(A). The responsibility for setting the early case conference falls on the Plaintiff. NRCP 16.1 (b) (4) (A).

The parties are required to participate in an early case conference unless the following exemptions apply:

- (A) the case is exempt from the initial disclosure requirements under Rule 16.1(a)(l)(B);
- (B) the case is subject to arbitration under Rule 3(A) of the Nevada Arbitration Rules (NAR) and an exemption from arbitration under NAR 5 has been requested but not decided by the court or the commissioner appointed under NAR 2(c);

- (C) the case is in the court-annexed arbitration program;
- (D) the case has been through arbitration and the parties have requested a trial de novo under the NAR;
- (E) the case is in the short trial program; or
- (F) the court has entered an order excusing compliance with this requirement.

NRCP 16.1 (b) (1).

When a plaintiff fails to comply with requirements of NRCP 16.1(b), a Court may dismiss the Complaint, without prejudice, under NRCP 16.1(e)(1) which provides the following:

If the conference described in Rule 16.1(b) is not held within 180 days after service of an answer by a defendant, the court, on motion or on its own, may dismiss the case as to that defendant, without prejudice, unless there are compelling and extraordinary circumstances for a continuance beyond this period.

NRCP 16.1(e).

As the Nevada Supreme Court noted in *Dougan v. Gustaveson*, 108 Nev. 517, 523, 835 P.2d 795, 799 (1992) [internal quotation marks omitted], abrogated on other grounds by *Arnold v. Kip*, 123 Nev. 410, 415, 168 P.3d 1050, 1053 (2007), the enforcement provisions of NRCP 16.1 “recognize judicial commitment to the proposition that justice delayed is justice denied.” That is the purpose of the Rule which the *Arnold* Court required the district court to analyze in determining whether



to dismiss a case for failure to comply with the Rule's time constraints.

Under *Arnold, supra*, this Court stated:

This court has not explicitly articulated the standard under which we will review orders granting motions to dismiss under NRCP 16.1(e)(2). However, in evaluating sanctions imposed under NRCP 16(f) for pretrial conference noncompliance, we have indicated that those sanctions are within the district court's discretion. 6 NRCP 16.1(e)(2), like NRCP 16(f), provides that the district court "may" sanction noncompliance with the rule and therefore leaves the matter to the district court's discretion. Accordingly, we review the district court's order granting a motion to dismiss under NRCP 16.1(e)(2) for an abuse of discretion.

*Id.* at 414, 168 P.3d at 1052. In light of the history of Plaintiff's non-compliance with statutes, rules, procedures and court orders in this case, only a fraction of which was articulated above, it was clearly erroneous for Respondent to find that Plaintiff had good cause for not timely conducting an ECC **for six months beyond the outside deadline for doing so**, and continuing the pattern of extending a lifeline to Plaintiff and his counsel when they clearly have no respect for proper practice, orders and requirements.

Even more problematic is that Plaintiff precipitated the very delays in this case, prejudicing the respective defendants due to extraordinary delays in commencing discovery, now **five years after** the alleged acts giving rise to this matter..

Moreover, *Arnold* provided a roadmap which a district court should follow in determining the propriety of dismissal of a case for a party's failure to conduct a

timely ECC:

The decision to dismiss an action without prejudice for a plaintiff's failure to comply with the timing requirements of NRCP 16.1(e)(2) remains within the district court's discretion. NRCP 16.1(e)(2) was adopted to promote the prosecution of litigation within adequate timelines, and it permits sanctions to ensure compliance with specific deadlines. Therefore, **the factors to be considered by the district court in dismissing an action under NRCP 16.1(e)(2) should be those that relate to the purpose of the rule. A nonexhaustive list of such factors includes the length of the delay, whether the defendant induced or caused the delay, whether the delay has otherwise impeded the timely prosecution of the case, general considerations of case management such as compliance with any case scheduling order or the existence or postponement of any trial date, or whether the plaintiff has provided good cause for the delay. Going further, just as the defendant is not required to demonstrate prejudice resulting from the delay, neither is the district court required to consider the plaintiff's inability to pursue his claim after an NRCP 16.1(e)(2) dismissal because the statute of limitations may expire.** The district court's consideration of a motion to dismiss without prejudice should address factors that promote the purpose of the rule, rather than factors that focus on the consequences to the plaintiff resulting from his or her failure to comply with the rule.

*Id.* at 415-16, 168 P.3d at 1053-54 (emphasis supplied).

“Absent compelling and extraordinary circumstances, neither the court nor the parties may extend the time [to conduct the conference] to a day more than 180 days after an appearance is served by the defendant in question.” NRCP 16.1(b)(1). Thus, it was incumbent upon Plaintiff to demonstrate “compelling and extraordinary circumstances” for not conducting the ECC within 180 days from the Schneier

Defendants' interposition of their answer on December 15, 2020. Essentially, all which was required of the defendants in this case was to present evidence that more than 180 days elapsed from the time to conduct the ECC. Defendants demonstrated just that fact and Respondent properly determined that the time to conduct same commenced on December 15, 2020. There was no reason, much less a compelling one, why Plaintiff failed to timely conduct an early case conference in this matter, despite the declaration of Kimball Jones, Esq. for the manufactured excuse of COVID-19. Given the uncontestable history of the litigation in this matter coupled with the undeniable truth that Mr. Jones' firm initiated a bevy of lawsuits during the very timeframe within which he was to have conducted an ECC in this case, dispelled any notion that he was understaffed or prevented in any way by the COVID-19 pandemic from initiating and participating in a very short, perfunctory obligation required to commence discovery in this matter. Everything which inured to Plaintiff's detriment during the timeframe of COVID-19 pandemic due was in no way due to the pandemic itself or the problems associated therewith, but rather to his counsel's own refusal to follow the rules and move this matter forward. Plaintiff should not have been rewarded and Defendants should not have been permitted to be prejudiced by the excessive delay of Plaintiff's own making.

What was uncontested on the original motion was that this matter is not subject to arbitration, was not in the court-annexed arbitration program and had not been through arbitration. This matter was also not in the short trial program, nor had

there been any order excusing compliance with NRCP 16.1 (b). As such, Plaintiff was required to set an early case conference by June 13, 2021. Plaintiff failed to do so for almost one year after he was supposed to. Up to the point the Schneier Defendants moved to dismiss and SVH joined said motion, Plaintiff made no attempt to even set an ECC. As Plaintiff has failed to timely hold an ECC, Respondent should have dismissed this case as to the Schneier Defendants, and due to principles of ostensible agency, dismissed as against SVH, pursuant to NRCP 16.1(e).

This Court in *Arnold* emphasized was that a defendant **is not required to demonstrate prejudice when seeking dismissal for a Plaintiff's violation of NRCP 16.1(e)**. Specifically this Court held:

**the party moving for dismissal under NRCP 16.1(e)(2) is not required to demonstrate prejudice**, and the district court is not required to consider whether the defendant has suffered prejudice because of the delay in the filing of the case conference report. Nothing in the language of NRCP 16.1(e)(2) -- either the earlier version or the current version -- requires the defendant to demonstrate prejudice or the district court to determine whether the defendant has suffered prejudice as a condition to granting a dismissal without prejudice.

**To hold otherwise would largely eviscerate the rule because it would allow plaintiffs to exceed the deadline for filing a case conference report as long as the defendant could not demonstrate prejudice.**

*Arnold, supra.* at 415, 168 P.3d 1053 (emphasis added). While not required to demonstrate prejudice, the prejudice was obvious. All parties were precluded from initiating any discovery pursuant to NRCP 16.1, 33 and 34 due to the Plaintiff's

abject failure to fulfill his obligations to initiate and conduct the ECC. The delay was not minimal. The motion to dismiss was not made until nearly one year after the Schneier Defendants' answer was interposed and exceeded the outside deadline for conducting an ECC by 6 months. That was in addition to the multiple delays precipitated by Plaintiff's counsel's improper pleadings which required multiple motions to dismiss and/or strike **over the course of several years**. Even then, Plaintiff's predecessor counsel, Mr. Jones, repeatedly claimed that he "misunderstood" Court orders, "overlooked" his failures to circulate and file orders he was directed to prepare, etc. Again, the failure to conduct the ECC in this case was not an isolated incident. It is illustrative and comprises a pattern of purposeful or incompetent neglect by Plaintiff's counsel to prosecute this case, all with the generous indulgences of Respondent at the Defendants' expense. Thus, Respondent's decisions, when viewed in conjunction with the parade of nonsense created and conducted by Plaintiff, was clearly erroneous.

Plaintiff provided no compelling and extraordinary circumstances in this case warranting the denial of the Schneier Defendants' motion and SVH's joinder thereto. The COVID-19 excuse proffered by Mr. Jones' declaration in opposition to the motion was a manufactured misstatement of fact interposed to attempt to create an excuse where none existed. He failed to provide an explanation why he was able to spend hours in hearings on motions in this case, why he was able to improperly interpose a Third Amended Complaint, only to have it stricken, why he was able to

initiate a host of other unrelated lawsuits during the 180 days he had to conduct the ECC, but the few minutes to actually conduct the ECC was prevented by COVID and his staffing issues. That is utter nonsense, and for Respondent to have accepted the proffered excuse or given it any credence in light of the case history, let alone sound and prudent judgment based on a simple perception of the situation or facts of this case, was an abuse of discretion which must be rectified by reconsideration and reversal of Respondent's order denying the motion to dismiss and joinder thereto.

SVH's joinder to the Schneier Defendants' underlying motion to dismiss required dismissal of the case against SVH, since the sole remaining theory of liability remaining against SVH, after dismissal of all other causes of action and theories of liability on extensive motion practice, is that of ostensible agency. Ostensible agency is predicated solely on a theory of vicarious liability. *See, McCrosky v. Carson Tahoe Reg'l Med. Ctr.*, 133 Nev. 930, 934, 408 P.3d 149, 153 (2017). Vicarious liability is derivative of direct liability, which is based on some sort of status relationship between the accused and the primary actor. *See, Batt v. State*, 111 Nev. 1127 (1995).

Dismissal of the underlying negligence action extinguishes a derivative claim for vicarious liability. *Okeke v. Biomat USA, Inc.*, 927 F.Supp.2d 1021, 1028 (D.Nev.2013). *See also Mitschke v. Gosal Trucking, LDS*, 2014 WL 5307950, at \*2-3 (D. Nev. Oct. 16, 2014) (vicarious liability is not an independent cause of action

and does not survive dismissal of the direct claim). *Fernandez v. Penske Truck Leasing Co., L.P.*, 2012 WL 1832571, at \*1 n.1 (D. Nev. May 18, 2012); *Hillcrest Investments, Ltd. v. Robison*, 2015 WL 7573198, at \*2 (D. Nev. November 24, 2015); *Long v. Las Vegas Valley Water District*, 2015 WL 5785546, \*7 (D. Nev. October 1, 2015); *Phillips v. Tartet Corp.*, 2015 WL 4622673, \*5 (D. Nev. July 31, 2015). *See also Wright v. Walkins*, 968 F.Supp.2d 1092 (D.Nev.2013).

In *Allison v. Lott*, 2019 Nev. Dist. LEXIS 860 (Nev. Dist. Ct. August 28, 2019), CASE NO. A-16-747551-C,<sup>26</sup> Plaintiffs' claim against St. Rose Hospital was predicated solely on negligent hiring, training and supervision. Plaintiffs dismissed the case against the two covered medical providers employed by St. Rose. The Court held that by dismissing the two providers, St. Rose could not be held liable for negligent hiring, training and supervision because such a claim is derivative only and predicated solely on a theory of vicarious liability,. Lacking the underlying negligence claim, the derivative claim is automatically extinguished.

Likewise in this case, Plaintiff's sole claim against SVH is based on ostensible agency, a theory of vicarious liability. Upon dismissal of Plaintiff's claims due to counsel's abject and inexcusable failure to conduct an early case conference within 180 days of the interposition of Schneier's answer, and what amounts to almost a year thereafter, any vicarious liability claims against SVH are automatically

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<sup>26</sup> This case should be familiar to Plaintiff's counsel as Mr. Jones' firm litigated it and was the recipient of the dismissal order as to St. Rose based upon the previously cited case law.

extinguished.

## CONCLUSION

In accordance with the above, SVH respectfully requests that this Court grant its Petition for Writ of Mandamus and order the Respondent to grant the Schneier Defendants' motion to dismiss and/or grant SVH's motion to reconsider same in its entirety.

Dated this 23<sup>rd</sup> day of June, 2022.

LEWIS BRISBOIS BISGAARD &amp; SMITH LLP

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

STATE OF NEVADA     )  
                              ) ss:  
COUNTY OF CLARK    )

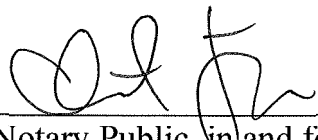
Adam Garth, Esq., being first duly sworn, deposes and states:

1. I am an attorney of record for Petitioner and make this Affidavit pursuant to Nev. R. App. P. 21(a)(5).
2. The facts and procedural history contained in the foregoing Petition for Writ of Mandamus and Memorandum of Points and Authorities are based upon my own personal knowledge as counsel for Petitioner. This Affidavit is not made by Petitioner personally because the salient issues involve procedural developments and legal analysis.
3. The contents of the foregoing Petition for Writ of Mandamus and the Memorandum of Points and Authorities are true and based upon my personal knowledge, except as to those matters stated on information and belief.
4. All documents contained in the Petitioner's Appendix, filed herewith, are true and correct copies of the pleadings and documents they are represented to be in the Petitioner's Appendix and as cited herein.
5. This Petition complies with Nev. R. App. P. 21(d) and Nev. R. App. P. 32(c)(2).

FURTHER YOUR AFFIANT SAYETH NAUGHT.

  
ADAM GARTH, ESQ.

Subscribed and sworn before me  
This 23<sup>rd</sup> day of June, 2022.

  
Notary Public, in and for said County and State



## **CERTIFICATE OF COMPLIANCE**

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

This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point type

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 21(d) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 6,786 words.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions if the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 23<sup>rd</sup> day of June, 2022.

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## CERTIFICATE OF MAILING

I hereby certify that on this 1<sup>st</sup> day of July, 2022, I served the foregoing **PETITION FOR WRIT OF MANDAMUS** upon the following parties by placing a true and correct copy thereof in the United States Mail in Las Vegas, Nevada with first class postage fully prepaid:

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By /s/ Heidi Brown  
An Employee of LEWIS BRISBOIS  
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