

Steven D. Grierson

Form 1. Notice of Appeal to the Supreme Court From a Judgment or Order of a District Court

No. A-21-842763-C

Dep. No. 30
Electronically Filed
Aug 03 2022 04:28 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

IN THE 8 JUDICIAL DISTRICT COURT OF THE
STATE OF NEVADA IN AND FOR
THE COUNTY OF Clark

A. B., Plaintiff }
v. }
C. D., Defendant }

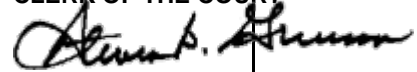
NOTICE OF APPEAL

Sharon McDougal v. Dr. Golta Tabassi i Defendants
Notice is hereby given that C. D., defendant above named, hereby appeals to the Supreme Court of Nevada (from the final judgment) (from the order (describing it)) entered in this action on the 29 day of July, 20 22

/s/ Sharon McDougal

Attorney for C.D.

Address



1 ASTA

2
3
4
5
6 **IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE**
7 **STATE OF NEVADA IN AND FOR**
8 **THE COUNTY OF CLARK**
9

10 SHARON MCDOWELL,

11 Plaintiff(s),

12 vs.

13 SOUTHERN HILLS MEDICAL HOSPITAL;
14 HOSPITAL CORPORATION OF AMERICA;
15 SUNRISE HEALTHCARE SYSTEM; DR. GUITA
16 TABASSI; DR. LINDA TRAN; INSURANCE CO.;
17 PATHOLOGIST,

18 Defendant(s),

Case No: A-21-842763-C

Dept No: VII

19 **CASE APPEAL STATEMENT**
20

21 1. Appellant(s): Sharon McDowell

22 2. Judge: Jerry A. Wiese

23 3. Appellant(s): Sharon McDowell

24 Counsel:

25 Sharon McDowell
26 3375 Rainbow Blvd., Apt. 8102
27 Las Vegas, NV 89117
28

1 4. Respondent (s): Southern Hills Medical Hospital

2 Counsel:

3 Mari K. Schnaan, Esq.
4 1140 N. Town Center Dr., Ste. 350
5 Las Vegas, NV 89144

6 Respondent (s): Hospital Corporation of America; Sunrise Healthcare System; Dr. Guita Tabassi;
7 Dr. Linda Tran; Insurance Co.; Pathologist

8 Counsel:

9 unknown

10
11 5. Appellant(s)'s Attorney Licensed in Nevada: N/A
12 Permission Granted: N/A

13 Respondent(s)'s Attorney Licensed in Nevada: Yes
14 Permission Granted: N/A

15 Respondent(s)'s Attorney Licensed in Nevada: N/A
16 Permission Granted: N/A

17 6. Has Appellant Ever Been Represented by Appointed Counsel In District Court: No

18 7. Appellant Represented by Appointed Counsel On Appeal: N/A

19 8. Appellant Granted Leave to Proceed in Forma Pauperis**: Yes, October 19, 2021
20 **Expires 1 year from date filed
21 Appellant Filed Application to Proceed in Forma Pauperis: N/A
22 Date Application(s) filed: N/A

23 9. Date Commenced in District Court: October 15, 2021

24 10. Brief Description of the Nature of the Action: NEGLIGENCE - Medical/Dental

25 Type of Judgment or Order Being Appealed: Dismissal

26 11. Previous Appeal: No

27 Supreme Court Docket Number(s): N/A

28 12. Child Custody or Visitation: N/A

1 13. Possibility of Settlement: Unknown

2 Dated This 2 day of August 2022.

3 Steven D. Grierson, Clerk of the Court

4
5 /s/ Heather Ungermann

6 Heather Ungermann, Deputy Clerk

7 200 Lewis Ave

8 PO Box 551601

9 Las Vegas, Nevada 89155-1601

10 (702) 671-0512

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
cc: Sharon McDowell

Steven D. Grierson

BREF

1 Sharon McDowell
(Name)
2 MSsharonmcdowell@gmail.com
(Address)
3 Las Vegas Nevada
(City, State, Zip)
4 702-328-4269
(Telephone)

5 ☒ Plaintiff/ ☐ Defendant, *Pro Se*

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

8 Sharon McDowell

10 Plaintiff(s),

11 vs. Dr. Guita Tabassi

12 Dr. Unda Tran

13 Hospital Corporation of America

14 Insurance Companies vs. Pathologist

Defendant(s).

Southern Hills Medical Hospital - Sunrise
SYSTEM

Case No.: A-21-842763-C

Dept. No.: 30

Date of Hearing: N/A

Time of Hearing: N/A

APPELLATE BRIEF

16 ☒ Appellant/ ☐ Respondent, Sharon McDowell (your name), appearing

17 *pro se*, submits this Appellate Brief pursuant to JCRCP 75 and NRAP 28.

I. TABLE OF CONTENTS AND AUTHORITIES

19 II. Statement of the Issues Presented for ReviewPage 1

20 III. Statement of the Case.....Page 2

21 IV. Argument Page 3

22 V. ConclusionPage 4

23 VI. Certificate.....Page 4

24 The District Court is directed to the following legal authority, which supports the
25 argument contained in this brief (list any legal authority cited by you in the Argument section of your brief, if

26 any): Defendants willfully deceived the court and engaged in
27 conduct utterly inconsistent with the orderly administration
28 of justice.) Eppes v. Snowden, 656 F. Supp. 1267 1279 -
Continued next pg.

Fraud On The Court : Intentional Fraudulent
Conduct Specifically directed at the Court itself¹⁴
16 Nev. L. J. 707, HAGUE FINAL.DOCX
Page - [VOL. 16: 707] Nevada Law JOURNAL

¹³ See, e.g., Combs v. Rockwell Int'l Corp., 927 F.2d
486, 488, (9th Cir. 1991) (relying on Rule 11 where
Council made thirty-six changes on a deposition
extrata sheet after the client advised that the transcript
was accurate and the testimony was correct); Braxton
Sav. Bank v. Peat Marwick, Mitchell & Co., 771 F.2d
511-12 (1st Cir. 1985) (affirming district court's entry
of default judgment under court's inherent powers in
response to defendant's abusive litigation practices);
Wyle v. R.J. Reynolds Indus. Inc., 709 F.2d
585, 589 (9th Cir. 1983) ("[C]ourts have
inherent power to dismiss an action
when a party has willfully deceived the
court and engaged in conduct utterly inconsistent
with the orderly administration of justice.");
Eppe v. Snowden, 656 F. Supp. 1267, 1279
(E.D. Ky. 1986) (finding that where fraud
is committed upon the court, the court's

(710
pgs 4 of 36)

(P8)
Continued

power to dismiss is inherent "to protect the integrity of its proceedings".

13 C.B.H. Resources, Inc. v. Mars Forging Co., 98 F.R.D. 564, 569 (W.D. Pa. 1983) (dis-

missing under Fed. R. Civ. P. 41(c) where party's fraudulent scheme, including use of a bogus subpoena, was "totally at odds with the... notions of fairness central to our

System of litigation).

14 See, e.g., *Herring v. United States*, 421 F.3d 384, 386-87 (3d Cir. 2005).
15 See, e.g., *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1338 (5th Cir. 1978).

Good Cause Laws in Abroad - Then your Guilty of FRAUD IF YOU PARTICIPATE.

16 Nev. L.J. 707, HAGUE-FINAL.DOCX

4/12/16 6:31pm

Spring 2016] FRAUD ON THE COURT

Chinery, (3) the victim's status during the underlying litigation—i.e., whether the harmed party was in position to recognize and combat the fraud at issue pre judgment—and (4) the relief sought. Part III also utilizes the four-step process to demonstrate that advancing falsehoods during the discovery process is a form of fraud on the court and that courts have equitable power to entertain a party's motion that seeks to set aside a judgment based upon fraud during the discovery process.

I ABUSIVE DISCOVERY PRACTICE
A. Common Discovery Abuse ATTACH pg 7/11

Patients have a right to ethical, honorable and proficient medical care under their physicians. As set forth in NRS 41A.017, Defendants fell below the standard of care. Life changing injuries, suffered unduly. Catastrophic personal injury, to a patient that was healthy with all organs & limbs intact - cutting off body parts. Falsifying Medical Records. Harming the patient. Withholding Medical records. Lying

I suffered harm due to a preventable medical act, Dr. Tabassi, Dr. Tran. Other defendants and the hospital refused to accept fault for negligence and even falsified medical records in an attempt to cover up their wrongdoings, Southern Hills Medical Hospital covered up this mistake 1 year 9 months. They lied refused to give me all my medical records, images.

Anthony A Manager told me they did not have medical records for Oct 16, 2020 there was nothing and no operative report. Promised to mail me all medical records. Exhibit - Medical Records mailed to me 2021

From Anthony. I learned there were two sets of Medical Records. Defendants owed plaintiff a duty to use the care Skill Ordinarily exercised by Physicians to use reasonable diligence of and best judgment in the exercise of skill and learning in a effort to accomplish the purpose for which they were employed. Such a breach was proximate. STAFF fell below the STANDARD OF CARE which ultimately RESULTED IN DAMAGES

Sustained by Sharon McDowell

1 **II. ISSUES PRESENTED FOR APPEAL**

2 This appeal presents the following issues to be determined by the District Court (provide a
3 short explanation of why you are seeking appellate relief or why appellate relief is not warranted):

4 Negligence - FALSIFIED MEDICAL RECORDS, Hid patients
5 Medical Records for 1 year 9 months. A person can not get a
6 fair Trial without the Correct Medical Records so they know what
7 happen to them.

8 **II. STATEMENT OF THE CASE**

9 This is an appeal from a judgment entered by the Justice Court on the 29 day of
10 April, 2022, in which the Justice Court found in favor of the ☐ Plaintiff/
11 ☒ Defendant, _____ (name), who is the ☐ Appellant/ ☐ Respondent on
12 appeal, and awarded (describe the damages or other relief awarded in the judgement):

13 ☐ Money damages in the amount of \$ _____, and/or

14 ☒ Other relief as follows: dismissed the case.

15 Attorney guilty of Rambo Lawyering. Crossed Ethical Lines, wasn't Honest.

16 The following facts are relevant to the issues on appeal (briefly explain what your case is about;
17 list the facts that are important to your case, with references to the evidence you presented; and explain what
18 happened in the Justice Court): My case is about Medical Malpractice. I went to

19 Southern Hills Medical Hospital for a DC procedure, A biopsy
20 of fibroids. I had irregular bleeding wanted to make sure I
21 did not have cancer. I authorized a 30 min procedure. Woke
22 up upset felt confused. Later found that I had body parts
23 missing and Organs missing. etc. wholes tares inside vagina-walls.
24 After recieving Medical Records from Southern Hills Medical Hospital
25 Early 2021 I learned that I had been put to sleep for 45 min
26 Doctor Tabassi put me to sleep a extra 15 minutes. There
27 was a massive amount of Blood Loss. Un Authorized Medical
28 Surgeries that were not Needed or part of October 16, 2020
authorized-DC procedure.

October 16, 2020 Sharon Maxwell Underwent Surgery.
While the first agent, the Paralytic, was properly
administered. The second one was not. The
patient woke up. That meant the patient was
awake and could feel everything but was
paralyzed and could not move or speak.
I experienced ANESTHETIC AWARENESS.
From failing to properly ANESTHETIZE ME.
The surgery was inside my uterus. Yet damage injury outside surgical area.
I woke up after the DC procedure. I was in a
different room. I saw 3 people at my feet. They
were standing looking at me. I saw Dr. Guita Tabassi.
I saw Dr. Linda Tran. I saw a male Doctor Asian
descent. My legs were pushed back like having a baby.
There was a object on, attached to my vagina lips 2 1/2 x 5
inches of flesh. My lips were between the blue green
plastic object circular with teeth. I could see my
flesh drooping. My lips hanging over the plastic
device. I thought she's tearing up my vagina. After
a few seconds I was able to speak I said your
tearing up my vagina. Dr. Tabassi came to my bedside
said you had to have a Hysterectomy I slurred
Hysterectomy recall crying. I felt excruciating

pain recalled Seeing a Metal tray with Organs On it. I don't understand why these Doctors Hurt Me. Tabassi and Tran Were Facing me. The Male Dr. turned away. The Asian decent Male took the tray with the Organs on it. He walked away I passed out. I kept blacking in out. Wake up, black out.

Screaming Hollaring Crying from Escrucating Pain. Before the Asian Male took the Metal tray away with my Organs on it. I saw that my Vagina Lips $2\frac{1}{2} \times 5 = 5\frac{1}{2}$ inches were still Attached to my body but drooping. The blood Circulation was being Cut Off. When I woke up After Surgery October 16, 2020 My Vagina Lips were NOT Attached. I was cut to the bone. Nerves glands etc were cut off. Tendons. (etc) Before Surgery on * October 16, 2020 I had a normal vagina and All OF MY Organs. Later I noticed My Vagina was Amputated. Ulvar cut Sewn together. She Mutilated My Vagina. She, They disfigured me.

To date. July 29, 2022 My Vagina Lips are no longer attached parts were cut off. For Personal GRATIFICATION - HATE.

* Mid-2021 I had a bad stomach Infection went to A Hospital.

2021 - 2022 I have gone to Doctors to find out

What is wrong with me? What happened to me?

I have Information Discovery for Injuries. I WAS Healthy Happy. My papsmeear results for 2020 said NO Cancer. GUITA TABASSI INSISTED I GET A DC PROCEDURE.

ARGUMENT ↓

The tools for a DC procedure are not the same for Amputations. A needle and thread were not needed for A DC procedure of Fibroids. Tabassi Concealed Medical tools the Needle, thread were used to Sew my Vagina together no Vulvar lips etc!

III. ARGUMENT

The position and contentions of ☒ Appellant/ ☐ Respondent on appeal are as follows

(explain to the Court why you believe this appeal should or should not be granted, directing the Court to the important facts and law that support your position): Fraudulent Concealment. Fraud

on the Court is: A bias for the Civil Rules of Civil procedure. Plaintiff is deserving of a New Trial. December 2020 after getting off bedrest. Sharon McDowell went to a Doctors visit with Guita Tabassi. I had not seen her or heard from her since October 16, 2020 I asked the Doctor Tabassi if any of my organs were ~~TAKEN~~. If any other Surgeries were done on me Oct 16, 2020 besides the DC procedure. After laughing in my face. Tabassi responded no other Surgeries were done. We wouldn't want to take anything from you. I told Tabassi I recalled waking up in the Surgery Room, I recalled a Conversation with her where she came over and told me I had to have a Hysterectomy. She denied it kept lying. Saying she never told me I had to have a Hysterectomy. Lying when she knew the Truth. I was Hysterical. After the Doctor Visit, she said Don't come back here unless you start Bleeding. Told me to go to a MD for check ups. Don't go to an OBGYN! Medical records and Images show missing organs Body Parts, TO DATE, 7/2022 There has been a Miscarriage of Justice, SHE ALSO took Ovaries And knew I would not have a Menstrual cycle. NO Blood.

|| Argument Continued Attachment

Alteration of Medical Records. Doctor tried to hide evidence. First falsifying a medical record is a crime punishable by a fine or even jail time. Additionally, altering medical records can make it harder for doctors to win medical malpractice cases. Southern Hills Medical Hospital hid records.

Juries do not trust liars, and a questionable change to a record implies that something is being covered up. In other words, the consequences of getting caught altering a medical record are probably worse than the consequences of telling the truth.

Secondly, it is hard to get away with falsifying medical records. Usually, in medical settings, documents are shared among doctors and nurses. Not to mention a patient's health insurance provider and testing facilities.

Discrepancies can be spotted among different copies of a document as well as in a patient's medical bills. With written records, forensic scientist caught when

a document has been changed by looking at inks and indentations in the paper. It's also easy to track changes in electronic documents.

Despite the risk, we still see altered medical records. Sometimes when a healthcare provider's caught, difficult cases suddenly become much easier to win. Conversely, cases with a lot of promise are sometimes lost because there is not an accurate record of what happened, preventing lawyers from being able to support their case with evidence. There was underlying harm to the patient.

Altering a medical record is a crime and can also be used against doctors in medical malpractice cases. However, it is not illegal for medical professionals to make honest updates to records, as long as they properly mark what they are doing and do not DISGUISE information.

A healthcare provider who knowingly or willfully destroys, alters, or otherwise obscures a medical record or other information about a patient to conceal evidence is guilty. Subject to fine and imprisonment. They will also lose their license.

The doctor, The Hospital LIED to protect themselves.

Ilegally Altered Medical Records
DC procedure was done incorrectly the patient
has Permanent Injuries - Change of Life. destroyed
Suffers daily - Dr. Labassi Southern Hills Medical Hospital
MRS 228.410 MEDICAL FRAUD
MRS 228.411
MRS 228.412 Insurance Fraud

II Legal Argument continued

A. Plaintiff is Entitled to an Entry of
Judgment, A NEW TRIAL. TO MAKE
MATTERS WORSE, THE HOSPITAL COVERED
UP THIS FOR 1 year 9 months with no
Regard to Sharon Maxwell's feelings.

V. CONCLUSION

Based upon the facts and argument set forth above, ☒ Appellant/ ☐ Respondent asks this Court to ☒ reverse/ ☐ uphold the Justice Court's judgment.

VI. CERTIFICATE

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.

DATED this 27 day of July, 20 22.

Respectfully submitted:

Sharon McDowell (signature)
SHARON McDOWELL (print name)
☒ Plaintiff/ ☐ Defendant, Pro Se

CERTIFICATE OF MAILING

I HEREBY CERTIFY that service of the foregoing **APPELLATE BRIEF** was made on (insert date) 29 July, 20 22, pursuant to NRCP 5(b) and JCRCP 5(b), by depositing a copy of the same in the United States Mail in Las Vegas, Nevada, postage prepaid, addressed as follows (insert name and address of the opposing party's attorney, or opposing party if unrepresented): Southern Hills Medical Hospital

Dr. Gulta Tabessi, Dr. Linda Tran
Hospital Corporation of America
Insurance Co. vs. Pathologist
Sun Rise Health Care System

July 29, 22
(Date)

Sharon McDowell
(Type or print name)

Sharon McDowell
(Signature)

Points And AuthoritiesI #Factual Background

On or about 9/10/20 - 10-16-2020 Defendants entered into: A agreement with the plaintiff on the Medical procedure and what would be done. Dc of fibroids a 30 min procedure

Exhibit - A B C D

Support (proof) of two sets of Medical Records

Continuation to
Page ____ of ____.

Page _____ of _____

CASE #: _____

Continuation to
Page ____ of ____.

Page _____ of _____

CASE #: _____

III CONCLUSION

WHERSTONE, Plaintiff, Suffers daily with
Chronic pain, depression, numbness in the hands
feet, forearm. Abdominal pain.
Plaintiff has permanent CATASTROPHIC
Injuries.

AFFIRMATION 2

Furthermore, pursuant to NRS 239B.030, the undersigned affirms that this document does not contain the Social Security Number of any person.

DATE July 27, 2022

proper

Need CERTIFICATE OF SERVICE ATTACHED

Proof Service

EXHIBIT A



Valued Patient,

Thank you for choosing Southern Hills Hospital for you and/or your loved one's healthcare needs. As a valued patient we want to inform you about recent changes to our visitor policies.

During this extraordinary public health crisis, I've been very proud how our Southern Hills family has continued to serve our community, demonstrating our commitment to the care and improvement of human life. We recognize an important aspect of a patient's healing journey is support from their loved ones.

We are pleased that COVID levels are decreasing in the hospital and the community. As a result, we're able to expand our visitor policy at this time. Southern Hills Hospital will allow visitors to the following areas:

- Inpatient areas:
 - One (1) adult visitor, 18 years or older, per patient
 - Visitor hours: 12 p.m. - 8 p.m.
- Outpatient Surgery:
 - One (1) adult visitor, 18 years or older, per patient
- ER, Labor & Delivery/Mother-Baby Units, Pediatrics areas:
 - One (1) adult visitor, 18 years or older, per patient
 - Visitor hours are 24-7
- NO visitors allowed for COVID patients or those patients being evaluated for the virus (PUIs)

However, due to Governor Sisolak's new policy, all patients, visitors, medical students, external vendors, affiliated physicians and additional contract workers are required to sign a waiver acknowledging COVID risk within our hospital and ER at the Lakes, releasing our facilities and employees of liability.

The current bill that excludes healthcare including Southern Hills Hospital allows businesses to have liability protection for exposure to COVID by third parties, including lawsuits. Because hospitals were excluded from the protection of this bill including our employees and front line healthcare workers- we are all now at too much potential risk.



SOUTHERN HILLS.

HOSPITAL & MEDICAL CENTER

A Sunrise Health System Hospital

VISITOR

NAME _____

DATE _____

9/30



Dr. Guita Tabassi

Dr. Linda Tran

McDowell, Sharon

10/18/1966

185445

09/25/2020

You are scheduled for the following surgery: Hysteroscopy D+C

Facility: Southern Hills Hospital Department: Main OR

Facility Phone Number: 702 916 5000

Surgery Date: 9/30/2020

☐ Inpatient

Surgery Time: 7:30 am

☒ Outpatient / Day Surgery

Arrival Time: 5:30 am

PRE-OP INSTRUCTIONS

*Do not drink or eat for 8 hours prior to your surgery. This includes water, mints, gum, etc.

*If you have regularly scheduled medications to take during this time, please check with Dr. Tabassi prior to taking.

*Please remove all jewelry and contact lenses prior to coming in for your procedure/surgery. You may wear glasses and hearing aids if you need to, but they will need to be removed prior to the procedure/surgery.

*You must arrive 2 hours prior to your procedure/surgery for pre op labs /testing.

PLEASE NOTE: If you eat/drink within 8 hours of your surgery, or If you arrive late, your procedure/surgery may be cancelled or delayed. If any of your testing/blood work is not completed as requested, your surgery may be cancelled or delayed.

☐ Within the next 2 weeks, you will need to have the following tests performed:

☐ Chest X-ray ☐ order given to patient ☐ Order sent from office

☐ EKG ☐ Order given to patient ☐ Order sent from office

☐ Blood work ☐ Order given to patient ☐ Order sent from office

☒ 72 Hours prior to your surgery on 9/29/2020, you will need to arrive at your facility to register and have blood work done. Please call them at the above number prior to going.

☐ OB PATIENTS – Please pre-register at the above hospital if you have not already done so.

POST-OP INSTRUCTIONS

Post-Op Office Appointment Date: 10/14/2020 Time: 11:45 am

WHASN, Southern Hills

6970 S. Cimarron Rd. Suite 230, Las Vegas, Nv. 89113

(702)-871-0303 phone / (702)-562-0054 Fax

Sherbert building Sunset Ford Avenue

Next Wed 5:30

Tues 12 midnight (no food, no water)

McDowell, Sharon
10/18/1966
185445
09/25/2020

PROCEDURE EDUCA

Recommend that you read this handout carefully in order to prepare yourself or family members for the proposed procedure. In doing so, you will benefit both the outcome and safety of the procedure. *If you still have any questions or concerns, we strongly encourage you to contact our office prior to your procedure so that we may clarify any pertinent issues. "An educated patient is the best patient."*

DILATION AND CURETTAGE/HYSTEROSCOPY

Definition

Dilation = the act of stretching the cervical (the neck of the womb) opening to the cavity of the uterus (womb)

Curettage = scraping the lining of the uterus (endometrium) for removal of (normal and/or abnormal) tissue, often for diagnostic evaluation

Hystero = of or denoting the womb (uterus)

Scopy = examination with an instrument for improved viewing, often with magnification and directed lighting

Dilation and curettage (D&C) is an outpatient procedure during which your doctor will enlarge the opening to the uterus (womb) so that a surgical instrument, called a curette, can be inserted to scrape out the lining of the uterus. Hysteroscopy is the direct visualization of the uterine cavity with lighting and magnification through a long, pencil-sized "telescope" inserted in the cavity of the uterus. D&C, with or without a hysteroscopy, can be performed for a variety of symptoms, such as abnormal uterine bleeding, postmenopausal bleeding, and irregularity in ultrasound or x-ray of the uterus. Often this is done to aid in the diagnosis of infertility or when cancer of the uterine lining is suspected.

The menstrual cycle is designed to prepare a healthy endometrial lining for a fertilized egg to grow in. Once a month, if a woman does not become pregnant, the "old" lining is shed through the cervical canal with the menstrual period and replaced with "new" lining in preparation for pregnancy. This cycle is repeated throughout a woman's lifetime until her ovaries no longer make enough of the hormones needed to continue a regular, monthly cycle. Alterations in this cycle and irregularities of the lining of the uterus can lead to episodes of vaginal bleeding that are unpredictable, heavy, or cause significant discomfort.

For women in their teens, 20s, and 30s, irregular bleeding is most often the result of either pregnancy or an egg not being released during their menstrual cycles (anovulation). As women enter their 40s and 50s, ovulation becomes less regular and may lead to abnormal patterns of uterine bleeding. Another cause of bleeding in women in their 40s and 50s is thickening of the uterine lining. In the woman who has stopped menstruating, or reached menopause, a common cause for uterine bleeding is hormone therapy.

Irregular uterine bleeding and bleeding during menopause are often signs of uterine cancer. Because uterine cancer is more common in older women than in younger women, it is important that the cause of bleeding is investigated and treated. Cancers of the uterus, when discovered early in their development, can be cured.

Abnormalities in the shape of the uterine cavity can lead to a variety of symptoms including abnormal bleeding, repetitive pregnancy loss, inability to conceive, and others. Abnormal separations (septations), fibroid tumors (benign tumors), endometrial polyps, and scarring are only some of the causes of abnormalities in the shape of the uterine cavity.

There are a variety of procedures to collect endometrial tissue from the lining of the uterus. Some are designed to be performed in your doctor's office (endometrial biopsy) with very little advance preparation or discomfort. Dilation and curettage (D&C) is a procedure that removes a larger sample of the uterine lining and is typically performed in an outpatient hospital setting or surgery center. Dilation and curettage, when combined with hysteroscopy, allows your doctor to see most abnormalities present, and many times, an opportunity to correct them. The type of procedure recommended will depend on your symptoms, age, results of other testing, and the preference of your doctor. The pros and cons of each will have already been discussed with you in your consultation.

HOW DC SURGERY IS DONE!

Preparation

Special preparation is necessary for most patients. However, for some it is necessary to begin the process of opening the cervix the day before the procedure. There are different methods of preparing the cervix, including the placement of dried sponge-like material in the opening and placement of medicines in the vagina near the cervix. This preparation will be started in the office if your doctor feels it is necessary to include it in your care. Your doctor will tell you which medicines you may take for discomfort.

If you have been having heavy bleeding, your doctor might ask for a blood test to check for anemia (low blood count). A pregnancy test is usually performed for women who might be pregnant.

The D&C can be performed with anesthesia (pain management and sedation) given locally (injected around the cervix), regionally (delivered around the nerve supply to the pelvis), or generally (medicine given in the veins to control pain and make you sleep). Your gynecologist and anesthesiologist will make a recommendation for anesthesia based on your condition, the goals of the D&C/hysteroscopy, and if any other procedures will be performed at the same time.

As with most procedures in which regional or general anesthesia is administered, you will be instructed not to eat or drink anything after a certain time, usually midnight, on the evening prior to your surgery. You may brush your teeth in the morning but should not swallow the water. If you are on medications that must be taken, you will have discussed this with us and/or the anesthesiologist and instructions will have been given to you. The procedure might not be performed if you are currently taking, or have recently taken any medication that may interfere with your ability to clot your blood ("blood thinners, aspirin, anti-inflammatory medicines, etc..."). The most common of these medications are aspirin and all related pain relievers or anti-inflammatory compounds (whether prescription or over-the-counter).

Please refer to the attached list and tell us if you took any of these within the past 10 days. If your new medication is not on the list, alert us immediately so that we may ensure optimal procedure safety. We will have reviewed all of your current medications with you during the pre-operative/pre-procedure consultation. You are obligated to inform us if anything has changed (medication or otherwise) since your previous visit.

Procedure

You will be lying on your back with your legs elevated in stirrups, much like you would for a pelvic examination. The procedure usually takes between 30 minutes and one hour depending on the type of anesthesia used and if other procedures are to be performed at the same time.

The procedure begins by gently cleaning the vagina and placing a speculum in the vagina to hold it open. The cervix is grasped with an instrument to hold it still, while the opening is gradually dilated with surgical instruments until the hysteroscope or curette can be inserted without force.

The cavity of the uterus is much like a balloon: when empty it is flat but when inflated, space is created inside the balloon where there was none. Performing hysteroscopy involves "inflating" the cavity of the uterus with a liquid or gas (flowing in and out through the "telescope") so that each surface can be seen. Miniaturized instruments can then be placed along with the telescope to correct many of the abnormalities of the shape of the cavity.

After hysteroscopy is completed, the lining is scraped out through the opening and collected for microscopic examination in the laboratory by a pathologist. Hysteroscopy may or may not be repeated following curetting the lining of the cavity.

Post Procedure

You will be in the recovery room for a short time before being sent home from the outpatient surgery center. Though you may have some discomfort and cramping following the procedure, it is not necessary for you to plan time off from work or your normal activities beyond the day of surgery. It is normal to have some bleeding and discharge following D&C/hysteroscopy. It is suggested that you use menstrual pads to maintain hygiene and protect your clothing. You are instructed to refrain from vaginal intercourse, douching, and tampon use until told you may resume by your doctor.

Medications, such as ibuprofen or naproxen, are usually all that is needed for the cramping you might have after your surgery. Ask your doctor what is recommended or if a prescription for pain medicine will be given. An antibiotic

NEVER TAKEN

prescription may also be given and should be taken until completion. If any side effects occur, contact our office immediately.

Expectations of Outcome

Your doctor will explain what information was found following your surgery. The results of the microscopic examination of the specimens collected will take up to a week to become available from the laboratory. Once this information is available, your doctor will make recommendations for further treatment based on the specific results of your testing.

Many women who have experienced heavy or irregular uterine bleeding will return to a regular menstrual cycle following D&C. Maintenance of regular cycles may be assisted with hormone or birth control pills.

If your surgery was part of an investigation into infertility, your doctor will explain what was found and accomplished by the surgery and will help you understand the impact of these findings on your future fertility.

Possible Complications of the Procedure

All surgical procedures, regardless of complexity or time, can be associated with unforeseen problems. They may be immediate or even quite delayed in presentation. While we have discussed these and possibly others in your consultation, we would like you to have a list so that you may ask questions if you are still concerned. Aside from anesthesia complications, it is important that every patient be made aware of all possible outcomes, which may include, but are not limited to:

- **Perforation of the Uterus:** The most serious complication of the procedure is the creation of a perforation, or hole, in the wall of the uterus. Perforation of the uterus may lead to injury of other structures and organs within the abdomen (blood vessels, nerves, intestines, and bladder), bleeding, or infection. Perforation is not common, however, may require another operation to be treated appropriately.
- **Infection:** D&C/hysteroscopy involves placing an instrument through the vagina and cervix into the uterus. Because of this, it is possible to introduce a microorganism (such as bacteria or yeast) from the vagina into the uterine cavity. Many microorganisms are normally present in the vagina and cause no infection or other symptoms. However, when these same microorganisms are present within the cavity of the uterus, a more serious infection can be the result. Signs of infection that you should be watchful of are: foul-smelling vaginal discharge, tenderness, or pain in the vagina and pelvis for more than two days, bleeding lasting more than two days, fevers, shaking chills, nausea, vomiting, weakness, and feeling ill.

****If you have symptoms suggesting any of the above after your discharge from the hospital, you must contact us immediately or go to the nearest emergency room.***

- **Bleeding:** Most women will have a small amount of bleeding following this procedure. If your bleeding is heavier than your normal period, or lasts longer than two days, please call your doctor.
- **Fluid Imbalance:** In addition to water, fluids used to "inflate" the cavity of the uterus for hysteroscopy contain dissolved sugars, starches, and salts. These substances give the fluids certain desirable properties for visualization of the uterine cavity. When too much fluid flows from the uterus and enters the abdominal cavity or blood stream, an "imbalance" in the water content of the blood may result. Careful choice of fluid and monitoring of fluid delivery make this an uncommon complication.
- **Deep Vein Thrombosis (DVT)/Pulmonary Embolus (PE):** In any operation (especially longer operations), you can develop a clot in a vein of your leg (DVT). Typically, this two to seven days (or longer) after the procedure as pain, swelling, and tenderness to touch in the lower leg (calf). Your ankle and foot can become swollen. ***If you notice these signs, you should go directly to an emergency room and also call our office.*** Although less likely, this blood clot can move through the veins and block off part of the lung (PE). This would present as shortness of breath and possibly chest pain. We may sometimes ask the medical doctors to be involved with the management of either of these problems.
- **Lower Extremity Weakness/Numbness:** This, too, is a rare event that may arise due to your position on the operating table. It is possible in procedures in which you are in the lithotomy (legs up in the air) for a long

2 NO DR Signature

period. The problem is usually self-limited, with a return to baseline expected.

Physician

Date

Witness

Date

Patient

Date

McDowell, Sharon

10/18/1966

185445

09/25/2020

The information contained in this Medical Informed Consent form ("Con
used as a substitute for medical evaluation, advice, diagnosis or treatm
endeavors to ensure the reliability of information contained in its Cons
information becomes available. Oakstone cannot and does not guaranty the accuracy or completeness of the information contained in this Medical Informed Consent Form, and assumes no liability for its content or for any errors or omissions. Laws vary from state to state regarding the information that must be given to a patient for informed consent. Please be sure to check the laws regarding legal informed consent as they apply within your state. Please call your doctor or other healthcare provider if you have any questions.

Consent Form, and assumes no liability for its content or for any errors or omissions. Laws vary from state to state regarding the information that must be given to a patient for informed consent. Please be sure to check the laws regarding legal informed consent as they apply within your state. Please call your doctor or other healthcare provider if you have any questions.

PATIENT: MCDOWELL, SHARON
D.O.B.: 10/18/66
SPECIMEN #: SNV:HS20-4143
Physician: Tabassi, Guita DO
Oth Phy(s):

Collected: 10/16/20
Received: 10/16/20
Accessioned: 10/16/20

CLINICAL HISTORY

CLINICAL HISTORY: FIBROIDS
ICD10 CODE(S): NONE GIVEN
PROCEDURE/FINDINGS: DILATION AND CURETTAGE HYSTEROSCOPY
SPECIMEN(S):
A. ENDOMETRIAL CURETTINGS
B. BIOPSY OF UTERINE MASS/FIBROID

FINAL DIAGNOSIS

- A. ENDOMETRIUM, CURETTAGE:
FRAGMENTS OF BENIGN, ATROPHIC ENDOMETRIUM. HE
ABUNDANT BLOOD.
NO HYPERPLASIA OR MALIGNANCY IDENTIFIED.
- B. BIOPSY OF UTERINE MASS/FIBROID
BENIGN ENDOMYOMETRIAL NODULE, CONSISTENT WITH SUBMUCOSAL LEIOMYOMA.
NO MALIGNANCY IDENTIFIED.

Dictated by: Hughes, Jonathan MD

is he the 3rd Dr

GROSS DESCRIPTION

- A. The specimen is received in formalin labeled with proper patient identification and "endometrial curettings" and consists of multiple red soft tissue fragments that are 1.5 x 1.5 x 1.0 cm in aggregate. The specimen is entirely submitted in HistoWrap as A. (JG/dnt)
- B. The specimen is received in formalin labeled with proper patient identification and "fibroid" and consists of three tan soft tissue fragments that vary from <1 mm to 2 mm in greatest dimension. The specimen is entirely submitted in HistoWrap as B. Due to the small size and friable nature of the specimen, it may not survive processing. (JG/dnt)

MICROSCOPIC/COMMENT

A,B. Microscopic examination is performed, and the results are incorporated in the final diagnosis section of the report. All controls stained appropriately.

Pt Name: MCDOWELL, SHARON

Attend Dr: Tabassi, Guita DO

Acct#: H89678171322 Age/Sex: 53/F

Unit#: H000397486 Status: DEP SDC

SS#: Location:

SOUTHERN HILLS HOSPITAL

9300 West Sunset Rd

Las Vegas, Nevada 89148

Phone: (702) 880-2920 Fax: (702) 880-2929

copy EXA

PATIENT: MCDOWELL, SHARON
D.O.B.: 10/18/66
SPECIMEN #: SNV:HS20-4143
Physician: Tabassi, Guita DO
Oth Phy(s):

Collected: 10/16/20
Received: 10/16/20
Accessioned: 10/16/20

*

INTERPRETATION PERFORMED AT:

SOUTHERN HILLS HOSPITAL 9300 WEST SUNSET LAS VEGAS NV 89148

Final: Hughes, Jonathan MD * 10/17/20 by HUGJO

Pt Name:	MCDOWELL, SHARON	SOUTHERN HILLS HOSPITAL
Attend Dr:	Tabassi, Guita DO	9300 West Sunset Rd
Acct#:	H89678171322	Age/Sex: 53/F
Unit#:	H000397486	Status: DEP SDC
SS#:		Location:
		Las Vegas, Nevada 89148
		Phone: (702) 880-2920 Fax: (702) 880-2929

Copy E.A.

SHARON MCDOWELL
6608 LOMBARD DR
LAS VEGAS, NV 89108

Dear SHARON MCDOWELL,

Your physician recently submitted your Pap test to Quest Diagnostic for review.

Your test results from your Pap collection show no sign of cancer or pre-cancerous conditions.

For questions on your Pap test or information regarding additional tests ordered, please contact your doctor's office during routine business hours.

Thank you,

Quest Diagnostics

The Pap is a screening test for cervical cancer.

It is not a diagnostic test and is subject to false negative and false positive results. It is most reliable when a satisfactory sample, regularly obtained, is submitted with relevant clinical findings and history, and when the Pap result is evaluated along with historic and current clinical information.

✓

EXHIBIT B

Ciox Health

P.O. Box 409900
Atlanta, GA 30384-9900
Fed Tax ID 58 - 2659941
1-800-367-1500

Date

02/09/2021

Request ID #

0329213722**Ship To:**

SHARON MCDOWELL
MCDOWELL, SHARON
6608 LOMBARD DR
LAS VEGAS,NV 89108-2742

Requested By: MCDOWELL, SHARON**Patient Name:** MCDOWELL SHARON**DOB :** 10/18/1966**Records From:**

SOUTHERN HILLS HOSPITAL
NEVADA
9300 W SUNSET RD
LAS VEGAS,NV 89148-4844

Creation Date: 2/11/2021

Patient Name
SHARON MCDOWELL

Patient Number **Dates of Service**
89678171322 10/16/2020-10/16/2020

Hospital Number **Medical Record Number**
08967 000000397486

Patient Type
OUTPATIENT SURGICAL SERVICES

Itemization of Hospital Services

021825
SSC08591 2190472 953480788
SHARON MCDOWELL
6608 Lombard Dr
Las Vegas, NV 89108-2742



Attached is a list of hospital services you requested for care you received at SOUTHERN HILLS HOSP/MC on 10/16/2020-10/16/2020.

Please note that this is not a bill and does not show the amount you owe. The amount you owe will be sent to you separately on your hospital bill once payments from your insurance company or other adjustments are applied to the total shown here.

This is a list of your hospital services only. Other providers involved with your care who do not work for the hospital such as your physician, a lab, or other specialists, may bill separately for their services.

If you have questions about this list or about statements received from the hospital, please call (866) 437-3502.

THANK YOU FOR CHOOSING SOUTHERN HILLS HOSPITAL.
WE APPRECIATE YOUR BUSINESS.







Itemization of Hospital Services

SSC08591 2190472 953480788

SHARON MCDOWELL
6608 Lombard Dr
Las Vegas, NV 89108-2742

Creation Date: 2/11/2021

Patient Name
SHARON MCDOWELL

Patient Number 89678171322 **Dates of Service** 10/16/2020-10/16/2020

Hospital Number 08967 **Medical Record Number** 000000397486

Patient Type
OUTPATIENT SURGICAL SERVICES

Itemization of Hospital Services

REV CODE	DATE	HCPS	UNITS	DESCRIPTION	AMOUNT*
0250 - PHARMACY					
	10/16/20	0J3490	1	PLASMA-LYTE A 1000ML INJ	\$ 76.20
	10/16/20	00000	1	ROCURONIUM 50MG VIAL	\$ 673.00
Subtotal:					\$ 749.20
0272 - STERILE SUPPLIES					
	10/16/20	00000	1	SET XTN 5ML 32IN IV M LL	\$ 84.00
	10/16/20	00000	2	DRSG PAD NADH CRD 8X3IN	\$ 62.00
	10/16/20	00000	1	SOLN IRR NACL 9% 3000 ML	\$ 265.00
	10/16/20	00000	1	SET IRRIG CYSTO STRAIGHT	\$ 128.00
	10/16/20	00000	1	SOLUTION IRR 0.9% NACL1L	\$ 77.00
	10/16/20	00000	1	KIT IV STRT	\$ 31.00
	10/16/20	00000	1	CATH IV 20GA 1.25IN PINK	\$ 75.00
	10/16/20	00000	1	SET INFS PUMP 117IN	\$ 109.00
Subtotal:					\$ 831.00
0301 - LAB/CHEMISTRY					
	10/16/20	080053	1	COMP METABOLIC PANEL	\$ 541.00
	10/16/20	084703	1	HCG QUALITATIVE SERUM	\$ 387.00
Subtotal:					\$ 928.00
0302 - LAB/IMMUNOLOGY					
	10/16/20	086901	1	RH TYPE	\$ 48.00
	10/16/20	086900	1	ABO TYPE	\$ 48.00
	10/16/20	086850	1	ANTIBODY SCREEN EA	\$ 88.00
Subtotal:					\$ 184.00
0310 - PATH/LAB					
	10/16/20	088305	2	SURG PATH LEVEL 4	\$ 1,986.00
Subtotal:					\$ 1,986.00
0360 - OR SERVICES					
	10/16/20	00000	1	SURGERY 1ST 30 MINUTES	\$ 5,738.00
	10/16/20	00000	2	SURGERY ADD 15 MINUTES	\$ 5,744.00
Subtotal:					\$ 11,482.00

Itemization of Hospital Services

REV CODE	DATE	HCPS	UNITS	DESCRIPTION	AMOUNT*
0370 - ANESTHESIA					
	10/16/20	00000	1	ANESTHESIA 1ST 30 MIN	\$ 1,140.00
	10/16/20	00000	2	ANESTHESIA ADD 15 MIN	\$ 1,158.00
Subtotal:					\$ 2,298.00
0636 - DRUGS REQUIRING DET CODE					
	10/16/20	0J2765	1	METOCLOPRAMIDE TO 10 MG	\$ 177.00
	10/16/20	0J3010	● 1	FENTANYL CIT 0.1 MG INJ	\$ 64.00
	10/16/20	0J2704	● 20	PROPOFOL 200 MG INJ	\$ 59.00
	10/16/20	0J2405	● 4	ONDANSETRON 4 MG VL	\$ 420.00
	10/16/20	0J2250	● 2	MIDAZOLAM 2 MG INJ	\$ 158.00
	10/16/20	0J1100	● 8	DEXAMETH NA PHOS 4 MG	\$ 348.00
	10/16/20	0J1885	● 2	KETOROLAC 30 MG INJ	\$ 271.00
Subtotal:					\$ 1,497.00
0710 - RECOVERY ROOM					
	10/16/20	00000	1	RECOVERY ROOM 1ST 30 MIN	\$ 1,202.00
	10/16/20	00000	5	RECOVERY ROOM ADD 15 MIN	\$ 3,020.00
Subtotal:					\$ 4,222.00
Amount Before Adjustments/Discounts:					\$ 24,177.20
Adjustments/Discounts:					\$ 23,354.59
Total Amount for Hospital Services:					\$ 822.61

You are not being asked to pay the itemized amounts listed above. The amount you owe after all insurance payments and adjustments will be on your hospital bill.

● Non-Billable

*This is not a bill and does not reflect what you are being asked to pay. This is an itemization of hospital services, which hospitals are required to provide upon request and includes amounts from the hospital's master list of charges, which every hospital is required to maintain. **For more information please call (866) 437-3502.**

Itemization of Hospital Services

REV CODE	DATE	HCPS	UNITS	DESCRIPTION	AMOUNT*
----------	------	------	-------	-------------	---------

0730 - EKG/ECG

09/30/20	093005	1	EKG TRACING ONLY	\$ 243.00
----------	--------	---	------------------	-----------

Subtotal: \$ 243.00

Amount Before Adjustments/Discounts: \$ 1,804.00

Adjustments/Discounts: \$ 1,773.15

Total Amount for Hospital Services: \$ 30.85

You are not being asked to pay the itemized amounts listed above. The amount you owe after all insurance payments and adjustments will be on your hospital bill.

**This is not a bill and does not reflect what you are being asked to pay. This is an itemization of hospital services, which hospitals are required to provide upon request and includes amounts from the hospital's master list of charges, which every hospital is required to maintain. For more information please call (866) 437-3502.*

THANK YOU FOR CHOOSING SOUTHERN HILLS HOSPITAL.
WE APPRECIATE YOUR BUSINESS.

PAGE 4

Creation Date: 2/8/2021

Patient Name
SHARON MCDOWELL

Patient Number **Dates of Service**
89678135807 09/30/2020-09/30/2020

Hospital Number **Medical Record Number**
08967 000000397486

Patient Type
OUTPATIENT SURGICAL SERVICES

Itemization of Hospital Services

023548
SSC08591 2185342 952008193
SHARON MCDOWELL
6608 Lombard Dr
Las Vegas, NV 89108-2742



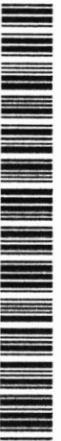
Attached is a list of hospital services you requested for care you received at SOUTHERN HILLS HOSP/MC on 09/30/2020-09/30/2020.

Please note that this is not a bill and does not show the amount you owe. The amount you owe will be sent to you separately on your hospital bill once payments from your insurance company or other adjustments are applied to the total shown here.

This is a list of your hospital services only. Other providers involved with your care who do not work for the hospital such as your physician, a lab, or other specialists, may bill separately for their services.

If you have questions about this list or about statements received from the hospital, please call (866) 437-3502.

THANK YOU FOR CHOOSING SOUTHERN HILLS HOSPITAL.
WE APPRECIATE YOUR BUSINESS.







Itemization of Hospital Services

SSC08591 2185342 952008193

SHARON MCDOWELL
6608 Lombard Dr
Las Vegas, NV 89108-2742

Creation Date: 2/8/2021

Patient Name
SHARON MCDOWELL

Patient Number 89678135807
Dates of Service 09/30/2020-09/30/2020

Hospital Number 08967
Medical Record Number 000000397486

Patient Type
OUTPATIENT SURGICAL SERVICES

Itemization of Hospital Services

REV CODE	DATE	HCPS	UNITS	DESCRIPTION	AMOUNT*
0272 - STERILE SUPPLIES					
	09/30/20	00000	1	KIT IV STRT	\$ 31.00
	09/30/20	00000	1	CATH IV 20GA 1.25IN PINK	\$ 75.00
	09/30/20	00000	1	SET INFS 117IN ALR 20 GT	\$ 109.00
Subtotal:					\$ 215.00
0301 - LAB/CHEMISTRY					
	09/30/20	080053	1	COMP METABOLIC PANEL	\$ 501.00
	09/30/20	084703	1	HCG QUALITATIVE SERUM	\$ 358.00
Subtotal:					\$ 859.00
0302 - LAB/IMMUNOLOGY					
	09/30/20	086850	1	ANTIBODY SCREEN EA	\$ 88.00
	09/30/20	086901	1	RH TYPE	\$ 48.00
	09/30/20	086900	1	ABO TYPE	\$ 48.00
Subtotal:					\$ 184.00
0305 - LAB/HEMATOLOGY					
	09/30/20	085027	1	CBC AUTOMATED	\$ 303.00
Subtotal:					\$ 303.00

Itemization of Hospital Services

REV CODE	DATE	HCPS	UNITS	DESCRIPTION	AMOUNT*
0730 - EKG/ECG					
	09/30/20	093005	1	EKG TRACING ONLY	\$ 243.00
Subtotal:					\$ 243.00
Amount Before Adjustments/Discounts:					\$ 1,804.00
Adjustments/Discounts:					\$ 1,773.15
Total Amount for Hospital Services:					\$ 30.85

You are not being asked to pay the itemized amounts listed above. The amount you owe after all insurance payments and adjustments will be on your hospital bill.

**This is not a bill and does not reflect what you are being asked to pay. This is an itemization of hospital services, which hospitals are required to provide upon request and includes amounts from the hospital's master list of charges, which every hospital is required to maintain. For more information please call (866) 437-3502.*

Itemization of Hospital Services

REV CODE	DATE	HCPS	UNITS	DESCRIPTION	AMOUNT*
----------	------	------	-------	-------------	---------

0370 - ANESTHESIA

10/16/20	00000		1	ANESTHESIA 1ST 30 MIN	\$ 1,140.00
10/16/20	00000		2	ANESTHESIA ADD 15 MIN	\$ 1,158.00
Subtotal:					\$ 2,298.00

0636 - DRUGS REQUIRING DET CODE

10/16/20	0J2765		1	METOCLOPRAMIDE TO 10 MG	\$ 177.00
10/16/20	0J3010	●	1	FENTANYL CIT 0.1 MG INJ	\$ 64.00
10/16/20	0J2704	●	20	PROPOFOL 200 MG INJ	\$ 59.00
10/16/20	0J2405	●	4	ONDANSETRON 4 MG VL	\$ 420.00
10/16/20	0J2250	●	2	MIDAZOLAM 2 MG INJ	\$ 158.00
10/16/20	0J1100	●	8	DEXAMETH NA PHOS 4 MG	\$ 348.00
10/16/20	0J1885	●	2	KETOROLAC 30 MG INJ	\$ 271.00
Subtotal:					\$ 1,497.00

0710 - RECOVERY ROOM

10/16/20	00000		1	RECOVERY ROOM 1ST 30 MIN	\$ 1,202.00
10/16/20	00000		5	RECOVERY ROOM ADD 15 MIN	\$ 3,020.00
Subtotal:					\$ 4,222.00

Amount Before Adjustments/Discounts: \$ 24,177.20

Adjustments/Discounts: \$ 23,354.59

Total Amount for Hospital Services: \$ 822.61

You are not being asked to pay the Itemized amounts listed above. The amount you owe after all insurance payments and adjustments will be on your hospital bill.

● Non-Billable

*This is not a bill and does not reflect what you are being asked to pay. This is an itemization of hospital services, which hospitals are required to provide upon request and includes amounts from the hospital's master list of charges, which every hospital is required to maintain. **For more information please call (866) 437-3502.**

LLN210200010544

body /
concern
patients

2/3/21

Admission-

entention Patients

ce and to help prevent the spread and
d you know that you may electronically
your records by one of the following

atient portal "MyHealthOne"

ne" patient portal will provide the option for self -
load and/or print options
Southernhillshospital.com

- Select Patients & Visitors
- Select MyHealthOne
- Log in to an existing account or create a new account
- Need Help: Portal support is available by calling 855-422-6625
 - Mon – Sat 8:00 am to 9:00 pm PST
 - Sun 10:30 am to 7:00 pm PST

2. Visit us on the web at Southernhillshospital.com

- Select "Patients & Visitors"
- Select Medical Records & Birth Registry for Paper Copy of Medical Records for a Medical Release Form to submit a request by fax or email
 - Fax: 877-865-9738
 - Email: Ciox.Nashville@parallon.com

To check on the status of your request please call us at:

866-270-2311

FROM Anthony

| Toll Free: 1-866-270-2311 | Fax 877-865-9738

Section A: This section must be completed for all Authorizations

Patient Name: <u>Robert Williams</u>	Birth Date: <u>10-15-66</u>	Last 4 digits SSN (optional):	
Facility Name: Southern Hills Hospital & Medical Center	Recipient's Name: <u>702-328-4269</u>	Recipient's Phone:	
Facility Address: 9300 West Sunset Road, Las Vegas, NV 89148	Address: <u>1608 W. Rainbow Blvd</u>		
Patient Email:	City: <u>Las Vegas</u>	State: <u>NV</u>	Zip: <u>89103</u>

This authorization will expire ninety days from the date of signature unless otherwise indicated below.

Date: _____ **Event:** _____

Purpose of disclosure: For insurance

Request Delivery (If left blank, a paper copy will be provided): ☐ Paper Copy ☒ Electronic Media, if available (e.g., USB, CD/DVD) ☐ Encrypted Email ☐ Unencrypted Email

NOTE: In the event the facility is unable to accommodate an electronic delivery as requested, an alternative delivery method will be provided (e.g., paper copy). There is some level of risk that a third party could see your PHI without your consent when receiving unencrypted electronic media or email. We are not responsible for unauthorized access to the PHI contained in this format or any risks (e.g., virus) potentially introduced to your computer/device when receiving PHI in electronic format or email.

Is this request for psychotherapy notes? ☐ Yes, then this is the only item you may request on this authorization. You must submit another authorization for other items below. ☒ No, then you may check as many items below as you need.

Description: check all that apply	Date(s):	Description: check all that apply	Date(s):	Description: check all that apply	Date(s):
<input checked="" type="checkbox"/> All PHI in medical record	<u>10/15/06</u>	<input checked="" type="checkbox"/> Operative Information		<input checked="" type="checkbox"/> Labor/delivery sum.	<u>10/15/06</u>
<input checked="" type="checkbox"/> Admission form	<u>10/15/06</u>	<input checked="" type="checkbox"/> Cath lab		<input checked="" type="checkbox"/> OB nursing assess	<u>10/15/06</u>
<input checked="" type="checkbox"/> Dictation reports	<u>10/15/06</u>	<input checked="" type="checkbox"/> Special test/therapy		<input checked="" type="checkbox"/> Postpartum flow sheet	<u>10/15/06</u>
<input checked="" type="checkbox"/> Physician orders	<u>10/15/06</u>	<input checked="" type="checkbox"/> Rhythm Strips		<input checked="" type="checkbox"/> Itemized bill:	<u>10/15/06</u>
<input checked="" type="checkbox"/> Intake/outtake	<u>10/15/06</u>	<input checked="" type="checkbox"/> Nursing Information		<input checked="" type="checkbox"/> UB-92:	<u>10/15/06</u>
<input checked="" type="checkbox"/> Clinical Test	<u>10/15/06</u>	<input checked="" type="checkbox"/> Transfer forms		<input checked="" type="checkbox"/> Other: <u>Will be sent</u>	<u>10/15/06</u>
<input checked="" type="checkbox"/> Medication Sheets	<u>10/15/06</u>	<input checked="" type="checkbox"/> ER Information		<input checked="" type="checkbox"/> Other: <u>All copies</u>	<u>10/15/06</u>

I acknowledge, and hereby consent to such, that the released information may contain alcohol, drug abuse, psychiatric, HIV testing, HIV results or AIDS information. SB MC (Initial) If not applicable, check here. ☐

I understand that:

I may refuse to sign this authorization and that it is strictly voluntary.

My treatment, payment, enrollment or eligibility for benefits may not be conditioned on signing this authorization.

I may revoke this authorization at any time in writing, but if I do, it will not have any affect on any actions taken prior to receiving the revocation. Further details may be found in the Notice of Privacy Practices.

If the requester or receiver is not a health plan or health care provider, the released information may no longer be protected by federal privacy regulations and may be re-disclosed.

I understand that I may see and obtain a copy the information described on this form, for a reasonable copy fee, if I ask for it.

I get a copy of this form after I sign it.

Section B: Is the request of PHI for the purpose of marketing?

If yes, the health plan or health care provider must complete Section B, otherwise skip to Section C.

Will the recipient receive financial or in-kind compensation in exchange for using or disclosing this information? ☐ Yes ☒ No

If yes, describe:

Section C: Signatures

I have read the above and authorize the disclosure of the protected health information as stated.

Signature of Patient/Patient's Representative: <u>[Signature]</u>	Date: <u>10/15/06</u>
Print Name of Patient/Representative: <u>Robert Williams</u>	Relationship to Patient:

EXHIBIT C

Southern Hills Hospital and Medical Center
9300 West Sunset Road, Las Vegas, Nevada 89148 (702)916-5000

IN / OUT / ER PATIENT ADMISSION RECORD
ACCOUNT#: **H89678171322** ADM DATE: 10/16/20 UNIT RCRD #: **H000397486** ARRIVAL:
ROOM/BED: ADM TIME: 0817 MARKET URN: H230118 CONF: VIP:
PT. TYPE: REG SDC ADMIT PRI/SRC: EL / CR LOCATION(S): H.SURG FC: 09
PATIENT INFORMATION

SURGERY VISIT:
10/16/2020

Pages: 16 (including banner)

HPF print request.

SOUTHERN HILLS HOSPITAL AND MEDICAL CENTER
9300 WEST SUNSET
LAS VEGAS, NV 89148

REPORT NAME: HISTORY AND PHYSICAL

PATIENT'S NAME: MCDOWELL, SHARON
DOB: 10/18/66 AGE: 53
ATTENDING PHYS: Tabassi, Guita DO
ADMISSION DATE: 10/16/20
DISCHARGE DATE: 10/16/20

UNIT NO: H000397486
ACCOUNT NO: H89678171322
PT TYPE: DEP SDC
LOCATION: H.SURG

PRIMARY CARE PHYSICIAN: Guita Tabassi, DO

REFERRING PHYSICIAN: Guita Tabassi, DO

HISTORY OF PRESENT ILLNESS

+ This is a 53-year-old female with history of postmenopausal bleeding since 2012 or so. She had stopped her periods between 2011 and 2012, and then she suddenly started to have continuous bleeding for months at a time, then became like irregular bleeding until now. She does have a history of fibroid uterus. Ultrasound shows multiple fibroid uterus with the largest being 5 cm. LH and FSH showed that she is in a menopausal state. The patient has not had good care due to lack of insurance for the last few years and now she is seeking care since she finally does have insurance. She has also recently moved from California. *She was initially scheduled a couple weeks ago for D and C, hysteroscopy. When she came in, her blood pressures were in the 200 systolic range over 120 and more diastolic range. Surgery was canceled. She was sent down to the ER. It happens to be that she apparently has had history of hypertension, but she was trying to self treat with ARBs. So the emergency room put her on lisinopril and metoprolol, which she has been taking, but today's blood pressures are still elevated in the 180s/90s to 100. The patient - has not established with her primary care since she was released from the ER and is running out of her blood pressure medication. She has 1 pill left of each and asking us to refill.

+ PAST MEDICAL HISTORY

History of chronic hypertension, vitamin D deficiency, anxiety, depression, history of previous trauma from car accident.

OB HISTORY

Gravida 3, para 3.

PAST SURGICAL HISTORY

C-section, facial surgery, tubal ligation.

FAMILY HISTORY

Breast cancer, colon cancer, ovarian cancer, pancreatic cancer, prostate cancer.

- SOCIAL HISTORY

Denies smoking, alcohol, or drugs.

False

PATIENT NAME: MCDOWELL, SHARON

ACCOUNT #: H89678171322

REVIEW OF SYSTEMS
As above.

PHYSICAL EXAMINATION

VITAL SIGNS: Blood pressure is 180s/90s to 100s, afebrile, normal pulse and respiration.

CARDIOVASCULAR: Regular rate and rhythm.

LUNGS: Clear to auscultation bilaterally.

ABDOMEN: Soft and nontender.

PELVIC: Deferred for exam under anesthesia.

EXTREMITIES: No clubbing, cyanosis, or edema.

ASSESSMENT

1. Postmenopausal bleeding.
2. History of hypertension, poorly controlled, noncompliant.

PLAN

+ The patient is scheduled for D and C, hysteroscopy. Risks versus benefits and alternatives have been fully discussed with the patient. Risks including, but not limited to anesthesia complications, risk of demise, hemorrhage, and blood transfusion, uterine perforation, infection. She understands there is a perforation and there may be damage to adjacent organs. She may have to have laparoscopy, laparotomy, and calling in specialist to repair damaged organs. We may have to remove fibroids as needed. She verbalizes full understanding, has no further questions and agrees with plan.

Dictated by: Guita Tabassi, DO

GT:modl

D: 10/16/2020 09:28:41 / T: 10/16/2020 09:46:43

Voice ID: 917483 / Job ID: 896667338

Authenticated by Guita Tabassi DO On 10/24/2020 01:02:52 PM

Report ID: 1016-0052

Electronically Signed by Guita Tabassi, DO on 10/24/20 at 1103

*I was never informed
of Risk. NOT True
I had questions we
discussed in the P.A.*

PATIENT NAME: MCDOWELL, SHARON

ACCOUNT #: H89678171322

4

SOUTHERN HILLS HOSPITAL AND MEDICAL CENTER
9300 WEST SUNSET
LAS VEGAS, NV 89148

REPORT NAME: OPERATIVE REPORT

PATIENT'S NAME: MCDOWELL, SHARON
DOB: 10/18/66 AGE: 53
ATTENDING PHYS: Tabassi, Guita DO
ADMISSION DATE: 10/16/20
DISCHARGE DATE: 10/16/20

UNIT NO: H000397486
ACCOUNT NO: H89678171322
PT TYPE: DEP SDC
LOCATION: H.SURG

DATE OF PROCEDURE: 10/16/2020

SURGEON:
Guita Tabassi, DO

PREOPERATIVE DIAGNOSES:
Postmenopausal bleeding, fibroid uterus.

POSTOPERATIVE DIAGNOSES:
Postmenopausal bleeding, fibroid uterus, questionable bicornuate uterus.

PROCEDURES PERFORMED:
Dilation and curettage, hysteroscopy, biopsy of uterine mass, possible fibroid.

? ASSISTANT:
None.

ANESTHESIOLOGIST:
Dr. Bischoff.

ANESTHESIA:
General.

ESTIMATED BLOOD LOSS:
Minimal.

COMPLICATIONS:
None.

— PATHOLOGY:
Biopsy of fibroid/uterine mass and endometrial lining.

BRIEF FINDINGS:
Cavity appears to be bicornuate, otherwise the lining seemed to be atrophic.
There is a large uterine mass, possible fibroid occupying the whole right
cornua.

DESCRIPTION OF PROCEDURE:
After informed consent was signed by the patient, risks versus benefits and
alternatives have been fully discussed, she verbalized full understanding and

PATIENT NAME: MCDOWELL, SHARON

ACCOUNT #: H89678171322

P
agreed to have procedure done. She was taken to the operating room, placed in dorsal lithotomy position under general anesthesia. She was prepped and draped in normal sterile fashion. Time-out was taken. Exam under anesthesia revealed vulva and vagina within normal. Uterus anteverted. At this point, a gravity speculum was inserted. Anterior lip of the cervix was grasped with single-tooth tenaculum. Cervix was gently dilated. Also sounded to 11 cm. At this point, hysteroscope was inserted using normal saline as media. Once we had enough distention, it was noted that the ostia on the left side was visualized. Lining appeared to be atrophic. Also, uterus appeared to be bicornuate in shape and large uterine mass occupying the whole right cornua with some scar tissue around it adhering it to the uterine walls. Unable to see beyond that. It most likely appears to be a submucosal fibroid. At this point, decision was made to take a couple of biopsies from the mass and send separately to pathology. Then, hysteroscope was removed and a curette was introduced and rotated around. Endometrial lining was removed and sent to pathology as well. Hysteroscope was removed. All the instruments were removed from the patient's vagina. She tolerated the procedure well and was transferred to recovery room in awake and stable condition.

Dictated By: Guita Tabassi, DO

GT:MODL

D: 10/16/2020 10:42:38 / T: 10/16/2020 11:49:32

Voice ID: 402017 / Job ID: 896681442

Authenticated by Guita Tabassi DO On 10/24/2020 01:02:54 PM

Report ID: 1016-0056

Electronically Signed by Guita Tabassi, DO on 10/24/20 at 1103

PATIENT NAME: MCDOWELL, SHARON

ACCOUNT #: H89678171322

6

8 dr. s. [unclear]

10/18/20
0205

SOUTHERN HILLS HOSPITAL AND MEDICAL CENTER
9300 W SUNSET RD, LAS VEGAS, NV 89148
HPF Pathology Specimen Report
Jonathan Hughes, M.D., Ph.D- Laboratory Medical Director

PAGE 1

PATIENT: MCDOWELL, SHARON	ACCT #: H89678171322	LOC: H.SURG	U #: H000397486
REG DR: Tabassi, Guita DO	AGE/SX: 53/F	ROOM:	REG: 10/16/20
	STATUS: DEP SDC	BED:	DIS:

Specimen: SNV:HS20-4143 Received: 10/16/20-1037 Status: SOUT Req#: 03369358
Spec Type: SURGICAL Subm Dr: Tabassi, Guita DO

CLINICAL HISTORY

CLINICAL HISTORY: FIBROIDS
ICD10 CODE(S): NONE GIVEN
PROCEDURE/FINDINGS: DILATION AND CURETTAGE HYSTEROSCOPY
SPECIMEN(S):
A. ENDOMETRIAL CURETTINGS
B. BIOPSY OF UTERINE MASS/FIBROID

FINAL DIAGNOSIS

- A. ENDOMETRIUM, CURETTAGE:
FRAGMENTS OF BENIGN, ATROPHIC ENDOMETRIUM. HE
ABUNDANT BLOOD.
NO HYPERPLASIA OR MALIGNANCY IDENTIFIED.
- B. BIOPSY OF UTERINE MASS/FIBROID
BENIGN ENDOMYOMETRIAL NODULE, CONSISTENT WITH SUBMUCOSAL LEIOMYOMA.
NO MALIGNANCY IDENTIFIED.

Dictated by: Hughes, Jonathan MD

GROSS DESCRIPTION

- A. The specimen is received in formalin labeled with proper patient identification and "endometrial curettings" and consists of multiple red soft tissue fragments that are 1.5 x 1.5 x 1.0 cm in aggregate. The specimen is entirely submitted in HistoWrap as A. (JG/dnt)
- B. The specimen is received in formalin labeled with proper patient identification and "fibroid" and consists of three tan soft tissue fragments that vary from <1 mm to 2 mm in greatest dimension. The specimen is entirely submitted in HistoWrap as B. Due to the small size and friable nature of the specimen, it may not survive processing. (JG/dnt)
-

MICROSCOPIC/COMMENT

A,B. Microscopic examination is performed, and the results are incorporated in the final diagnosis section of the report. All controls stained appropriately.

** CONTINUED ON NEXT PAGE **

7

10/18/20
0205

SOUTHERN HILLS HOSPITAL AND MEDICAL CENTER
9300 W SUNSET RD, LAS VEGAS, NV 89148
HPF Pathology Specimen Report
Jonathan Hughes, M.D., Ph.D- Laboratory Medical Director

PAGE 2

Patient: MCDOWELL, SHARON

#H89678171322

(Continued)

*

INTERPRETATION PERFORMED AT:
SOUTHERN HILLS HOSPITAL 9300 WEST SUNSET LAS VEGAS NV 89148

HISTOLOGY:

TISSUE	ID	BLK	PCS	CAS	LEV	/	PROCEDURE	DISPOSITION
ENDOMETRIUM CUR A		1			2			
SOFT TISSUE MAS B		1			1			

MARKERS: NOT APPLICABLE (NON TR)

PROCEDURES: *BLOCK1 (10/16/20-1038)
88305 (10/17/20-1521)
*RECUTS X 1 (10/16/20-1038)

TISSUES:

- A. ENDOMETRIUM CURETTINGS/BIOPSY - ENDOMETRIAL CURETTINGS=A
- B. SOFT TISSUE MASS (EXCEPT LIPOMA) BIOPSY/SIMPLE EXCISION - BIOPSY OF UTERINE MAS/FIBROIDS=B

Final: Hughes, Jonathan MD * 10/17/20 by HUGJO

** END OF REPORT **

10/17/20
0201

SOUTHERN HILLS HOSPITAL AND MEDICAL CENTER
9300 W SUNSET RD, LAS VEGAS, NV 89148
HPF LAB Discharge Summary Report w/o Pathology
Jonathan Hughes, M.D., Ph.D- Laboratory Medical Director

PAGE 1

PATIENT: MCDOWELL, SHARON ACCT #: H89678171322 LOC: H.SURG U #: H000397486
AGE/SX: 53/F ROOM: REG: 10/16/20
REG DR: Tabassi, Guita DO STATUS: DEP SDC BED: DIS:

*** CHEMISTRY ***

ROUTINE CHEMISTRY

Date	10/16/20				Reference	Units
Time	0827					
NA	142				(136-145)	MMOL/L
K	4.4				(3.5-5.1)	MMOL/L
CL	106				(98-107)	MMOL/L
CO2	28				(21-32)	MMOL/L
ANION GAP	12				(10-20)	MMOL/L
GLUCOSE RANDOM	96				(74-106)	MG/DL
BUN	9				(7-18)	MG/DL
CREATININE	1.00				(0.55-1.02)	MG/DL
TOTAL PROTEIN	7.8				(6.4-8.2)	GM/DL
ALBUMIN	4.1				(3.4-5.0)	GM/DL
A/G RATIO	1.1	L			(1.7-2.2)	
CALCIUM	10.80	H			(8.5-10.1)	MG/DL
TOTAL BILIRUBIN	0.6(A)				(0.2-1.0)	MG/DL

(A) Use of this assay is not recommended for patients undergoing treatment with eltrombopag due to the potential for falsely elevated results.

SGOT/AST	19				(15-37)	IU/L
SGPT/ALT	23				(12-78)	IU/L
TOTAL ALK PHOS	176				(46-116)	IU/L

Test	Date	Time	Result	Reference	Units
ESTIMATED GFR	10/16/20	0827	58(B)	L (>60)	ML/MIN

(B) CALCULATION FOR CAUCASIAN IS BASED ON STANDARD BODY SURFACE AREA OF 1.73 METERS SQUARED. IF PATIENT IS AFRICAN AMERICAN, THE eGFR RESULT SHOULD BE MULTIPLIED BY 1.21. eGFR IS A CALCULATED INDEX THAT MAY VARY WITH AGE AND OTHER FACTORS, AND CAREFUL CLINICAL CORRELATION OF THE RESULT IS REQUIRED.

HCG SERUM QUAL 10/16/20 0827 ABSENT (absent)

Patient: MCDOWELL, SHARON Age/Sex: 53/F Acct#H89678171322 Unit#H000397486

10/17/20
0201

SOUTHERN HILLS HOSPITAL AND MEDICAL CENTER
9300 W SUNSET RD, LAS VEGAS, NV 89148
HPF LAB Discharge Summary Report w/o Pathology
Jonathan Hughes, M.D., Ph.D- Laboratory Medical Director

PAGE 2

Patient: MCDOWELL, SHARON #H89678171322 (Continued)

**** BLOOD BANK ****

BLOOD BANK

COLLECTED: Oct 16, 2020 8:23am Flag Reference Units

BLOOD TYPE | O POS
ANTIBODY SCREEN | NEGATIVE

COLLECTED: Oct 16, 2020 8:23am Flag Reference Units

PREV HX CHECK | YES NO PREV RXN
PREV AB HISTORY | NO

Patient: MCDOWELL, SHARON Age/Sex: 53/F Acct#H89678171322 Unit#H000397486

10

1236

Run Date/Time: 10/16/20 1109	Southern Hills Medical Center OUTPT PROCEDURE DISCHARGE MEDICATIONS	Printed By: HNUR.JPB
MCDOWELL, SHARON		Acct# H89678171322 MR# H000397486
ALLERGIES: Iodine and Iodide Containing Produc Adverse Drug Reactions: morphine, oxycodone (From PERCOCET), acetaminophen (From PERCOCET)		
PREFERRED PHARMACY: Paper Rx Preferred, , , NV,		
NOT FINALIZED Discharge Medications ***NOT FINALIZED***		
Updated Home Medication List		
GENERIC NAME (TRADE NAME) DOSE	ROUTE	FREQUENCY
CALCIUM CARB/VITA. D (TRADE NAME: OS-CAL WITH VITAMIN D 600 MG-200 IU) 1 TAB	ORAL	DAILY Next Dose due: _____
CALCIUM CARBONATE (TRADE NAME: Calcium) 1 TAB	ORAL	DAILY Next Dose due: _____
CHOLECALCIFEROL (VITAMIN D3) (TRADE NAME: Vitamin D3) 2000 UNIT	ORAL	DAILY Next Dose due: _____ RX Inst: CONVERSION 40 UNITS/1 MCG
CIPROFLOXACIN (TRADE NAME: CIPRO) 250 MG	ORAL	EVERY 12 HOURS Next Dose due: _____ INDICATION: PREOP
CYANOCOBALAMIN (VITAMIN B-12) (TRADE NAME: Vitamin B-12) 1000 MCG	ORAL	DAILY Next Dose due: _____
LISINOPRIL (TRADE NAME: ZESTRIL) 20 MG	ORAL	TWICE DAILY Next Dose due: _____
METOPROLOL TARTRATE (TRADE NAME: Metoprolol Tartrate) 50 MG	ORAL	TWICE DAILY Next Dose due: _____

*** This is a list of the medication(s) you provided prior to surgery/procedure ***
*** and includes any changes ordered by your surgeon. Contact your primary care ***
*** physician with any questions pertaining to your discharge medication list. ***
*** Please take this list to your next doctor's appointment. ***

MCDOWELL, SHARON Acct# H89678171322 DOB: 10/18/66 Age: 53 Sex: F LOC: (702) 871-0301
MR# H000397486 Adm/Svc: 10/16/20 Attend MD: Tabassi, Guita DO
Patient/Representative Signature Date/Time Nurse/Clinician Signature Date/Time

DISCHARGE INSTRUCTIONSMCDOWELL, SHARON
H89678171322/H000397486**Southern Hills Medical Center**

It has been a pleasure caring for you. If you have questions or concerns, or your symptoms worsen after discharge, please contact your physician.

DISCHARGE INFORMATION**YOUR DIET**

Resume Home Diet/Feeds

Mls allowed per day:

YOUR ACTIVITY

PELVIC REST FOR 6 WEEKS

FOLLOWUP APPOINTMENTS

FOLLOW-UP IN 2 WEEKS

PHYSICIAN FOLLOWUP APPOINTMENTS**For Patients Who Smoke**

You should quit. It is the most important thing you can do for your health.

Here are other FREE resources you can use.

The American Cancer Society: 1-800-227-2345
The American Lung Association: 1-800-548-8252
Internet site: <http://smokefree.gov>

DISCHARGE MEDICATIONS

Please refer to the discharge medication list provided by the nurse at the time of discharge. Please be sure to take this list with you to your next physician office visit.

12

DISCHARGE INSTRUCTIONS

MCDOWELL, SHARON
H89678171322/H000397486

I understand that a copy of my home medication list as well as the medications I received during this hospital stay will be provided to my next health care provider.

Southern Hills Medical Center

Name: MCDOWELL, SHARON
Acct #: H89678171322 Room/Bed: /
Unit #: H000397486 Admit date:
Admit Physician:

POST OPERATIVE GENERAL DISCHARGE INSTRUCTIONS

Southern Hills Hospital and Medical Center

1. The medicine which was used during your surgery will be acting in your body for the next twenty-four (24) hours or more, so you may feel a little sleepy. This feeling will slowly wear off.
2. For your protection and safety, a responsible adult should remain with you today and tonight. Rest quietly the remainder of the day.
3. Do not drink alcohol, drive a car, make legal decisions, cook, operate machinery, or perform any other task that might endanger your/others safety for twenty-four (24) hours after receiving anesthesia or intravenous (IV) sedation, or while taking pain medication.
4. You may have some pain following surgery. A prescription for pain may be given by your doctor; this should be taken as directed. If it does not improve the pain, contact your doctor. If your doctor does not prescribe for pain, you may take a non-prescription, non-aspirin pain medication which can be purchased at the drugstore; please follow the directions on the label.
5. Following surgery it is best to start with clear liquids (tea, flat soda, broth) then soup and crackers and gradually progress to solid foods.
6. Some medications may cause nausea and vomiting. If this persists, call your doctor.
7. Check the operative area for signs of unusual or excessive bleeding, such as slow oozing that soaks the dressing completely, or bright red bleeding. In either case, apply pressure, elevate if possible, and call your doctor immediately.
8. Check the operative area for any sign of infection. It is normal to have a slightly red swollen incision. Call your doctor if you have increased redness, swelling, or smelly discharge. Fever also is a sign of infection. A slight fever is normal the day after surgery. Call your doctor if your temperature is over one hundred (100) degrees.
9. To help prevent infection, wash your hands well before and after caring for the operative area and keep the area or dressing clean and dry.
10. If you have any problems or questions, contact your doctor immediately. If you cannot contact your doctor and feel that your symptoms warrant a doctor's attention, call or go to the emergency room which is closest to you.

Pt/Family have received discharge instructions that include a list of medications, if applicable, and all questions have been answered to my satisfaction.

If you are a smoker, to quit smoking call Nevada Tobacco Hotline at 1-800 QUIT NOW - 1-800-784-8669.

I have received all personal belongings / medications / valuables brought to the hospital.

Patient/Responsible Person verbalized or demonstrated understanding of

H89678171322 ADM DT:

MCDOWELL, SHARON

H000397486

DOB: 10/18/66 53 F

Tabassi, Guita DO



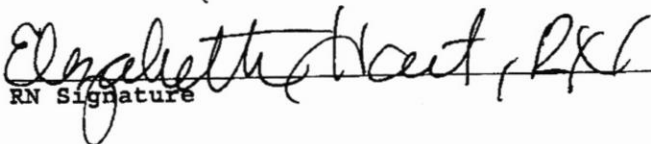
POST OPERATIVE GENERAL DISCHARGE INSTRUCTIONS
Southern Hills Hospital and Medical Center

discharge instructions provided.

- * Follow up with your primary care physician for medication questions *
- Including re-starting any medications you were taking before your surgery/procedure.



Patient Signature

10/16/20
Date


RN Signature

10/16/2020
Date

15

H89678171322 ADM DT:
MCDOWELL, SHARON
H000397486 DOB: 10/18/66 53 F
Tabassi, Guita DO


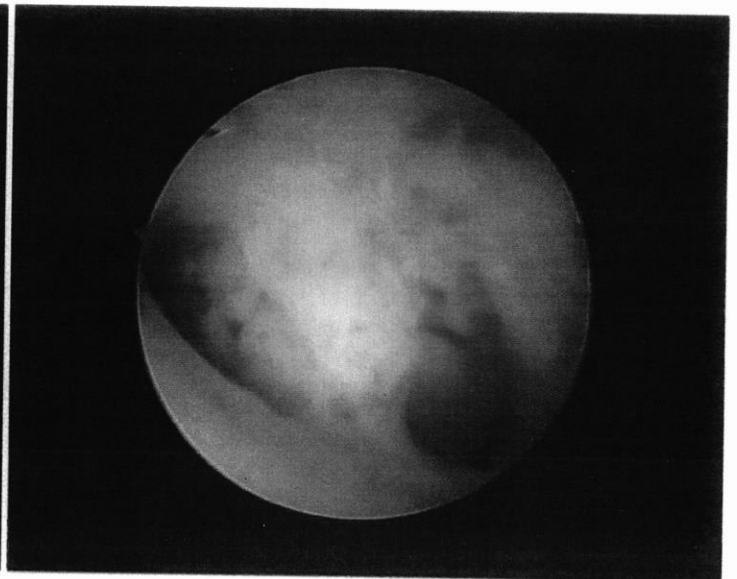
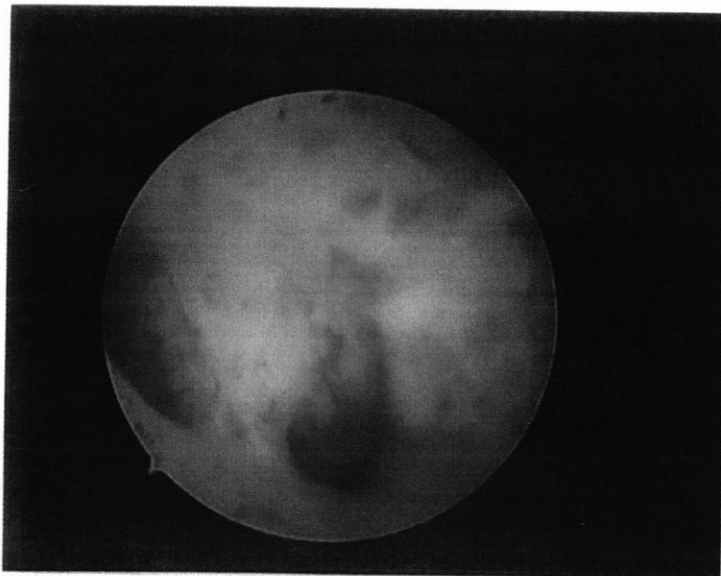
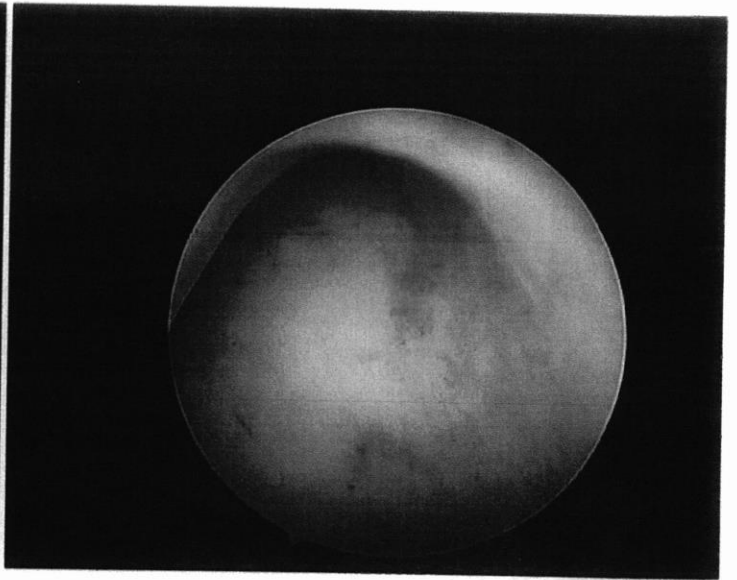
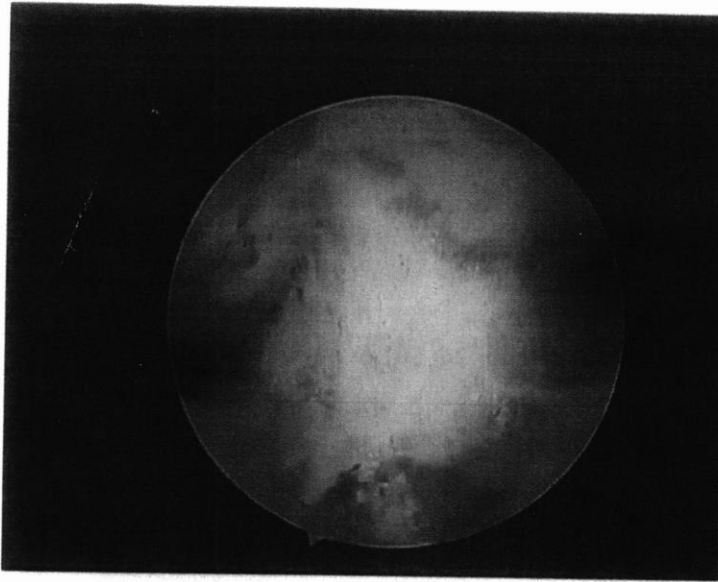


EXHIBIT D

PATIENT: MCDOWELL, SHARON
D.O.B.: 10/18/66
SPECIMEN #: SNV:HS20-4143
Physician: Tabassi, Guita DO
Oth Phy(s):

Collected: 10/1
Received 10/1
Accessioned: 10/1

*

INTERPRETATION PERFORMED AT:

SOUTHERN HILLS HOSPITAL 9300 WEST SUNSET LAS VEGAS NV 89148

PATIENT: MCDOWELL, SHARON
D.O.B.: 10/18/66
SPECIMEN #: SNV:HS20-4143
Physician: Tabassi, Guita DO
Oth Phy(s):

Collected: 10/1
Received: 10/1
Accessioned: 10/1

CLINICAL HISTORY

CLINICAL HISTORY: FIBROIDS
ICD10 CODE(S): NONE GIVEN
PROCEDURE/FINDINGS: DILATION AND CURETTAGE HYSTEROSCOPY
SPECIMEN(S):
A. ENDOMETRIAL CURETTINGS
B. BIOPSY OF UTERINE MASS/FIBROID

FINAL DIAGNOSIS

- A. ENDOMETRIUM, CURETTAGE:
FRAGMENTS OF BENIGN, ATROPHIC ENDOMETRIUM. HE
ABUNDANT BLOOD.
NO HYPERPLASIA OR MALIGNANCY IDENTIFIED.
- B. BIOPSY OF UTERINE MASS/FIBROID
BENIGN ENDOMYOMETRIAL NODULE, CONSISTENT WITH SUBMUCOSAL LEIOMYOMA.
NO MALIGNANCY IDENTIFIED.

Dictated by: Hughes, Jonathan MD

GROSS DESCRIPTION

- A. The specimen is received in formalin labeled with proper patient identification "endometrial curettings" and consists of multiple red soft tissue fragments that are 1.5 x 1.0 cm in aggregate. The specimen is entirely submitted in HistoWrap as A.
- B. The specimen is received in formalin labeled with proper patient identification "fibroid" and consists of three tan soft tissue fragments that vary from <1 cm in greatest dimension. The specimen is entirely submitted in HistoWrap as B. Due to the small size and friable nature of the specimen, it may not survive processing.

MICROSCOPIC/COMMENT

A,B. Microscopic examination is performed, and the results are incorporated in the diagnosis section of the report. All controls stained appropriately.

SOUTHERN HILLS HOSPITAL & MEDICAL CENTER

9300 W Sunset Rd

Las Vegas, NV 89148

PATIENT: MCDOWELL, SHARON
ACCOUNT: H89678171322
ADMISSION DATE: 10/16/2020
ATTENDING PHYSICIAN:
DATE OF DISCHARGE:

DOB: 10/18,
MRN: H00039
AGE: 53
ROOM:
STATUS:

DATE OF PROCEDURE: 10/16/2020

SURGEON:

Guita Tabassi, DO

PREOPERATIVE DIAGNOSES:

Postmenopausal bleeding, fibroid uterus.

POSTOPERATIVE DIAGNOSES:

Postmenopausal bleeding, fibroid uterus, questionable bi
uterus.

PROCEDURES PERFORMED:

Dilation and curettage, hysteroscopy, biopsy of uterine
possible fibroid.

P

ASSISTANT:

None.

*

ANESTHESIOLOGIST:

Dr. Bischoff.

ANESTHESIA:

General.

ESTIMATED BLOOD LOSS:

Minimal.

COMPLICATIONS:

None.

Cavity appears to be bicornuate, otherwise the lining seems to be atrophic. There is a large uterine mass, possibly fibroid occupying the whole right cornua.

DESCRIPTION OF PROCEDURE:

After informed consent was signed by the patient, risks, benefits and alternatives have been fully discussed, she verbalized full understanding and agreed to have procedure. She was taken to the operating room, placed in dorsal lithotomy position under general anesthesia. She was prepped and draped in normal sterile fashion. Time-out was taken. Exam under anesthesia revealed vulva and vagina within normal. Uterus anteverted. At this point, a gravity speculum was inserted. Anterior lip of the cervix was grasped with single-tooth tenaculum. Cervix was gently dilated. Also sounded to depth. At this point, hysteroscope was inserted using normal saline media. Once we had enough distention, it was noted that the ostia on the left side was visualized. Lining appeared thin and atrophic. Also, uterus appeared to be bicornuate in shape with a large uterine mass occupying the whole right cornua with scar tissue around it adhering it to the uterine walls. Unable to see beyond that. It most likely appears to be a submucosal fibroid. At this point, decision was made to take a couple of biopsies from the mass and send separately to pathology. Hysteroscope was removed and a curette was introduced and rotated around. Endometrial lining was removed and sent to pathology as well. Hysteroscope was removed. All the instruments were removed from the patient's vagina. She tolerated the procedure well and was transferred to recovery room in awake and stable condition.

Dictated By: Guita Tabassi, DO

GT:MODL

D: 10/16/2020 10:42:38 / T: 10/16/2020 11:49:32

Voice ID: 402017 / Job ID: 896681442

McDowell, Sharon, 53 Y, F, 10/18/1966

702-328-4269

Whasn Southern Hills

6970 S CIMARRON RD Ste 230, LAS VEGAS, NV 89113-2135

702-871-0303

FINAL RESULT

Accession ID: LV407611L

Ref ID: 32107643

Order Date: 07/24/2020

Received: 10/06/2020 12:53:50

Spec Recd: 07/24/2020 17:20:00

Collection Date: 07/24/2020 11:08:00

Report: 07/28/2020 09:24:00

Requesting Physician: Tabassi, Guita

Ordering Physician: Tabassi, Guita

**THINPREP TIS PAP AND HPV mRNA E6/E7 REFLEX HPV
16,18/45 (91414)**

NAME	VALUE	REFERENCE RANGE	LAB
F CLINICAL INFORMATION:	None given		QAW
F LMP:	NONE GIVEN		QAW
F PREV. PAP:	NONE GIVEN		QAW
F PREV. BX:	NONE GIVEN		QAW
F SOURCE:	Cervix, Endocervix		QAW
F STATEMENT OF ADEQUACY:			QAW
- Satisfactory for evaluation.			
- Endocervical/transformation zone component absent.			
- Age and/or menstrual status not provided			
F INTERPRETATION/RESULT:	Negative for intraepithelial lesion or malignancy.		QAW
F COMMENT:	This Pap test has been evaluated with computer assisted technology.		QAW
F CYTOTECHNOLOGIST:			QAW
- MXS, CT(ASCP)			
- CT screening location: Quest Las Vegas			
- 4230 Burnham Ave, Las Vegas, NV 89119			
F COMMENT			QAW
- EXPLANATORY NOTE:			
-			
- The Pap is a screening test for cervical cancer. It is			
- not a diagnostic test and is subject to false negative			

NAME	VALUE	REFERENCE RANGE	LAB
<ul style="list-style-type: none"> - and false positive results. It is most reliable when a - satisfactory sample, regularly obtained, is submitted - with relevant clinical findings and history, and when - the Pap result is evaluated along with historic and - current clinical information. - 			
F HPV mRNA E6/E7	Not Detected	Not Detected	QAW
<ul style="list-style-type: none"> - This test was performed using the APTIMA HPV Assay (Gen-Probe Inc.). - This assay detects E6/E7 viral messenger RNA (mRNA) from 14 - high-risk HPV types (16,18,31,33,35,39,45,51,52,56,58,59,66,68). - - The analytical performance characteristics of - this assay have been determined by Quest - Diagnostics. The modifications have not been - cleared or approved by the FDA. This assay has - been validated pursuant to the CLIA regulations - and is used for clinical purposes. 			
<div> <div>PERFORMING LAB: QAW, Quest Diagnostics-Las Vegas - 4230 Burnham</div> <div>4230 Burnham Ave, Las Vegas</div> <div>NV</div> <div>89119-5408 Elizabeth D Iole MD</div> </div>			
McDowell, Sharon 10/18/1966 F			Accession ID: LV407611L

FRAUD ON THE COURT AND ABUSIVE DISCOVERY

David R. Hague*

Unbeknownst to many, federal courts have the power under the Federal Rules of Civil Procedure to set aside judgments entered years earlier that were obtained by "fraud on the court." Fraud on the court, however, can take many forms and courts and commentators agree that it is a nebulous concept. The power to set aside a judgment requires courts to strike a balance between the principles of justice and finality. A majority of courts require a showing, by clear and convincing evidence, of intentional fraudulent conduct specifically directed at the court itself. This standard is flawed. And courts that have adopted it are abdicating their solemn responsibility as the gatekeeper to justice because innocent victims seeking to set aside judgments obtained by abusive discovery find themselves as a square-peg trying to fit into a round hole. The remedial and equitable nature of the fraud-on-the-court doctrine and the great public policy that it embodies militates against making that burden an impossible hurdle for victims of abusive discovery.

This Article suggests that courts depart from the heightened standard used to set aside judgments, particularly judgments obtained by abusive discovery. Specifically, this Article advances a four-step process to resolve the ultimate inquiry: whether the abusive conduct caused the court not to perform in the usual manner its impartial task of adjudging cases. Under this standard, courts will more readily find that abusive discovery that undermines the integrity of the judicial process or influences the decision of the court constitutes a fraud on the court.

TABLE OF CONTENTS

INTRODUCTION	708
I. ABUSIVE DISCOVERY PRACTICE.....	711
A. Common Discovery Abuse	711
B. The Vulnerable Victims	717
1. The Pro Se Litigant	717
2. The Attorney-Abandoned Litigant	722
II. FRAUD ON THE COURT	725
III. ABUSIVE DISCOVERY AS FRAUD ON THE COURT AND REEVALUATING THE STANDARD	730
A. The Offender and His Duty	730

* Assistant Professor of Law, South Texas College of Law. I would like to thank my research assistant, Laura Thetford, for her help with this article.

B. Evaluation of the Conduct	732
C. Consideration of the Victim's Status (The Equitable Component).....	735
D. Consideration of the Relief Being Sought	737
E. Illustration of the Four-Part Test	739
1. The Offending Party and His Duty	740
2. The Conduct	740
3. The Victim	741
4. The Relief	741
CONCLUSION	742

INTRODUCTION

There is an old adage that nice guys finish last. It is well documented that in litigation, this maxim oftentimes rings true. General William Tecumseh Sherman stated, "War is Hell!"¹ Litigation, some think, is like war. Make your opponent's life miserable, put them through hell, and you will eventually defeat your adversary. Why is hardball litigation so common? Is it because it works and frequently goes unpunished? As one scholar noted, "[t]hough perceptions differ, there seems to be some consensus that adversary excess is frequent, often not by any standard justifiable as zealous representation, and that many lawyers will indeed cross ethical lines when they think they can get away with it, which, because of the weakness of monitoring agents, they usually do."²

When this abusive practice—sometimes referred to by lawyers and judges as "Rambo-Lawyering"³—occurs during litigation, parties are equipped with several tools under the rules of civil procedure to thwart improper behavior and move the proceeding into civil territory. However, when attorney misconduct or abusive discovery tactics result in favorable judgments to the offending parties, the available remedies under the rules diminish substantially, and the party

¹ William Tecumseh Sherman, WIKIQUOTE, http://en.wikiquote.org/wiki/William_Tecumseh_Sherman (last visited Jan. 5, 2016).

² Robert W. Gordon, *The Ethical Worlds of Large-Firm Litigators: Preliminary Observations*, 67 *FORDHAM L. REV.* 709, 736 (1998).

³ The term "Rambo Lawyering" has been discussed in several legal articles. See, e.g., Jean M. Cary, *Rambo Depositions: Controlling an Ethical Cancer in Civil Litigation*, 25 *HOFSTRA L. REV.* 561 (1996); Gideon Kanner, *Welcome Home Rambo: High-Minded Ethics and Low-Down Tactics in the Courts*, 25 *LOY. L.A. L. REV.* 81 (1991); Robert N. Saylor, *Rambo Litigation: Why Hardball Tactics Don't Work*, *A.B.A. J.*, Mar. 1, 1988, at 79. Moreover, the District Court of Denver includes a "Rambo Lawyering" instruction to attorneys in case management orders. The instruction reads as follows

This is a *CIVIL* division. "Rambo Lawyering" will not be tolerated. Counsel will treat jurors, parties, witnesses, me, my staff and each other with professionalism, courtesy and respect at all times. This applies not only to the actual trial, but to all aspects of the case, including discovery and motions practice, and includes what is written as well as what is said.

Rambo Lawyering, WEINBERGER LAW OFFICES, http://weinbergerlawoffice.com/article_rambolawyering.asp (last visited Jan. 5, 2016).

against whom the judgment was entered is now faced with a challenging legal hurdle. A rancher from Nevada knows this story all too well.

In 2007, Judith Adams sued Susan Fallini for the death of her son after he struck one of Ms. Fallini's cows that was on a well-known highway in Nevada.⁴ That stretch of highway is designated as "open range."⁵ Nevada law protects open-range ranchers from liability if vehicles strike their cattle.⁶ Thus, Ms. Fallini should have prevailed in the lawsuit because of this statutory defense, but that did not happen.⁷ Instead, Ms. Fallini's lawyer abandoned her during the case and, among other things, failed to respond to plaintiff's requests for admission, which asked Ms. Fallini to admit that the accident did not occur on open range, even though it did, and even though plaintiff and her attorney knew it did.⁸ Because she failed to answer the request for admission, she was deemed to have admitted that the accident did not occur on open range, which obviated her complete defense under Nevada law.⁹ Eventually, Ms. Fallini's "admission" led to a partial summary judgment in plaintiff's favor and an award of damages in excess of \$2.7 million.¹⁰

Was the type of conduct in the *Fallini* case just clever lawyering and proficient advocacy? Or did the attorney act uncivilly or unethically in obtaining the judgment and, consequently, violate rules of civil procedure and professional conduct? More importantly, if the attorney knew the accident occurred on open range and knew that the open-range defense provided a complete defense to Fallini as a matter of law, did that attorney perpetrate a "fraud on the court"¹¹ when he obtained summary judgment based on Fallini's deemed admission of a well-known false fact? The answer to this last question is puzzling.

While fraud on the court has been recognized for centuries as a basis for setting aside a final judgment, it has been used for several other purposes under the rules of civil procedure. Generally, fraud on the court is a fraud "directed to the judicial machinery itself and is *not* fraud between the parties or fraudulent documents It is thus fraud where . . . the impartial functions of the court have been directly corrupted."¹² Interestingly, the term "fraud on the court" is

⁴ Mike Blasky, *Conflicted Judge's Decision Looms in Rancher Lawsuit*, L.V. REV.-J., July 28, 2014, at B001; *see also* Complaint at 2–4, *Estate of Adams v. Fallini*, No. CV24539 (Nev. 5th Dist. Ct. Jan. 31, 2007).

⁵ Blasky, *supra* note 4.

⁶ *Id.*; *see also* NEV. REV. STAT. ANN. § 568.360(1) (West 2015) (providing that those who own domestic animals do not have a duty to keep those animals off highways located on "open range" and are not liable for any damage or injury resulting from a collision between a motor vehicle and an animal on open range highways).

⁷ Blasky, *supra* note 4.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ FED. R. CIV. P. 60(d)(3).

¹² *Robinson v. Audi Aktiengesellschaft*, 56 F.3d 1259, 1266 (10th Cir. 1995) (emphasis added) (citation omitted).

only mentioned in Rule 60(d)(3) of the Federal Rules of Civil Procedure, yet courts have also used this doctrine to order dismissal or default under other rules where a litigant has stooped to the level of fraud on the court.¹³

Generally, if a party wants to utilize the fraud-on-the-court doctrine as a remedy under the rules of civil procedure, it must prove, by clear and convincing evidence, intentional fraudulent conduct specifically directed at the court itself.¹⁴ Recent case law incorrectly suggests that this high standard for proving fraud on the court—which several courts agree is reserved only for the most egregious misconduct, such as a bribery of a judge or jury members—lacks any flexibility or equitable components.¹⁵ Indeed, this rigid approach seems to disregard entirely the victim's status. It also creates a nearly impossible hurdle for innocent victims seeking to set aside judgments obtained by attorney misconduct. This flawed approach—particularly as courts apply the fraud-on-the-court doctrine to abusive discovery practices resulting in favorable judgments to the offending party—is inconsistent with the purpose of Rule 60(d)(3).

This Article suggests that courts depart from the heightened standard used to set aside judgments secured by a fraud on the court. Specifically, this Article advances a four-step process and recommends courts focus on one specific question when evaluating whether conduct rises to the level of fraud on the court: whether the conduct complained of caused the court not to perform in the usual manner in its impartial task of adjudging cases.

Part I of this Article discusses the various forms of abusive discovery that may lead to improper judgments, as well as some of the relevant rules of professional conduct and civil procedure. Part I also discusses the classes of victims that are the most greatly impacted by abusive discovery. Part II introduces the concept of “fraud on the court” and discusses its meaning, history, and use in combating fraudulent litigation practice. Finally, Part III introduces the four-step process, which requires an examination of the following: (1) the offending party and his duties, (2) the conduct at issue and its effect on the judicial ma-

¹³ See, e.g., *Combs v. Rockwell Int'l Corp.*, 927 F.2d 486, 488 (9th Cir. 1991) (relying on Rule 11 where counsel made thirty-six changes on a deposition errata sheet after the client advised that the transcript was accurate and the testimony was correct); *Brockton Sav. Bank v. Peat, Marwick, Mitchell & Co.*, 771 F.2d 5, 11–12 (1st Cir. 1985) (affirming district court's entry of default judgment under court's inherent powers in response to defendant's abusive litigation practices); *Wyle v. R.J. Reynolds Indus., Inc.*, 709 F.2d 585, 589 (9th Cir. 1983) (“[C]ourts have inherent power to dismiss an action when a party has willfully deceived the court and engaged in conduct utterly inconsistent with the orderly administration of justice.”); *Eppes v. Snowden*, 656 F. Supp. 1267, 1279 (E.D. Ky. 1986) (finding that where fraud is committed upon the court, the court's power to dismiss is inherent “to protect the integrity of its proceedings”).

¹⁴ *C.B.H. Resources, Inc. v. Mars Forging Co.*, 98 F.R.D. 564, 569 (W.D. Pa. 1983) (dismissing under Fed. R. Civ. P. 41(b) where party's fraudulent scheme, including use of a bogus subpoena, was “totally at odds with the . . . notions of fairness central to our system of litigation”).

¹⁴ See, e.g., *Herring v. United States*, 424 F.3d 384, 386–87 (3d Cir. 2005).

¹⁵ See, e.g., *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1338 (5th Cir. 1978).

chinery, (3) the victim's status during the underlying litigation—i.e., whether the harmed party was in a position to recognize and combat the fraud at issue prejudgment—and (4) the relief sought. Part III also utilizes the four-step process to demonstrate that advancing falsehoods during the discovery process is a form of fraud on the court and that courts have equitable power to entertain a party's action that seeks to set aside a judgment based upon fraud during the discovery process.

I. ABUSIVE DISCOVERY PRACTICE

A. Common Discovery Abuse

In a 2008 survey conducted by the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System, 45 percent of those surveyed indicated they believed discovery is abused in "almost every case."¹⁶ And a recent law review article led with this statement: "[o]ur discovery system is broken."¹⁷ Unfortunately, while the system may be "broken" for some, it oftentimes works for others as it allows them to gain a tactical advantage over their opponents.

Abusive discovery includes, among other things, expensive and time-consuming "inundation . . . with tons of motions, interrogatories, document requests, deposition notices and other pre-trial disputes."¹⁸ For example, in *Adelman v. Brady*, the Pennsylvania district court held that an interrogatory request in a Title VII discrimination case was "extremely burdensome" where it required the IRS to examine personnel files for records of reprimand with no limitations, such as a date range or employed staff versus unemployed staff.¹⁹ The court found that this would "require the IRS to review thousands of files."²⁰ Accordingly, the request was determined to be unduly burdensome and an abuse of discovery procedures.²¹

Discovery abuse also includes trickery,²² harassment,²³ threats,²⁴ and interference with depositions.²⁵ In *Prize Energy Resources, L.P. v. Cliff Hoskins*,

¹⁶ Gordon W. Netzorg & Tobin D. Kern, *Proportional Discovery: Making It the Norm, Rather than the Exception*, 87 DENV. U. L. REV. 513, 515 (2010) (quoting AM. COLL. OF TRIAL LAWYERS TASK FORCE ON DISCOVERY & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., INTERIM REPORT & 2008 LITIGATION SURVEY OF THE FELLOWS OF THE AMERICAN COLLEGE OF TRIAL LAWYERS, B-1 to B-2 (2008)).

¹⁷ Netzorg & Kern, *supra* note 16, at 513.

¹⁸ Ronald L. Hicks, Jr., *Strategies and Tips for Dealing with Dirty Litigation Tactics by Opposing Counsel*, EMP. & LAB. L. 153, 159 (May 2013).

¹⁹ *Adelman v. Brady*, No. 89-4714, 1990 WL 39147, at *2 (E.D. Pa. Mar. 28, 1990).

²⁰ *Id.*

²¹ *See id.*

²² *Prize Energy Res., L.P. v. Cliff Hoskins, Inc.*, 345 S.W.3d 537, 573 (Tex. App. 2011).

²³ *Id.*; *Adelman*, 1990 WL 39147, at *2.

²⁴ *Prize Energy Res.*, 345 S.W.3d at 573; *Florida Bar v. Ratiner*, 46 So.3d 35, 37 (Fla. 2010) (per curiam).

Inc., an attorney engaged in trickery when he “secur[ed] documents under false pretenses” during discovery.²⁶ The attorney used a “false letterhead” to contact potential witnesses regarding a case and purported to be a “businessman” for an oil and gas company.²⁷

In addition to his trickery, the same attorney also engaged in harassment to obtain discovery information.²⁸ For example, he contacted the opposing party and “continually badgered him to produce documents that had already been provided,” even after the party obtained counsel.²⁹ Additionally, he threatened the opposing party with “criminal penalties” if the party failed to comply.³⁰

Attorneys frequently adopt similar behavior to interfere with depositions and thwart truth telling or disclosure of facts. *In re Fletcher* is illustrative.³¹ In *Fletcher*, an attorney threatened a police-officer witness with civil liability during his deposition as a means of intimidation by telling the officer that he had been added to an amended complaint alleging a Bivens action against the officer.³²

Aside from improper and unethical threats, other parties engage in Rambo-Litigation tactics to deter depositions.³³ In *Van Pilsum v. Iowa State University of Science and Technology*, the court found that an attorney’s conduct was sanctionable when he “monopolize[d] 20% of his client’s deposition.”³⁴ There, the attorney interrupted and objected to opposing counsel’s questioning so often that between the “167 page deposition . . . only four segments [exist] where five or more pages occur without an interruption.”³⁵ He also groundlessly attacked opposing counsel for his “ethics, litigation experience, and honesty.”³⁶ For this behavior, the attorney was sanctioned and a protective order was issued.³⁷

While the above clearly demonstrates abusive discovery tactics and misconduct, the instances likely did not rise to fraud on the court. Throw in dishonest behavior by an officer of the court, however, and a strong argument begins to unfold that a fraud on the court may be in the works. Indeed, the most

²⁵ *In re Fletcher*, 424 F.3d 783, 785 (8th Cir. 2005); *Van Pilsum v. Iowa State Univ. of Sci. and Tech.*, 152 F.R.D. 179, 180–81 (S.D. Iowa 1993) (order on motion to compel); *Hall v. Clifton Precision*, 150 F.R.D. 525, 526 (E.D. Pa. 1993).

²⁶ *Prize Energy Res.*, 345 S.W.3d at 577.

²⁷ *Id.* at 573.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ See generally 424 F.3d 783 (8th Cir. 2005).

³² *Id.* at 790.

³³ See, e.g., *Van Pilsum v. Iowa State Univ. of Sci. and Tech.*, 152 F.R.D. 179, 181 (S.D. Iowa 1993) (order on motion to compel).

³⁴ *Id.*

³⁵ *Id.* at 180.

³⁶ *Id.*

³⁷ *Id.* at 181.

harmful form of discovery abuse is likely in the form of attorney deceit. No one can dispute “the discovery system is designed to facilitate truth-finding.”³⁸ Yet, deception during discovery is all too common. As one scholar noted, “one reason for [attorney misconduct] is the tension inherent in the discovery process.”³⁹ Absent information protected by the attorney-client privilege or work-product doctrine, the rules of civil procedure require full disclosure during discovery; yet providing an opposing party with information that might harm the client’s case seems to conflict with zealous advocacy.⁴⁰ This quandary appears to be a true Catch-22 from which there is no escape. Thus, when these mutually conflicting situations arise, “the natural tendency for many lawyers is to resist the disclosure of client information”⁴¹ or consciously deceive the opposing party in order to gain a tactical advantage.

In *In re Shannon*,⁴² for example, a lawyer—the subject of the complaint filed by the State Bar of Arizona—materially altered some of his client’s handwritten answers to interrogatories without providing a copy of the altered interrogatories to his client.⁴³ After the client terminated the lawyer—but while the lawyer was still acting as the attorney of record—he submitted the altered interrogatories, along with the verification to the court for support of a motion for summary judgment.⁴⁴ Fortunately, the lawyer’s motion was denied,⁴⁵ and the court *did not* have to discuss whether the lawyer committed fraud upon the court. The opinion arose out of disciplinary proceedings, so the focus was whether the attorney violated certain rules of conduct and ethics, not whether a fraud on the court occurred. Further, despite the altered interrogatories submitted to the court, no judgment was ever obtained, and therefore, the parties were not seeking to set aside any judgment.⁴⁶ If, however, a judgment was obtained in favor of the lawyer’s client based on the doctored answers to the interrogatories, would this be sufficient to set aside the judgment for fraud on the court pursuant to Rule 60(d)(3)? The answer is unclear.

In another similar case, *In re Griffith*,⁴⁷ an attorney was disciplined for failing to make critical disclosures during discovery and trial concerning his client’s medical records and treatment.⁴⁸ In that case, the lawyer represented the estate of Morris Pina, Jr. in a lawsuit against the City of New Bedford for po-

³⁸ W. Bradley Wendel, *Rediscovering Discovery Ethics*, 79 MARQ. L. REV. 895, 895 (1996).

³⁹ Alex B. Long, *Attorney Deceit Statutes: Promoting Professionalism Through Criminal Prosecutions and Treble Damages*, 44 U.C. DAVIS L. REV. 413, 423 (2010).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² See generally 876 P.2d 548 (Ariz. 1994), *modified*, 890 P.2d 602 (Ariz. 1994).

⁴³ *Id.* at 552.

⁴⁴ *Id.* at 556.

⁴⁵ *Id.*

⁴⁶ *Id.* at 577.

⁴⁷ 800 N.E.2d 259 (Mass. 2003).

⁴⁸ *Id.* at 259.

lice misconduct.⁴⁹ New Bedford police officers arrested Pina and, while in custody, he died.⁵⁰ Before commencing the trial, however, the lawyer for the estate learned that Pina was being treated for medical problems and had tested positive for human immunodeficiency virus (HIV).⁵¹ And when specifically asked through interrogatories whether Pina had ever been treated or admitted to a hospital prior to the alleged incident, the estate responded that it had no knowledge of any treatment or admissions.⁵² These responses were false. The estate was also served with a request for documents, including a request to produce all medical records with any doctor or hospital rendering treatment on behalf of Pina for a period of five years prior to Pina's death.⁵³ The lawyer never produced the documents he had in his possession that would have been responsive to this request.⁵⁴ Furthermore, the attorney retained an expert economist to testify on damages arising from Pina's alleged wrongful death.⁵⁵ However, the lawyer never told the expert about the HIV.⁵⁶ Accordingly, the expert calculated the decedent's total loss of pleasure of life exceeded two million dollars.⁵⁷ At trial, the estate was awarded damages in the amount of \$435,000.⁵⁸

But, during trial the defendant learned of the HIV and opposing counsel's calculated efforts to conceal this material information.⁵⁹ Following trial, the parties settled for \$555,000 and defense counsel sought sanctions against the lawyer, alleging that he had withheld this critical information during discovery and trial.⁶⁰ After a hearing, the judge entered an order in which he found that the lawyer had "engaged in a pattern of activity to hide [Pina's HIV status] from the defendants and initially . . . from the court, and had engaged in deliberate misconduct in connection with [plaintiff's] responses to the defendants' interrogatories."⁶¹ Again, the court was not forced to analyze Rule 60(d)(3) because the attorneys uncovered the deceit before a judgment was rendered. However, had plaintiff prevailed at trial, would the defendant have a case to set aside the judgment for fraud upon the court? Did the plaintiff intentionally aim the false responses directly at the court? Could the failure disclose relevant information cause the court not to perform in the usual manner its impartial task of adjudging cases? Or was this just ordinary fraud between the parties?

⁴⁹ *Id.*

⁵⁰ *Id.* at 260.

⁵¹ *Id.*

⁵² *Id.* at 261.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 260.

⁵⁹ *Id.* at 262.

⁶⁰ *Id.* at 260, 262.

⁶¹ *Id.* at 262 (internal quotation marks omitted).

In another case, *In re Estrada*,⁶² the lawyer—who was representing a pharmacy in a personal injury action resulting from a pharmacist accidentally filling a child's prescription with methadone—misled the court by falsely denying the plaintiff's request for admission of fact.⁶³ The lawyer's indiscretion was not just a minor oversight, but rather a critical omission that could make or break the plaintiff's case against the pharmacy.⁶⁴ Indeed, the case resulted in a mistrial after it became apparent that a prescription introduced into evidence, intended to prove that the pharmacy could account for all its dispensed methadone, was a forgery.⁶⁵ Fraud on the court?

Unfortunately, the foregoing represents just a small number of cases where deceit and fraud are present. One would hope that the majority of attorneys understand and acknowledge that zealous representation—even aggressive representation—can always be accomplished through playing by the rules. Indeed, despite the tension of litigation, lawyers are always responsible for maintaining the ethical standards of the profession. These standards and ethical obligations are governed by a combination of sources,⁶⁶ which include the Federal Rules of Civil Procedure, state rules, and laws governing attorney conduct.⁶⁷ Violating or otherwise ignoring these discovery-based rules have broad implications. As one court noted,

A lawyer who seeks excessive discovery given what is at stake in the litigation, or who makes boilerplate objections to discovery requests without particularizing their basis, or who is evasive or incomplete in responding to discovery, or pursues discovery in order to make the cost for his or her adversary so great that the case settles to avoid the transaction costs, or who delays the completion of discovery to prolong the litigation in order to achieve a tactical advantage, or who engages in any of the myriad forms of discovery abuse that are so commonplace is . . . hindering the adjudication process, and . . . violating his or her duty of loyalty to the "procedures and institutions" the adversary system is intended to serve.⁶⁸

Notwithstanding the procedural and ethical components of these rules, there will always be lawyers and parties that simply disregard or sidestep the rules to gain an advantage. And it does not matter whether the rule falls within a "gray area" of law or is replete with obvious warnings and penalties designed to deter the offending party from abusive practice.

Consider, for example, Rule 26(g) of the Federal Rules of Civil Procedure. This rule—"[o]ne of the most important, but apparently least understood or fol-

⁶² 143 P.3d 731 (N.M. 2006).

⁶³ *Id.* at 735.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ See Debra Lyn Bassett, *E-Pitfalls: Ethics and E-Discovery*, 36 N. KY. L. REV. 449, 450 (2009).

⁶⁷ *Id.*

⁶⁸ *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 362 (D. Md. 2008) (citation omitted).

lowed, of the discovery rules⁶⁹—clearly and expressly requires that “every discovery request, response, or objection be signed by at least one attorney of record, . . . or by the [client], if unrepresented.”⁷⁰ The signature “certifies that to the best of the person’s knowledge, information, and belief formed after a reasonable inquiry,” the discovery is complete and correct, and that the discovery request, response, or objection is

(i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law; (ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and (iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.⁷¹

If a lawyer or party makes the certification required by Rule 26(g) that violates the rule, the court “must” impose an appropriate sanction, which may include an order to pay reasonable expenses and attorney’s fees caused by the violation.⁷² But do fraudulent responses to written discovery, for example, expose a party to default or dismissal for committing fraud on the court?

Rule 26 is clear on its face and in its purpose: deter abusive discovery and sanction offending parties for misconduct in discovery. One would think that the transparencies of the rule and the obvious consequences for compliance would have a strong deterrent effect, yet that is not always the case. In addition to Rule 26, other remedies exist to prevent abusive discovery, including sanc-

⁶⁹ *Id.* at 357.

⁷⁰ FED. R. CIV. P. 26(g).

⁷¹ *Id.*

⁷² *Id.* The Advisory Committee’s Notes to Rule 26(g) provide further guidance:

Rule 26(g) imposes an affirmative duty to engage in pretrial discovery in a responsible manner that is consistent with the spirit and purposes of Rules 26 through 37. In addition, Rule 26(g) is designed to curb discovery abuse by explicitly encouraging the imposition of sanctions. The subdivision provides a deterrent to both excessive discovery and evasion by imposing a certification requirement that obliges each attorney to stop and think about the legitimacy of a discovery request, a response thereto, or an objection. . . .

If primary responsibility for conducting discovery is to continue to rest with the litigants, they must be obliged to act responsibly and avoid abuse. With this in mind, Rule 26(g), which parallels the amendments to Rule 11, requires an attorney or unrepresented party to sign each discovery request, response, or objection. . . .

Although the certification duty requires the lawyer to pause and consider the reasonableness of his request, response, or objection, it is not meant to discourage or restrict necessary and legitimate discovery. The rule simply requires that the attorney make a reasonable inquiry into the factual basis of his response, request, or objection.

The duty to make a “reasonable inquiry” is satisfied if the investigation undertaken by the attorney and the conclusions drawn therefrom are reasonable under the circumstances. It is an objective standard similar to the one imposed by Rule 11.

FED. R. CIV. P. 26(g) advisory committee’s notes to the 1983 amendments (emphasis added) (citations omitted).

tions,⁷³ discovery statutes,⁷⁴ and misconduct-reporting boards.⁷⁵ These rules and remedies share a few common shortfalls. First, they are written and used to deter abusive conduct *during* the litigation. However, these rules have little utility post-judgment (i.e., if abusive discovery leads to an improper judgment, these rules have minimal value or impact). Second, while these rules may combat abuse that otherwise might lead to improper judgments, the rules are plainly more effective in the hands of competent attorneys who understand how they operate and how they can potentially deter attorney misconduct. Yet, when victims of abusive discovery are representing themselves *pro se*, or have been abandoned by counsel, the rules serve a very limited function, if any, in these victims' hands.

B. *The Vulnerable Victims*

Abusive discovery practice comes in all shapes and sizes. From the multi-billion-dollar case with hundreds of defendants to the ten-thousand dollar breach of contract case, one is likely to find attorneys engaging in unsound litigation tactics. Any party on the receiving end of this abuse is a victim and has standing to seek redress from the court. However, abusive discovery's impact seems to be far greater for two classes of victims: the *pro se* litigant and the attorney-abandoned litigant. Should these victims receive special treatment when faced with judgments obtained by fraud? Is their status relevant to the court's analysis under Rule 60(d)(3)—i.e., should the courts be more flexible and willing to set aside judgments in cases where the victim was not adequately represented by counsel when the fraud occurred?

1. *The Pro Se Litigant*

The saying goes, "one who is his own lawyer has a fool for a client."⁷⁶ In *Powell v. Alabama*,⁷⁷ the Supreme Court wrote,

Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding

⁷³ See, e.g., *In re Lucas*, 789 N.W.2d 73, 78 (N.D. 2010) (suspending an attorney for misconduct). Sanctions can also include paying opposing party's attorney's fees.

⁷⁴ See, e.g., FED. R. CIV. P. 26(b)(2)(C) (providing that a court "must limit the frequency or extent of discovery"); FED. R. CIV. P. 33(a)(1) (providing that "[u]nless otherwise stipulated or ordered by the court, a party may serve on any other party no more than 25 written interrogatories"); FED. R. CIV. P. 37(a)(1) (allowing a party to compel discovery); FED. R. CIV. P. 45(d)(3)(A) (authorizing a district court to quash a subpoena if it subjects a person, including a non-party, to an undue burden, fails to allow for a reasonable time for compliance, or requires disclosure of confidential information).

⁷⁵ *Outback Steakhouse of Florida, Inc. v. Markley*, 856 N.E.2d 65, 85 (Ind. 2006) (disciplining by ethics committee for false statements); *People v. Scruggs*, 52 P.3d 237, 241 (Colo. 2002) (holding that disbarment was an appropriate remedy for abuse).

⁷⁶ *Faretta v. California*, 422 U.S. 806, 852 (1975) (Blackmun, J., dissenting).

⁷⁷ *Powell v. Alabama*, 287 U.S. 45 (1932).

hand of counsel at every step in the proceeding against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.⁷⁸

So why would anyone choose to appear pro se? The likely response is that they have no choice. They are victims of a legal market failure. On the demand side, most Americans struggle to find a lawyer to provide them with legal advice. On the supply side, law school graduates and other lawyers are either unemployed or underemployed.⁷⁹ Chief Justice Warren Burger predicted thirty-five years ago that America was turning into “a society overrun by hordes of lawyers, hungry as locusts.”⁸⁰ But what are these lawyers craving? Pro bono work? Serving the underprivileged? Not likely. Lawyers, generally, provide for the legal needs of those individuals and businesses that can deliver a secure retainer and pay a considerable amount of money. However, there are only so many low-risk, high-paying clients around. As a result, scores of the American population are forced to represent themselves because lawyers are either not willing to take on the risk of not being paid or not willing to devote a significant amount of time to serving the underprivileged.

This “pro se” problem was recently highlighted in states where foreclosures require a judge’s approval. “[H]omeowners in default have traditionally surrendered their homes without ever coming to court to defend themselves.”⁸¹ That inaction, however, has begun to recede.⁸² Indeed, “[w]hile many foreclosures are still unopposed, courts are seeing a sharp rise in cases where defendants show up representing themselves.”⁸³ Some courts “welcome[] the influx of parties defending themselves.”⁸⁴ Louis McDonald, the chief judge for New Mexico’s Thirteenth Judicial District, acknowledged that “[s]ome of [the pro se defendants] have fairly legitimate defenses.”⁸⁵ But the law grows more complex as cases progress through litigation, and several of the pro se defendants are in over their heads and unable to combat abusive practice.⁸⁶ These parties are susceptible to the problems highlighted above. “Admit you signed the loan documents.” “Admit you are in default.” “Admit we hold the deed of trust against your home and we are the entitled beneficiaries.” If true, these requests to admit, alone, could establish a lender’s prima facie foreclosure case. But what if the plaintiff submitting these requests was not the beneficiary? What if they were not in possession of the promissory note and the deed of trust? That

⁷⁸ *Id.* at 69.

⁷⁹ Michael S. Hooker & Guy P. McConnell, *Too Many Lawyers—Is It Really a Problem?*, FED. LAW., Sept. 2014, at 62, 63–64.

⁸⁰ Warren E. Burger, *Our Vicious Legal Spiral*, 16 JUDGES’ J. 22, 49 (1977).

⁸¹ David Streitfeld, *For the Foreclosed, Themselves*, N.Y. TIMES, Feb. 3, 2011, at B1.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

alone would be sufficient to prevent the lender from foreclosing. If the requests went unanswered, they would be deemed admitted.⁸⁷ By asking the homeowners to admit known falsehoods and then injecting those falsehoods into the court system to support a motion for summary judgment, would the plaintiff seeking to foreclose be committing fraud on the court?

New York has experienced similar issues. Before 2008, “about 90 percent of foreclosure defendants never appeared before a judge.”⁸⁸ However, with new mandatory settlement laws in place, “more than three-quarters of defendants now show up to court, about 32,000 in the first [ten months of 2010].”⁸⁹ However, only about 12,000 had a lawyer.⁹⁰ The other 20,000 were in charge of their own fate. “We’re getting the people in here, getting them to the table with the bank, but I don’t know what happens to these cases long term,” said Paul Lewis, chief of staff to New York’s chief administrative judge.⁹¹ “Many of the homeowners would do much better with an attorney.”⁹²

Unlike criminal proceedings, the right to counsel is not absolute in civil cases.⁹³ This further strengthens the argument that most pro se appearances by civil litigants are not voluntary, but instead result because they simply cannot afford attorneys to represent them. This is especially true when one considers the potential costs involved with discovery alone. Indeed, “[p]erhaps the greatest driving force in litigation today is discovery. Discovery abuse is a principal cause of high litigation transaction costs.”⁹⁴ Unfortunately, “in far too many cases, economics—and not the merits—govern discovery decisions.”⁹⁵ The result is that “[l]itigants of moderate means are often deterred through discovery from vindicating claims or defenses, and the litigation process all too often becomes a war of attrition for all parties.”⁹⁶

If the right to counsel were absolute in civil cases, pro se appearances would decrease significantly, if not entirely. For several justifiable reasons, however, this is not how the American legal system functions. Because of this, some courts accord pro se litigants a certain degree of leniency, particularly

⁸⁷ See, e.g., FED. R. CIV. P. 36(a)(3) (stating that “[a] matter is admitted unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney”).

⁸⁸ Streitfeld, *supra* note 83.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Lassiter v. Dep’t. of Soc. Servs.*, 452 U.S. 18, 26–27 (1981).

⁹⁴ S. REP. NO. 101-650, at 20 (1990), as reprinted in 1990 U.S.C.C.A.N. 5763, 6823.

⁹⁵ *Id.*

⁹⁶ *Id.*

with respect to procedural rules.⁹⁷ Notwithstanding, extending too much leniency undermines the system. As one court recently explained,

[T]he Court may not be co-opted by a pro se litigant to perform tasks normally carried out by hired counsel. Providing assistance or extending too much procedural leniency to a pro se litigant risks undermining the impartial role of the judge in the adversary system. Moreover, it has never been suggested that procedural rules in ordinary civil litigation should be interpreted so as to excuse mistakes by those who proceed without counsel. Pro se litigants must adhere to procedural rules as would parties assisted by counsel. This includes procedural requirements regarding the provision of adequate factual averments to sustain legal claims.⁹⁸

In other words, claims of discovery abuse may be null, even if there is some trickery or omission from the opposing counsel because procedural rules tend to apply uniformly to pro se and represented parties, regardless of the unequal knowledge of the law.⁹⁹ For example, in *Tall v. Alaska Airlines*, a Kentucky court of appeals held that a pro se defendant's belief that he had entered a settlement agreement with the plaintiff's counsel during discovery did not provide a remedy when he failed to submit a denial in a request for admissions.¹⁰⁰ The defendant defaulted on a credit agreement and responded to a complaint filed by the bank by "denying that he owed any debt."¹⁰¹ He stated that he discussed a settlement amount with the bank's attorney that would allow him to bring his account current; this conversation allegedly occurred prior to suit.¹⁰² A review of the case indicates there was a misunderstanding as to the agreement, and instead of a monthly payment, the defendant rendered the total "principal amount," minus "interest owed, costs, or fees."¹⁰³

During discovery, the opposing counsel requested admissions and the defendant failed to answer, resulting in his admission that he still owed the debt.¹⁰⁴ The defendant argued that counsel had "tak[en] advantage of [his] ignorance of the law" in violation of a state statute that required parties to make a "good faith effort" to resolve discovery disputes.¹⁰⁵ Yet, the court held that because the "unanswered admission requests are deemed admitted . . . there is no

⁹⁷ See, e.g., *GJR Invs., Inc. v. Cty. of Escambia*, 132 F.3d 1359, 1369 (11th Cir. 1998) (stating that "[c]ourts do and should show a leniency to pro se litigants not enjoyed by those with the benefit of a legal education").

⁹⁸ *United States v. Gregg*, No. 12-322, 2013 WL 6498249, at *4 (W.D. Pa. Dec. 11, 2013) (internal quotations and citations omitted).

⁹⁹ *Paselk v. Rabun*, 293 S.W.3d 600, 611 (Tex. Ct. App. 2009) (petition denied).

¹⁰⁰ *Tall v. Alaska Airlines*, No. 2009-CA-002256-MR, 2011 WL 831918, at *1-*2 (Ky. Ct. App. Mar. 11, 2011) (alleging Credit Union took advantage of Tall's pro se representation during discovery, in violation of Jefferson County Local Rule 4).

¹⁰¹ *Id.* at *1.

¹⁰² *Id.* at *3.

¹⁰³ *Id.* at *4.

¹⁰⁴ *Id.* at *3.

¹⁰⁵ *Id.* at *4 (citing Local Rule 402).

foreseeable reason for a party to seek to compel such admissions.”¹⁰⁶ Therefore, an opposing attorney does not have a duty to warn another party, even pro se, to follow discovery procedures.¹⁰⁷

This Article does not necessarily advocate for extra-judicial assistance to pro se litigants.¹⁰⁸ Instead, it highlights a growing problem: pro se litigants are becoming more plentiful and they lack legal skill and knowledge to oppose aggressive counsel. As one scholar noted,

Our civil process before and during trial, in state and federal courts, is a masterpiece of complexity that dazzles in its details—in discovery, in the use of experts, in the preparation and presentation of evidence, in the selection of the fact-finder and the choreography of the trial. But few litigants or courts can afford it.¹⁰⁹

When a party opponent senses this weakness, it will seize its prey. In one article discussing foreclosures and pro se parties, it was noted that lawyers “pretty much bank on people not showing up, or not having an attorney to represent them.”¹¹⁰ Consequently, in addition to facing the aggressive lawyer, the misguided and naïve litigant is likely to encounter an opposing party who refuses to play by the rules because it knows (1) the chances of being caught, sanctioned, or challenged are relatively small and (2) the probability of prevailing in the lawsuit is significantly greater if the rules are not observed. The skilled lawyer, knowing that his opponent is not qualified, is thus encouraged to engage in improper or unsound litigation tactics.¹¹¹ During the pending litigation, there are several remedies available to thwart abusive litigation practice. Yet, when abusive practice actually leads to a judgment in favor of the perpe-

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ Some courts actually do accord “special attention” to pro se litigants faced with procedural complexities, such as summary judgment motions. *Ham v. Smith*, 653 F.2d 628, 629–30 (D.C. Cir. 1981). Indeed, some courts agree that a litigant is entitled to be warned that when she is confronted by a summary judgment motion, she must obtain evidentiary material to avoid the entry of judgment against her. *See, e.g., Timms v. Frank*, 953 F.2d 281, 285 (7th Cir. 1992); *Roseboro v. Garrison*, 528 F.2d 309, 310 (4th Cir. 1975) (per curiam); *Hudson v. Hardy*, 412 F.2d 1091, 1094 (D.C. Cir. 1968) (per curiam).

¹⁰⁹ Kent D. Syverud, *ADR and the Decline of the American Civil Jury*, 44 UCLA L. REV. 1935, 1942 (1997).

¹¹⁰ Kat Aaron, *Foreclosure Crisis + Legal Aid Cuts = @#%!*, MOTHER JONES (Feb. 14, 2011, 7:00 AM), <http://www.motherjones.com/politics/2011/02/legal-services-corporation-recession>.

¹¹¹ *See* Scott L. Garland, *Avoiding Goliath's Fate: Defeating a Pro Se Litigant*, 24 LITIG. 45, 46 (1998) (commenting that in his experience as a clerk at a federal district court, “[m]any lawyers seem to think that litigating against a pro se party gives the lawyer license to litigate like a pro se party, by omitting legal citations, making conclusory statements, forgoing affidavits and evidence in favor of *ipse dixit*, and failing to evaluate the opponent’s arguments.”); *see also* Jon O. Newman, *Pro Se Prisoner Litigation: Looking for Needles in Haystacks*, 62 BROOK. L. REV. 519, 520 (1996) (concluding that state attorney generals’ experience with frivolous pro se prisoner litigation has led them to exaggerate or misstate the merit of certain pro se allegations).

trator, the pro se litigant is left with very few procedural arrows in his quiver to combat the wrongdoing.

2. *The Attorney-Abandoned Litigant*

Pro se litigants are not the only victims abused by improper gamesmanship. The *Fallini* case introduced in the Introduction represents the classic example of attorney abandonment.

When Fallini was sued, she retained an attorney to represent and defend her.¹¹² He filed an answer on Fallini's behalf. At the time of the lawsuit, Fallini was over sixty years of age and had no legal skills or knowledge of the procedures involved in a lawsuit.¹¹³ She relied on and trusted her attorney to resolve the legal dispute quickly, efficiently and competently. In June 2007, shortly after her attorney filed Fallini's answer, he represented to her that the case was over and that she had prevailed because of her statutory open-range defense.¹¹⁴ Unbeknownst to Fallini, however, the case was not over. In fact, litigation continued by way of discovery requests and motion practice by counsel for the plaintiff, but Fallini's attorney failed to answer various requests for admission, oppose a motion for summary judgment based on those unanswered requests for admissions, appear for a hearing on the motion for summary judgment, or respond to other discovery requests.¹¹⁵

Fallini "did not receive direct notice of the foregoing neglect of her attorney."¹¹⁶ Nonetheless, the court entered partial summary judgment in which it imposed liability on Fallini for the accident.¹¹⁷ In particular, Fallini was *deemed* to have admitted that the accident did *not* occur on open range—which obviated her *complete defense* to the action pursuant to NRS § 568.360(1)—even though she had already asserted that defense in her answer.¹¹⁸

The court later held her attorney in contempt of court and repeatedly imposed significant sanctions for his failure to appear and comply with its orders in the case.¹¹⁹ "But despite these court-imposed sanctions, Fallini was still not informed of the status of her case, nor was she informed that her attorney was being sanctioned for his deliberate failure to represent her."¹²⁰ It was not until June 2010—three years after Fallini's attorney told her that the case was over

¹¹² *Estate of Adams v. Fallini*, No. CV 24539 (Nev. 5th Dist. Ct. Aug. 6, 2014), at 2 (court order).

¹¹³ Motion for Relief from Judgment Pursuant to NRCP 60(b) at 5, *Estate of Adams*, No. CV 24539.

¹¹⁴ *Id.* at 21.

¹¹⁵ *Id.* at 20–21.

¹¹⁶ *Id.* at 6.

¹¹⁷ *Estate of Adams*, No. CV 24539, at 3.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 3–4.

¹²⁰ Motion for Relief From Judgment Pursuant to NRCP 60(b) at 6, *Estate of Adams*, No. CV 24539.

and that she had prevailed—that Fallini learned the true status of her case—that a judgment exceeding \$2.7 million had been entered against her despite her ironclad statutory defense.¹²¹

In situations where attorney misconduct like that discussed above leads to a favorable judgment, Rule 60(d)(3) should serve as a wide-open door that victims can enter unhindered. One of the major problems associated with attorney abandonment is the difficulty in reversing the wrongdoing, especially if the party is faced with an adverse judgment. Abandonment has been defined in very strict terms and requires a high bar before a party may gain relief from judgment due to its own counsel's inadequacy.¹²² Though not a discovery-abuse case, in *Maples v. Thomas*,¹²³ the United States Supreme Court recently held that a "habeas prisoner's default" would be excused when the filing deadline was missed due to his attorneys' abandonment because "a client cannot be charged with the acts or omissions of an attorney who has abandoned him."¹²⁴ However, this is a high bar, requiring "extraordinary circumstances beyond . . . [a party's] control," such as "evidence [of] counsel's near-total failure to communicate with, [or respond to], petitioner."¹²⁵ A procedural error, such as missing a filing deadline, does not fit the mold.¹²⁶ Abandonment requires something more akin to the injured party in *Maple* where the attorneys not only failed to file the petition, but also, among other things, (1) took on new employment, (2) failed to notify their client, (3) failed to withdraw, (4) allowed ineffective counsel to take over, and (5) permitted clerical issues to occur at their firm that deprived the client of important communications.¹²⁷ Furthermore, the "attorney abandonment" addressed by the Supreme Court occurred in a criminal procedure context, not in a civil suit.¹²⁸

Accordingly, without facts similar to this extreme example of abandonment in a *criminal* case, courts are left to their discretion to render judgment against a party due to his own attorney's misconduct during discovery. Though failing to communicate with a client¹²⁹ and failing to file orders or respond to re-

¹²¹ *Id.* at 6–7.

¹²² This is a narrow exception from the normal discretion courts have to impose sanctions for discovery violations.

¹²³ 132 S. Ct. 912 (2012).

¹²⁴ *Id.* at 924.

¹²⁵ *Id.* at 923–24.

¹²⁶ *Id.* at 921. Yet, it should be noted that courts still have the discretion to sanction for a procedural error.

¹²⁷ *Id.* at 928 (Alito, J., concurring).

¹²⁸ See generally *id.*

¹²⁹ See, e.g., *Comerica Bank v. Esposito*, 215 Fed. App'x 506, 508 (7th Cir. 2007) (stating that failure to communicate with a client is not generally enough for "postjudgment relief"); *Cohen v. Brandywine Raceway Ass'n*, 238 A.2d 320, 325 (Del. Super. Ct. 1968) (stating that even if the attorney failed to follow up after delivering the interrogatories, it was not "excusable neglect" when answers were not filed on time).

quests¹³⁰ are common, these actions generally do not afford relief, even when it is the fault of the represented party's counsel.

For example, in *Platinum Rehab, Ltd. v. Platinum Home Health Care Services*, an Ohio district court found that abandonment arising to "extraordinary circumstances" did not exist when the represented party could not show she was free from fault after her attorney failed to meet several deadlines, resulting in judgment against her.¹³¹ The defendant alleged that her attorney was "grossly negligent" and "abandoned representation" when he failed to answer a complaint, respond to discovery requests, and failed to appear at a hearing.¹³² Yet, the court found that she was not abandoned for three reasons.¹³³ First, she was present and aware of the filing dates for the answer and discovery requests.¹³⁴ Second, there was no evidence except her own statement that she provided the necessary information for the discovery requests.¹³⁵ Third, there was no evidence that she made an effort "to ensure" her attorney complied with the deadlines.¹³⁶ For these reasons, the court upheld the judgment against the defendant, even though her own counsel was negligent.¹³⁷ But what if the complaint or discovery requests that went unanswered were peppered with inaccurate, misleading, or fraudulent statements that allowed the plaintiff to obtain a judgment against the attorney-abandoned defendant? What would be the defendant's remedy? How could that judgment be set aside? Even if she was not free from fault because she was aware of the filing dates, would that somehow offset any fraud that occurred during discovery or mitigate the harm?

In another case, a Michigan court of appeals held that "effective abandonment" was not a legal term and denied reversing judgment against the plaintiff that resulted from the plaintiff's attorney's failure to comply with discovery.¹³⁸

¹³⁰ See, e.g., *Gripe v. City of Enid*, 312 F.3d 1184, 1188 (10th Cir. 2002) (refusing to overturn dismissal for attorney's failure to follow court orders and procedures); *Tolliver v. Northrop Corp.*, 786 F.2d 316, 319 (7th Cir. 1986) (finding that relief for judgment was not warranted for attorney's failure to comply with discovery requests); *Corchado v. Puerto Rico Marine Mgmt., Inc.*, 665 F.2d 410, 413 (1st Cir. 1981) (holding that dismissal was appropriate where counsel repeatedly failed to respond to discovery requests); *Weinreb v. TR Developers, LLC*, 943 N.E.2d 856, 858 (Ind. Ct. App. 2011) (holding that relief from summary judgment would not be granted where the defendant's attorney failed to argue a defense that was "known or knowable" at the time judgment was granted); *Moore v. Taylor Sales, Inc.*, 953 S.W.2d 889, 894 (Ark. Ct. App. 1997) (holding that default judgment would not be set aside where the attorney failed to file "timely answers" even though his client delivered the attorney the answers and the attorney assured the client he would file a response).

¹³¹ *Platinum Rehab., Ltd. v. Platinum Home Health Care Servs., LLC*, No. 1:11CV1021, 2012 WL 4461502, at *4 (N.D. Ohio Sept. 25, 2012).

¹³² *Id.* at *1.

¹³³ *Id.* at *1, *4.

¹³⁴ *Id.* at *4.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* at *5.

¹³⁸ *Beck v. Cass Cty. Rd. Comm'n*, No. 305246, 2012 WL 4465166, at *2 (Mich. Ct. App. Sept. 27, 2012).

In *Beck v. Cass County Road Commission*, the trial court dismissed the plaintiff's complaint as a "sanction for the willful failure to comply with an order to compel discovery."¹³⁹ In denying the plaintiff's motion for relief from judgment, the court determined that relief was unwarranted because an attorney's professional negligence is attributable to the client and does not ordinarily constitute grounds for setting aside judgments.¹⁴⁰ Even though the plaintiffs claimed that they were effectively abandoned by this non-assistance, the court found that there was no legal basis for this claim.¹⁴¹ Thus, the attorney's lack of vigor and lack of compliance was insufficient to allow relief from judgment.¹⁴²

As illustrated in the *Fallini* case, a false admission, which stems from an attorney failing to respond adequately to a request for admission, may lead to a dangerous result: an improper judgment unsupported by any law.¹⁴³ While a court may have no problem withdrawing a false admission in a discovery document while discovery is *ongoing*,¹⁴⁴ there is little guidance to show how a court would consider a false admission after judgment has been entered.¹⁴⁵ A party who is represented and is subjected to judgment due to his own party's misconduct has very limited remedies. For states that impute liability, Federal Rules of Civil Procedure Rule 60¹⁴⁶—or state-law equivalents—appear to be the only source of relief.¹⁴⁷

II. FRAUD ON THE COURT

Rule 60(d) of the Federal Rules of Civil Procedure, which provides the grounds for relief from a final judgment, order, or proceeding, states that the rule "does not limit a court's power to . . . set aside a judgment for fraud on the court."¹⁴⁸

What is "fraud on the court" within the meaning of Rule 60? Are there certain time limitations associated with this rule for parties seeking grounds for

¹³⁹ *Id.* at *1.

¹⁴⁰ *Id.* at *2.

¹⁴¹ *Id.*

¹⁴² *Id.* at *3.

¹⁴³ Blasky, *supra* note 4.

¹⁴⁴ See *Brankovic v. Snyder*, 578 S.E.2d 203, 207 (Ga. App. 2003) (stating that "[a] party has no right to a judgment based on false 'admissions'" due to a late response).

¹⁴⁵ *Turner v. Alta Mira Vill. Homeowners Ass'n, Inc.*, No. 2 CA-CV 2013-0151, 2014 WL 7344049, at *4 (Ariz. Ct. App. Dec. 24, 2014) (refusing to award sanctions where false admission resulted from "erroneously admit[ing] the truth."). Compare this to the somewhat analogous treatment for the failure to assert an affirmative defense (both require an affirmative statement). See, e.g., *Allmerica Fin. Life Ins. & Annuity Co. v. Llewellyn*, 139 F.3d 664, 665–66 (9th Cir. 1997) (holding that failure to plead an affirmative defense does not afford relief from judgment due to an attorney's "'ignorance nor carelessness'" (quoting *Engleson v. Burlington N. R.R. Co.*, 972 F.2d 1038, 1043 (9th Cir. 1992))).

¹⁴⁶ See FED. R. CIV. P. 60.

¹⁴⁷ *Las Vegas Land & Dev. Co., LLC v. Wilkie Way, LLC*, 219 Cal. Rptr. 3d 391, 392 (Ct. App. 2013); *Beck*, 2012 WL 4465166, at *2.

¹⁴⁸ FED. R. CIV. P. 60(d)(3).

relief from a final judgment? Does “fraud on the court” require the same standard of proof for common law fraud? Was that intent of the rule’s framers?

Rule 60(d)(3) was added in 1948.¹⁴⁹ The framers’ intention may best be indicated in the Advisory’s Committee’s discussion of the rule:

The amendment . . . mak[es] fraud an express ground for relief by motion; and under the saving clause, fraud may be urged as a ground for relief by independent action insofar as established doctrine permits. And the rule expressly does not limit the power of the court . . . to give relief under the savings clause. As an illustration of the situation, see *Hazel-Atlas Glass Co. v. Hartford Empire Co.* [322 U.S. 238 (1944)].¹⁵⁰

Because of the express reference to *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*,¹⁵¹ an examination of this case is important for a full understanding of the meaning of the phrase. Hartford, in support of an application for a patent, submitted to the Patent Office an article—drafted by an attorney of Hartford—referring to the contested process as a “revolutionary device.” The company had arranged to have the article printed in a trade journal under the name of an ostensibly disinterested person.¹⁵² The Patent Office relied heavily on this article in granting the patent application.¹⁵³ Hartford then sued Hazel, charging infringement of the patent. The Third Circuit, in upholding the validity of the patent, also relied on the article.¹⁵⁴ Eventually, Hazel yielded and paid Hartford \$1,000,000 and entered into a licensing agreement.¹⁵⁵ Approximately ten years later, the information about the fraud surrounding the agreement was brought to light.¹⁵⁶ Hazel then filed an action with the court to have the judgment against it set aside and the judgment of the district court reinstated.¹⁵⁷ The Supreme Court, in an opinion authored by Justice Black, held that the judgment must be vacated.¹⁵⁸

[T]he general rule [is] that [federal courts will] not alter or set aside their judgments after the expiration of the term at which the judgments were finally entered. . . . [but]

. . . .

[e]very element of the fraud here disclosed demands the exercise of the historic power of equity to set aside fraudulently begotten judgments. This is not simply a case of a judgment obtained with the aid of a witness who, on the basis of after-discovered evidence, is believed possibly to have been guilty of perjury.

¹⁴⁹ 11 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE & PROCEDURE CIVIL* § 2870 (3d ed. 2015).

¹⁵⁰ FED. R. CIV. P. 60 advisory committee’s note to 1946 amendment (citations omitted).

¹⁵¹ 322 U.S. 238 (1944).

¹⁵² *Id.* at 240.

¹⁵³ *Id.* at 241.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 243.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 251.

Here, even if we consider nothing but Hartford's sworn admissions, we find a deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals.¹⁵⁹

Additionally, although Hazel may not have exercised proper diligence in uncovering the fraud, the Court thought it immaterial.¹⁶⁰ Indeed, it noted the case did not concern just the private parties, but rather the public at large because there are "issues of great moment to the public in a patent suit."¹⁶¹ It then stated,

Furthermore, tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud.¹⁶²

Interestingly, the Court held that it need not decide to what extent the published article by Hartford had influenced the judges who voted to uphold the patent or whether the article was the primary basis of that ruling because "Hartford's officials and lawyers thought the article material" and they were in "no position now to dispute its effectiveness."¹⁶³ And since the fraud had been directed to the Third Circuit, that court was the appropriate court to remedy the fraud.¹⁶⁴ Thus, the Supreme Court directed the Third Circuit to vacate its 1932 judgment and to direct the district court to deny all relief to Hartford.¹⁶⁵

Nearly all of the principles that govern a claim of fraud on the court come from the *Hazel-Atlas* case.¹⁶⁶ First, the power to set aside a judgment exists in every court.¹⁶⁷ Second, in whichever court the fraud was committed, that court should consider the matter.¹⁶⁸ Third, while parties have the right to file a motion requesting the court to set aside a judgment procured by fraud, the court may also proceed on its own motion.¹⁶⁹ Indeed, one court stated that the facts that had come to its attention "not only justify the inquiry *but impose* upon us the duty to make it, even if no party to the original cause should be willing to cooperate, to the end that the records of the court might be purged of fraud, if

¹⁵⁹ *Id.* at 244-45.

¹⁶⁰ *Id.* at 246.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* at 246-47.

¹⁶⁴ *Id.* at 248-50.

¹⁶⁵ *Id.* at 251.

¹⁶⁶ WRIGHT ET AL., *supra* note 151.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* (citing *Universal Oil Prods. Co. v. Root Refining Co.*, 328 U.S. 575 (1946) (other citations omitted)).

¹⁶⁹ *Id.*

any should be found to exist.”¹⁷⁰ Fourth, unlike just about every other remedy or claim existing under the rules of civil procedure or common law, there is no time limit on setting aside a judgment obtained by fraud, nor can laches bar consideration of the matter.¹⁷¹ The logic is clear: “[T]he law favors discovery and correction of corruption of the judicial process even more than it requires an end to lawsuits.”¹⁷²

The United States Supreme Court—in a case a few years after the *Hazel-Atlas* case—discussed some of the appropriate procedures used in adjudicating fraud on the court claims.

The power to unearth such a fraud is the power to unearth it effectively. Accordingly, a federal court may bring before it by appropriate means all those who may be affected by the outcome of its investigation. But if the rights of parties are to be adjudicated in such an investigation, the usual safeguards of adversary proceedings must be observed.¹⁷³

Since *Hazel-Atlas*, a considerable number of courts have had the opportunity to dissect the meaning of “fraud on the court” and several definitions have been attempted. A number of courts have held that a “fraud on the court” occurs “where it can be demonstrated, *clearly and convincingly*, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system’s ability impartially to adjudicate a matter by improperly influencing the trier or unfairly hampering the presentation of the opposing party’s claim or defense.”¹⁷⁴

Fraud on the court is a very high bar. The Tenth Circuit has held that it is fraud “directed to the judicial machinery itself and is *not* fraud between the parties or fraudulent documents It is thus fraud where . . . the impartial functions of the court have been directly corrupted.”¹⁷⁵ And “only the most egregious misconduct, such as bribery of a judge or members of a jury, or the fabrication of evidence by a party in which an attorney is implicated, will constitute a fraud on the court.”¹⁷⁶

Some courts require the moving party to meet certain elements in order to set aside a judgment for fraud on the court. For example, in the Third Circuit,

¹⁷⁰ *Root Refining Co. v. Universal Oil Prods. Co.*, 169 F.2d 514, 521–23 (3d Cir. 1948) (emphasis added).

¹⁷¹ See *WRIGHT ET AL.*, *supra* note 151.

¹⁷² *Lockwood v. Bowles*, 46 F.R.D. 625, 634 (D.D.C. 1969).

¹⁷³ *Universal Oil*, 328 U.S. at 580.

¹⁷⁴ *Aoude v. Mobil Oil Corp.*, 892 F.2d 1115, 1118 (1st Cir. 1989) (emphasis added) (citing *Alexander v. Robertson*, 882 F.2d 421, 424 (9th Cir. 1989)); *Pfizer Inc. v. Int’l Rectifier Corp.*, 538 F.2d 180, 195 (8th Cir. 1976); *England v. Doyle*, 281 F.2d 304, 309 (9th Cir. 1960); *United Bus. Commc’ns, Inc. v. Racal-Milgo, Inc.*, 591 F. Supp. 1172, 1186–87 (D. Kan. 1984); *United States v. ITT Corp.*, 349 F. Supp. 22, 29 (D. Conn. 1972), *aff’d mem.*, 410 U.S. 919 (1973).

¹⁷⁵ *Robinson v. Audi Aktiengesellschaft*, 56 F.3d 1259, 1266 (10th Cir. 1995) (emphasis added).

¹⁷⁶ *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1338 (5th Cir. 1978).

fraud on the court applies to only “the most egregious misconduct directed to the court itself”¹⁷⁷ and requires the following elements: “(1) an intentional fraud; (2) by an officer of the court; (3) which is directed at the court itself; and (4) in fact deceives the court.”¹⁷⁸

Furthermore, fraud on the court under Rule 60(d)(3) does not encompass “ordinary fraud,” and must also be distinguished from “fraud” under Rule 60(b)(3)—i.e., those frauds which are not directed to the judicial machinery itself.¹⁷⁹ Rule 60(b)(3) provides relief from judgment where there is “fraud . . . misrepresentation, or misconduct by an opposing party.”¹⁸⁰ “Fraud upon the court as distinguished from fraud on an adverse party is limited to fraud which seriously affects the integrity of the normal process of adjudication.”¹⁸¹ Accordingly, the standard for establishing fraud on the court under Rule 60(d)(3) “is higher and distinct from the more general standard for fraud under Rule 60(b)(3).”¹⁸² Furthermore, while Rule 60(c)(1) limits to one year the time within which a motion under Rule 60(b)(3) must be made, a claim based upon fraud on the court under Rule 60(d)(3) is intended “to protect the integrity of the judicial process” and, therefore, *is not time barred*.¹⁸³

Despite the definitions and standards developed by the courts, the distinction between “fraud” and “fraud on the court” is unclear and much confusion still exists about what type of conduct falls into this category. As one court queried,

What is meant by “defile the court itself”? What is meant by “fraud perpetrated by officers of the court”? Does this include attorneys? Does it include the case in which an attorney is deceived by his client, and is thus led to deceive the court? The most that we can get . . . is that the phrase “fraud on the court” should be read narrowly, in the interest of preserving the finality of judgments, which is an important legal and social interest. We agree, but do not find this of much help to us in deciding the question before us.¹⁸⁴

As one commentator noted, “[p]erhaps the principal contribution of all of these attempts to define ‘fraud upon the court’ and to distinguish it from mere ‘fraud’ is [] a reminder that there is a distinction.”¹⁸⁵ If any fraud connected with the presentation of a case to a court is fraud on the court, then Rule 60(b)(3) and the time restraints imposed on that rule lose meaning. Nonetheless, because of its opaque meaning and application, several arguments can be made that abusive discovery between the parties, which ultimately results in a

¹⁷⁷ *Herring v. United States*, 424 F.3d 384, 386–87 (3d Cir. 2005).

¹⁷⁸ *Id.* at 386.

¹⁷⁹ *See United States v. Buck*, 281 F.3d 1336, 1342 (10th Cir. 2002).

¹⁸⁰ FED. R. CIV. P. 60(b)(3).

¹⁸¹ *King v. First Am. Investigations, Inc.* 287 F.3d 91, 95 (2d Cir. 2002) (internal quotations omitted).

¹⁸² *In re Old Carco LLC*, 423 B.R. 40, 52 (Bankr. S.D.N.Y. 2010).

¹⁸³ *Bowie v. Maddox*, 677 F. Supp. 2d 276, 278 (D.D.C. 2010).

¹⁸⁴ *Toscano v. Comm’r of Internal Revenue*, 441 F.2d 930, 933–34 (9th Cir. 1971).

¹⁸⁵ WRIGHT ET AL., *supra* note 151.

favorable judgment to the offender, should be included in the species of fraud on the court under Rule 60(d)(3).

III. ABUSIVE DISCOVERY AS FRAUD ON THE COURT AND REEVALUATING THE STANDARD

When, if ever, will abusive discovery practices rise to the level of fraud on the court within the meaning of Rule 60(d)(3)? Do the current standards adopted by the courts preclude utilizing Rule 60(d)(3) to set aside judgments procured by deceptive or misleading discovery? Is it proper to modify the heightened standard under Rule 60(d)(3) based on the victim, the offender, and the relief sought?

Unfortunately, courts tend to focus on antiquated standards when analyzing whether a party has committed fraud on the court, but fail to recognize the flexibility and equitable nature of the fraud-on-the-court rule. Indeed, nearly all courts that undertake the fraud-on-the-court analysis begin their opinions with the *Hazel-Atlas* case, then discuss the standards and definitions adopted by other courts, and finally decide whether the facts fit within that definition and standard.¹⁸⁶ The problem with this flawed analysis, however, is that victims of fraudulent discovery find themselves as a square-peg trying to fit into a round hole. But each case is unique and must be assessed and adjudicated according to its own facts.

Accordingly, this article suggests that courts engage in a four-step process that requires (1) examination of the offender and his duties to the court, (2) evaluation of the conduct and its effect, (3) consideration of the victim's status (the equitable component), and (4) consideration of the relief being sought. By engaging in this four-step process, courts may be more willing to set aside judgments under Rule 60(d)(3) when abusive discovery occurs that influences the decisions of courts.

A. *The Offender and His Duty*

When abusive discovery is at issue, the offending party will likely be an attorney.¹⁸⁷ Why is the offender's status important to the analysis? "An attorney is an officer of the court and owes the court fiduciary duties and loyalty."¹⁸⁸ Accordingly, "[w]hen an attorney misrepresents or omits material facts to the court, or acts on a client's perjury or distortion of evidence, his conduct may

¹⁸⁶ See, e.g., *Murray v. Ledbetter*, 144 P.3d 492, 498 (Alaska 2006) (discussing *Hazel-Atlas*'s "strict" definition of the elements necessary to prove fraud on the court, the tracing of the rule, and whether, "[i]n keeping with *Hazel-Atlas*," the activity at hand constituted a fraud on the court).

¹⁸⁷ Obviously, there may be some situations where pro-se litigants are the one conducting abusive discovery, but that appears to be a rare occurrence.

¹⁸⁸ *Trehan v. Von Tarkanyi*, 63 B.R. 1001, 1007 (Bankr. S.D.N.Y. 1986).

constitute a fraud on the court.”¹⁸⁹ Furthermore, when an officer of the court fails to correct a misrepresentation or retract false evidence submitted to the court, it may also constitute fraud on the court.¹⁹⁰ Notwithstanding, examination of the offender and his duty is not limited solely to an attorney’s duty of candor toward the tribunal.¹⁹¹ Rather, the analysis requires courts to examine certain duties that arise well before the offender involves the court.

At the outset, Rule 26(g) of the Federal Rules of Civil Procedure requires that an attorney of record sign discovery-related filings, and prescribes that the signature certifies that “to the best of the person’s knowledge, information, and belief formed after a reasonable inquiry” the discovery request, response, or objection is “consistent with these rules and warranted by existing law.”¹⁹² The signature also certifies that the request, response, or objection is “not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation.”¹⁹³ Accordingly, Rule 26 obligates “each attorney to stop and think about the legitimacy of a discovery request, a response thereto, or an objection”¹⁹⁴ and to make a reasonable inquiry into the factual and legal basis of his response, request, or objection. The Model Rules of Professional Conduct provide further guidance.

Lawyers are professionally and ethically responsible for accuracy in their representations to the court. Rule 3.1 of the Model Rules of Professional Conduct states that lawyers “shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good-faith argument for an extension, modification or reversal of existing law.”¹⁹⁵ Similarly, Rule 3.3 provides that “[a] lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.”¹⁹⁶

In addition to the rules of professional conduct and an attorney’s duty of candor as an officer of the court, “Rule 11 [of the F.R.C.P.] imposes a duty on attorneys to certify that they have conducted a reasonable inquiry and have determined that any papers filed with the court are well grounded in fact, legally tenable, and not interposed for any improper purpose.”¹⁹⁷ The United States Supreme Court has held that Rule 11,

¹⁸⁹ *Id.*

¹⁹⁰ *In re McCarthy*, 623 N.E.2d 473, 477 (Mass. 1993).

¹⁹¹ *See, e.g.*, NEV. RULES OF PROF’L CONDUCT 3.3 (stating that lawyers shall not make false statements of fact or law to the court or fail to correct false statements of material fact to the court).

¹⁹² FED. R. CIV. P. 26(g).

¹⁹³ *Id.*

¹⁹⁴ FED. R. CIV. P. 60 advisory committee’s note to 1983 amendment.

¹⁹⁵ MODEL RULES OF PROF’L CONDUCT r 3.1 (AM. BAR. ASS’N 2013).

¹⁹⁶ *Id.* at 3.3(a).

¹⁹⁷ *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393 (1990) (internal quotation marks omitted).

imposes on any party who signs a pleading, motion, or other paper—whether the party's signature is required by the Rule or is provided voluntarily—an affirmative duty to conduct a reasonable inquiry into the facts and the law before filing, and that the applicable standard is one of reasonableness under the circumstances.¹⁹⁸

An examination of the offender and his duties is important because, as discussed below, violations of Rule 26, Rule 11, or even the rules of professional conduct may give rise to a fraud-on-the-court claim, even if those violations were not specifically directed to the court itself.

B. Evaluation of the Conduct

After evaluating the offender and his duties, courts should analyze the conduct at issue. In examining the conduct, however, this Article suggests that the heightened standard adopted by several courts for fraud on the court does not comport with the rationale for employing Rule 60(d)(3) to set aside judgments. Instead, this Article suggests that courts examine one specific question when evaluating the conduct: did the conduct cause the court not to perform in the usual manner in its impartial task of adjudging cases?

While some suggest that the fraud or deceit committed by the attorney must be aimed directly at the court to constitute fraud on the court, this position seems faulty; however, it raises an important issue: since “[f]raud between the parties and fraud on the court are two distinct bases for post-judgment relief,”¹⁹⁹ how can a victim use Rule 60(d)(3) to ever set aside a judgment? In other words, abusive discovery is aimed at the opposing party rather than the court, and, thus, it would appear a victim has no claim under Rule 60(d)(3). But that is not necessarily true. Fraud on the court can originate from abusive discovery and find its way, sometimes unintentionally, to the steps of the courthouse. Accordingly, it is a myopic approach to only examine the arrow that the attorney shot towards the court and then decide whether the arrow was sufficiently harmful to constitute fraud on the court. Rather, a proper approach will examine all of the arrows the attorney shot at the victim and then analyze which arrows found their way to the court and the impact those arrows caused on the judgment.

Thus, for example, if an adversary misrepresents certain relevant information, fails to disclose such information, requests admissions that he knows to be false, lies during a deposition, or engages in any other deceitful form of discovery, he has clearly violated Rule 26 and has potentially engaged in fraud, misrepresentation, or other misconduct prohibited by ethical rules and state and federal rules of civil procedure. Admittedly, fraud on the court requires more than misconduct between the adverse parties—it must be some sort of misconduct that hampers the judicial machinery. Therefore, the critical component to

¹⁹⁸ *Bus. Guides, Inc. v. Chromatic Commc'ns Enters., Inc.*, 498 U.S. 533, 551 (1991).

¹⁹⁹ *Zurich N. Am. v. Matrix Serv., Inc.*, 426 F.3d 1281, 1291 (10th Cir. 2005).

the analysis is whether the offending party utilizes the information it obtained through abusive discovery practices to obtain a favorable judgment.

In *Kupferman v. Consolidated Research & Manufacturing Corp.*,²⁰⁰ the court stated that

[w]hile an attorney “should represent his client with singular loyalty that loyalty obviously does not demand that he act dishonestly or fraudulently; on the contrary his loyalty to the court, as an officer thereof, demands integrity and honest dealing with the court.” And when he departs from that standard in the conduct of a case he perpetrates a fraud upon the court.²⁰¹

In other words, “[s]ince attorneys are officers of the court, their conduct, if dishonest, would constitute fraud on the court.”²⁰²

In order to establish fraud on the court, some courts require the movant to prove by clear and convincing evidence *intentional* fraudulent conduct *specifically directed* at the court itself.²⁰³ For example, the Tenth Circuit had held that the fraud must directed to the judicial machinery itself and cannot be fraud or misconduct between the parties or fraudulent documents exchanged between the parties.²⁰⁴ Other courts have held that an action for fraud on the court is available only when the movant can show an “unconscionable *plan* or *scheme*” to improperly influence the court’s decision.²⁰⁵ Under this strict approach, one could argue that the only cases of fraud on the court would be those of bribery of a judge or members of a jury. In fact, the strict approach would arguably take away any consideration of the conduct that occurred between the parties or an attorney making filings to the court without making “an inquiry reasonable under the circumstances,” as required under Rule 11(b).²⁰⁶

This strict approach in evaluating the conduct that occurred, however, seems inconsistent with the purpose of Rule 60(d)(3). If the judicial machinery is unable to perform in the usual manner in its impartial task of adjudicating cases because of attorney misconduct, why does fraud on the court require the conduct at issue to be intentional and aimed directly at the court itself? Why does it have to be an intentional “plan” or “scheme”?²⁰⁷ On the contrary, if a party is responsible for undermining the integrity of the judicial process because it chose to recklessly present misleading or false evidence to the court and the court’s judgment was influenced by the conduct at issue, the judgment should be set aside as a fraud on the court.

²⁰⁰ 459 F.2d 1072 (2d Cir. 1972).

²⁰¹ *Id.* at 1078 (internal citation omitted).

²⁰² *H.K. Porter Co. v. Goodyear Tire & Rubber Co.*, 536 F.2d 1115, 1119 (6th Cir. 1976).

²⁰³ *Herring v. United States*, 424 F.3d 384, 386–87 (3d Cir. 2005).

²⁰⁴ *Robinson v. Aktiengesellschaft*, 56 F.3d 1259, 1266 (10th Cir. 1995).

²⁰⁵ *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1338 (5th Cir. 1978) (emphasis added) (quoting *England v. Doyle*, 281 F.2d 304, 309 (9th Cir. 1960)).

²⁰⁶ FED. R. CIV. P. 11(b).

²⁰⁷ See, e.g., *Fierro v. Johnson*, 197 F.3d 147, 154 (5th Cir. 1999) (holding that in order to establish fraud on the court, it is “necessary to show an unconscionable plan or scheme which is designed to improperly influence the court in its discretion.”) (citation omitted).

Accordingly, lawyers that use information obtained through discovery that has no basis in law or fact to support motions filed with the court are clearly misleading the court, even if they have no intent to defraud the court. Indeed, "an attorney might commit fraud upon the court by instituting an action 'to which he knew [or should have known] there was a complete defense.'"²⁰⁸ Similarly, lawyers that choose to conduct discovery without making an inquiry reasonable under the circumstances and then present false or misleading information to the court in order to obtain a favorable judgment may be guilty of fraud on the court. For example, kneejerk discovery requests served without consideration of existing law can, and should, rise to the level of fraud on the court under Rule 60(d)(3) if the court is influenced by the discovery that was improperly obtained.

Some cases may be opening the door for a more relaxed approach to the conduct component. For example, in *Eastern Financing Corporation v. JSC Alchevsk Iron and Steel Works*,²⁰⁹ the court found that an attorney committed fraud on the court when he filed a motion for default judgment.²¹⁰ Absent from the court's opinion is any analysis of the attorney's intent.²¹¹ Instead, the court focuses on a few areas of conduct that suggest a more relaxed approach to the fraud on the court standard.²¹² Admittedly, the case does not involve abusive discovery, but it is illustrative of a softened approach when analyzing whether certain conduct rises to the level of fraud on the court.

Of particular importance in *Eastern Financing* is the court's continued reference to Rule 11 violations and a lawyer's duty to conduct a reasonable inquiry before filing documents with the court. Interestingly, Rule 11 does not speak to fraud, nor does a violation of Rule 11 require the movant to prove intent. Yet the court seemed content relying, at least in part, on this rule to find that a fraud on the court had occurred.²¹³ In fact, a Rule 11 violation can occur when an attorney acts recklessly. Indeed, the court found that the attorney filed the complaint "without making an inquiry reasonable under the circumstances as required under Rule 11(b)."²¹⁴ The court held that this was "irresponsible" for the attorney to rely on his client's "oral recitation of facts" in preparing the complaint.²¹⁵

The most compelling evidence against the attorney, however, was that he knowingly sponsored his client's nondisclosure and misrepresentations when

²⁰⁸ *Alexander v. Robertson*, 882 F.2d 421, 424 (9th Cir. 1989) (citing *Kupferman v. Consol. Research & Mfg. Corp.*, 456 F.2d 1072, 1079 (2d Cir. 1972)).

²⁰⁹ 258 F.R.D. 76 (S.D.N.Y. 2008).

²¹⁰ *Id.* at 88.

²¹¹ *But see, e.g., Herring v. United States*, 424 F.3d 384, 386 (3d Cir. 2005) (requiring intentional fraudulent conduct by an officer of the court in order to come within the purview of fraud on the court under Rule 60(d)(3)).

²¹² *See Eastern Financing*, 258 F.R.D. at 85.

²¹³ *Id.* at 86.

²¹⁴ *Id.*

²¹⁵ *Id.* at 87.

verifying the complaint and then filing the motion for default judgment.²¹⁶ That alone was enough for the court to find that the attorney committed a fraud on the court.²¹⁷ The court also found that a letter submitted by the attorney to the court that failed to make mention of a pending bankruptcy case was “less than honest dealing with the court.”²¹⁸ When discussing the party’s conduct that contributed to a Rule 11 violation, the court said his submissions to the court show that he is “careless with facts and often misleading, and that he relies on suspicion and hearsay.”²¹⁹ Absent again from the court’s analysis, however, is any reference to *intentional* fraudulent conduct *specifically directed* at the court itself.²²⁰ Notably, the court continued to analyze the very question posed by this Article: did the conduct at issue cause the court not to perform in the usual manner its impartial task of adjudging cases?²²¹

In further support of a lightened standard, courts that have analyzed fraud on the court claims consistently refer to the “fraud, misrepresentation, *or* conduct” that occurred in procuring the judgment.²²² Again, suggesting that intentional fraudulent conduct specifically directed at the court is not a prerequisite to a successful fraud on the court claim. Even the Supreme Court in *Hazel-Atlas* stated that “[t]he public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of *deception* and fraud.”²²³ There is no plausible explanation why a claim for fraud on the court cannot stand when the deception or misconduct occurs between the litigants during discovery and then, at some point during the case, the conduct at issue impedes the court from performing in the usual manner its impartial task of adjudging the case.

C. Consideration of the Victim’s Status (The Equitable Component)

The doctrine of fraud on the court allows courts to provide equitable relief. Indeed, “the doctrine of fraud on the court is a judicially devised equitable doc-

²¹⁶ *Id.* at 82–83.

²¹⁷ *Id.* at 88.

²¹⁸ *Id.*

²¹⁹ *Id.* at 90.

²²⁰ *See, e.g.,* Robinson v. Aktiengesellschaft, 56 F.3d 1259, 1266 (10th Cir. 1995) (holding that fraud on the court requires fraud directed to the judicial machinery itself).

²²¹ *See Eastern Financing*, 258 F.R.D. at 85.

²²² *See, e.g.,* Anderson v. New York, No. 07 Civ. 9599(SAS), 2012 WL 4513410, at *4 (S.D.N.Y. Oct. 2, 2012) (stating that the “fraud, misrepresentation *or* conduct must have actually deceived the court”) (emphasis added); *see also In re Old Carco, LLC*, 423 B.R. 40, 52 (Bankr. S.D.N.Y. 2010) (stating that “[t]he fraud, misrepresentation *or* conduct must involve an unconscionable plan or scheme which is designed to improperly influence the court in its decision”) (internal citation omitted).

²²³ *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 246 (1944) (emphasis added).

trine, the application of which is dependent on the facts of the case.”²²⁴ In *Hazel-Atlas*, the Court noted,

Equitable relief against fraudulent judgments is not of statutory creation. It is a judicially devised remedy fashioned to relieve hardships which, from time to time, arise from a hard and fast adherence to another court-made rule, the general rule that judgments should not be disturbed after the term of their entry has expired. Created to avert the evils of archaic rigidity, *this equitable procedure has always been characterized by flexibility which enables it to meet new situations which demand equitable intervention, and to accord all the relief necessary to correct the particular injustices involved in these situations.*²²⁵

Notwithstanding, some courts have held that even if a party can demonstrate conduct that caused the court not to perform in the usual manner its impartial task of adjudging a case, “[a]ny issues that may have been ‘addressed through the unimpeded adversary process’ are not appropriately attacked on the basis of fraud upon the court.”²²⁶ For example, in *Gleason v. Jandrucko*, the court found no fraud on the court where the plaintiff had an opportunity to expose misrepresentations made in discovery at trial.²²⁷ There, the plaintiff moved under Rule 60 after the plaintiff’s case was dismissed.²²⁸ The plaintiff argued that the officers in the case lied during their depositions about having probable cause; however, the district court found that the plaintiff had opportunity to expose those inconsistencies during trial and failed to do so.²²⁹ Other courts have stated that allegations of an opposing counsel’s intentional mischaracterization of the applicable law, evidence, or affidavits submitted to the court does not rise to the level of fraud on the court *if* the movant’s own counsel could have rebutted opposing counsel’s mischaracterization of the law and the record before the court.²³⁰

This harsh approach is unreasonable, especially if courts consider the victim. The Supreme Court in *Hazel-Atlas* made it clear that the fraud-on-the-court rule should be characterized by flexibility and an ability to meet new situations demanding equitable intervention.²³¹ Because of the equitable and flexible nature of the rule, this Article contends that courts have ample leeway and discretion to consider the victim’s status—i.e., those parties unable to recognize or combat the fraud prejudgment—in determining whether to set aside a judgment for fraud on the court.

²²⁴ State *ex rel.* Corbin v. Arizona Corp. Comm’n, 693 P.2d 362, 370 (Ariz. Ct. App. 1984).

²²⁵ *Hazel-Atlas*, 322 U.S. at 248 (emphasis added).

²²⁶ *In re Old Carco*, 423 B.R. at 53 (citing Weldon v. United States, No. 99-6142, 2000 WL 1134358, at *2 (2d Cir. Aug. 9, 2000)).

²²⁷ *Gleason v. Jandrucko*, 860 F.2d 556, 557 (2d Cir. 1988).

²²⁸ *Id.* at 558.

²²⁹ *Id.* at 560.

²³⁰ *Weldon*, 2000 WL 1134358, at *2.

²³¹ *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 248 (1944) (emphasis added).

Is it fair to suggest that pro se litigants or attorney-abandoned litigants have a duty to root out all evil during the discovery process and that any issues that could have been addressed cannot be appropriately attacked on the basis of fraud on the court? Should courts deny these victims relief because they should have, for example, rebutted opposing counsel's mischaracterization of the law and the record before the court? Or should courts, equipped with equitable power to correct transgressions that occur before them, recognize that oftentimes victims of abusive discovery lack both the skill and knowledge to uncover misconduct during discovery or at trial? Pro se litigants and attorney-abandoned litigants do not have the tools to combat abusive discovery. These victims do not understand what a deemed admission means. These victims do not understand how interrogatories can be used fraudulently to support a motion for summary judgment. These victims do not understand how the rules of civil procedure can be employed to thwart abusive discovery before it is too late.

Because courts are endowed with the power to ascertain whether their judgments were obtained by fraud, misrepresentation, or other misconduct, the victim's status should be a consideration. The fact that the misconduct could have been rooted out during discovery should be insignificant in most cases, but it should be especially inconsequential when an attorney does not represent the victim involved. Actions involving these sorts of victims should be governed by even more flexibility to afford necessary relief. The harsh standard other courts have employed should not be the current view because it is contrary to the equitable principles behind the relief afforded by Rule 60(d)(3).

D. Consideration of the Relief Being Sought

Interestingly, although Rule 60(d)(3) is the only rule that even mentions the fraud-on-the-court doctrine, other Federal Rules of Civil Procedure, including Rules 11, 16, 26, 37, and 41, have been cited in applying the doctrine. For example, courts have dismissed, defaulted, and sanctioned litigants for fraud on the court, and have found the necessary authority outside of Rule 60(d)(3)—often citing the inherent power given to all courts to fashion appropriate remedies and sanctions for conduct which abuses the judicial process.²³² Some courts have premised dismissal or default of a litigant who committed fraud on the court entirely on Rule 11.²³³ Other courts have relied on Rule 41(b) for authority to dismiss a plaintiff who has committed fraud on the court.²³⁴ Rule

²³² See, e.g., *Brockton Sav. Bank v. Peat, Marwick, Mitchell & Co.*, 771 F.2d 5, 11–12 (1st Cir. 1985); *Wyle v. R.J. Reynolds Indus., Inc.*, 709 F.2d 585, 589 (9th Cir. 1983); *Eppes v. Snowden*, 656 F. Supp. 1267, 1279 (E.D. Ky. 1986).

²³³ See, e.g., *Combs v. Rockwell Int'l Corp.*, 927 F.2d 486, 488 (9th Cir. 1991).

²³⁴ *C.B.H. Res., Inc. v. Mars Forging Co.*, 98 F.R.D. 564, 569 (W.D. Pa. 1983) (dismissing under Fed. R. Civ. P. 41(b) where party's fraudulent scheme, including use of a bogus subpoena, was "totally at odds with the . . . notions of fairness central to our system of litigation").

41(b) provides the court with authority to dismiss a case if a plaintiff fails to comply with the rules of civil procedure or other court orders.²³⁵ Such a dismissal operates as an adjudication on the merits.²³⁶ This rule, however, has no import if the offending party has already obtained a judgment.

The problem with the widespread use of the fraud-on-the-court doctrine is that courts continue to apply the heightened standard to prove a fraud on the court has occurred, yet the remedies and relief that flow from making such a finding can be entirely different. As one court observed,

When a fraud on the court is shown through clear and convincing evidence to have been committed in an ongoing case, the trial judge has the inherent power to take action in response to the fraudulent conduct. The judge has *broad discretion to fashion a judicial response* warranted by the fraudulent conduct. Dismissal of claims or of an entire action may be warranted by the fraud, as may be the entry of a default judgment.²³⁷

The First Circuit has examined the options of a federal district judge confronted by fraud on the court and has held that federal courts possess the inherent power to “order dismissal or default where a litigant has stooped to the level of fraud on the court.”²³⁸ It stated the following:

All in all, we find it surpassingly difficult to conceive of a more appropriate use of a court’s inherent power than to protect the sanctity of the judicial process—to combat those who would dare to practice unmitigated fraud upon the court itself. To deny the existence of such power would, we think, foster the very impotency against which the *Hazel-Atlas* Court specifically warned.²³⁹

Rule 60(d)(3), however, only serves one purpose: to “set aside a judgment for fraud on the court.”²⁴⁰ Setting aside a judgment is different from dismissing a claim, an entire action, or entering a default judgment. “[D]ismissal sounds ‘the death knell of the lawsuit’”²⁴¹ and is an extreme remedy that “must be exercised with restraint and discretion.”²⁴² On the other hand, Rule 60 enables courts to set aside judgments when necessary to accomplish justice and return the parties to the status quo that existed prior to the misconduct. In other words, Rule 60(d)(3) does not mandate a court to set aside a judgment *and* dismiss the entire case with prejudice. While dismissal with prejudice is certainly an option,²⁴³ it is not a mandate created by Rule 60(d)(3). Courts repeatedly hold that

²³⁵ FED. R. CIV. P. 41(b).

²³⁶ *Id.*

²³⁷ *Rockdale Mgmt. Co. v. Shawmut Bank, N.A.*, 638 N.E.2d 29, 31 (Mass. 1994) (emphasis added).

²³⁸ *Aoude v. Mobil Oil Corp.*, 892 F.2d 1115, 1119 (1st Cir. 1989).

²³⁹ *Id.*

²⁴⁰ FED. R. CIV. P. 60(d)(3).

²⁴¹ *Aoude*, 892 F.2d at 1118.

²⁴² *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991).

²⁴³ *See, e.g., Root Refining Co. v. Universal Oil Prods. Co.*, 169 F.2d 514, 534–35 (3d Cir. 1948) (stating that “[t]he records of the courts must be purged and the judgments in Universal’s favor, both in this court and in the District Court, must be vacated and the suits by Uni-

cases are to be tried on the merits if possible.²⁴⁴ Thus, based on the indiscretion at issue, courts may set aside the judgment and additionally take any of the following actions: (1) require a trial on the merits unblemished by the misconduct, (2) sanction the offending party, (3) dismiss a particular cause of action, or (4) dismiss the entire proceeding with prejudice.

The bottom line is that fraud on the court can take many forms and the standard for setting aside a judgment for fraud on the court under Rule 60(d) ought to be flexible. The options afforded to courts confronted by attorney misconduct suggest that courts can and should focus on the egregiousness of the conduct and the relief being sought. While some misconduct might fall short of furnishing a basis for setting aside a judgment *and* dismissal with prejudice, other indiscretions may warrant such a harsh remedy. Courts possess plenary authority “to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.”²⁴⁵ As a result, examination of the *options* of the court confronted by misconduct—whether that is taking additional steps beyond setting aside the judgment such as ordering dismissal or imposing sanctions—is an important component to process litigation to a just and equitable conclusion.

E. Illustration of the Four-Part Test

The *Fallini* case cited above provides a logical illustration of the four-part test for several reasons. First, it involved alleged misconduct by an officer of the court.²⁴⁶ Second, the alleged misconduct originated during the discovery process.²⁴⁷ Third, the attorney abandoned the victim when the misconduct transpired.²⁴⁸ And finally, the conduct caused the court not to perform in the usual manner its impartial task of adjudging the case, because the court never heard the merits, but instead entered an order based on a false admission.²⁴⁹

In order to address the misconduct in *Fallini*, the victim hired a new attorney and on May 21, 2014, filed a motion for relief from judgment under Rule 60. It alleged that plaintiff’s counsel “knowingly forced fraudulent facts on the

versal must be finally dismissed. No principle is better settled than the maxim that he who comes into equity must come with clean hands and keep them clean throughout the course of the litigation, and that if he violates this rule, he must be denied all relief whatever may have been the merits of his claim”).

²⁴⁴ See, e.g., *Moore v. City of Paducah*, 790 F.2d 557, 559 (6th Cir. 1986) (stating that “cases should be tried on the merits rather than the technicalities of pleadings”) (citation omitted).

²⁴⁵ *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630–31 (1962).

²⁴⁶ *Estate of Adams v. Fallini*, No. CV 24539 (Nev. 5th Dist. Ct. Aug. 6, 2014), at 1 (court order).

²⁴⁷ *Id.* at 3.

²⁴⁸ *Id.*

²⁴⁹ *Id.*

court and failed to correct misrepresentations thereby committing fraud upon the court.”²⁵⁰

1. *The Offending Party and His Duty*

The court, in addressing whether fraud on the court occurred under Rule 60, focused on the offending party—plaintiff’s lawyer—and noted that “as an officer of the court, [he] had a duty to not mislead the court or fail to correct a misrepresentation.”²⁵¹ It held that “[s]imple dishonesty of any attorney is so damaging on courts and litigants that it is considered fraud upon the court.”²⁵² And, citing to rules of professional conduct, the court further held that “[a]n officer of the court perpetrates fraud on the court a) through an act that is calculated to mislead the court or b) by failing to correct a misrepresentation or retract false evidence submitted to the court.”²⁵³

2. *The Conduct*

The court next focused on the conduct at issue. Interestingly, the attorney in *Fallini* denied knowing that the accident occurred on open range,²⁵⁴ which may have been an attempt to refute that any intentional misconduct occurred. After considering the evidence, however, the court found that the attorney “knew or *should have known* the accident occurred on open range prior to filing his request for admissions.”²⁵⁵ The court also found that “[a]t the bare minimum, [the attorney] possessed enough information to conduct a reasonable inquiry into the open range status of the location where the accident occurred.”²⁵⁶ Despite this knowledge, the attorney sought an admission from Fallini stating that the area where the accident occurred was not open range, a false fact that was deemed admitted when Fallini’s attorney failed to respond.²⁵⁷

Thus, as an officer of the court, the attorney violated his duty of candor under the rules of professional conduct “by utilizing Defendant’s denial that the accident occurred on open range to obtain a favorable ruling in the form of an unopposed award of summary judgment.”²⁵⁸ Consequently, the court found a violation of Rule 60(b) because “Plaintiff’s request for admission of a known fact, a fact that was a central component of Defendant’s case, was done when

²⁵⁰ *Id.* at 1.

²⁵¹ *Id.* at 7.

²⁵² *Id.* at 6.

²⁵³ *Id.*

²⁵⁴ *Id.* at 7. (emphasis added).

²⁵⁵ *Id.* (emphasis added).

²⁵⁶ *Id.*

²⁵⁷ *Id.* at 5.

²⁵⁸ *Id.* at 8.

counsel *knew or should have known* that the accident did not occur on open range, thereby perpetrating fraud upon the court.”²⁵⁹

3. *The Victim*

The court also considered the victim in this case. It noted that the attorney who committed the fraud on the court “may argue that all [Fallini’s prior attorney] had to do was simply ‘deny’ the request for admissions.”²⁶⁰ While this is certainly true, the court took special consideration of the fact that Fallini’s prior attorney failed “to respond to various motions and requests to the extent that [plaintiff’s attorney] knew or should have known that a response from [Fallini’s attorney] was unlikely.”²⁶¹

The court also recognized the maxim the Supreme Court expressed in *Hazel-Atlas*: the fraud-on-the-court rule should be characterized by flexibility and an ability to meet new situations demanding equitable intervention.²⁶² The court clearly considered and accepted the inequities of the case, as it acknowledged that “one cannot ignore the apparent injustice that Defendant has suffered throughout this matter. Ms. Fallini [was] responsible for a multi-million dollar judgment without the merits of the case even being addressed.”²⁶³ In other words, it was significant to the court that Fallini’s attorney had abandoned her, and this certainly influenced, at least in part, the court’s decision to set aside the judgment due to a fraud on the court.

4. *The Relief*

The court recognized that “[f]inality has a particular importance in our legal system.”²⁶⁴ However, it also noted that a final judgment is one “that disposes of the issues presented in the case, determines the costs, and leaves nothing for future consideration of the court.”²⁶⁵ But “the issues presented in this case were summarily disposed above due to the negligence of Defendant’s counsel . . . [and] [t]he merits of the case were never actually addressed.”²⁶⁶ Again, recognizing the victim’s status, the court found that had Fallini’s attorney “properly denied the improper request for admissions, the outcome may have been much different.”²⁶⁷

The court’s order states several times throughout that “cases are to be heard on the merits if possible” and that Fallini was unjustly punished without the

²⁵⁹ *Id.* (emphasis added).

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.* at 9.

²⁶⁴ *Id.* at 10.

²⁶⁵ *Id.* (quoting *Alper v. Posin*, 363 P.2d 502, 503 (1961)).

²⁶⁶ *Id.*

²⁶⁷ *Id.*

merits of the case ever being addressed.²⁶⁸ In addition to its express authority to set aside the judgment under Rule 60, the court clearly had the authority to order further relief, such as sanctions or dismissal with prejudice.²⁶⁹ Pursuant to the court's *Order Granting Motion for Entry of Final Judgment and Dismissing Case with Prejudice*, the court entered final judgment in favor of Fallini and dismissed the case with prejudice.²⁷⁰

CONCLUSION

While finality of judgment matters, no worthwhile interest is served in protecting judgments obtained by misconduct. The Federal Rules of Civil Procedure contemplate liberal discovery, but the potential for discovery abuse is ever-present. There are rules in place to remedy abusive discovery, yet those rules are only functional during litigation—they serve no purpose post-judgment. Thus, cheaters are prospering under the judicial system, especially against vulnerable victims that lack both the skill and knowledge to adequately prepare a defense or thwart the abusive conduct before an unfavorable judgment is rendered.

Rule 60(d)(3), however, allows a court to set aside judgments—judgments obtained years earlier—which have been secured by a fraud on the court. But to succeed in setting aside a judgment, several courts require a showing, by clear and convincing evidence, of intentional fraudulent conduct specifically directed at the court itself. This standard is too high. If federal courts were compelled to follow this standard, nearly every claim of abusive discovery would fail. However, the remedial and equitable nature of the fraud-on-the-court doctrine and the great public policy that it embodies militates against making that burden an impossible hurdle for victims of abusive discovery.

Fraud on the court can take many forms. Fortunately, the fraud-on-the-court rule that the United States Supreme Court articulated in *Hazel-Atlas* should be characterized by flexibility and an ability to meet new situations demanding equitable intervention. The equitable and flexible nature of the rule supports the contention that the current standard for evaluating fraud on the court is flawed. The four-step process outlined above—with the ultimate inquiry of whether the abusive conduct caused the court not to perform in the usual manner its impartial task of adjudging cases—further facilitates a court's inherent power to do whatever is reasonably necessary to deter abuse of the judicial process.

²⁶⁸ *Id.* at 9 (quoting *Passarelli v. J-Mar Dev., Inc.*, 720 P.2d 1221, 1223 (Nev. 1986)).

²⁶⁹ *See, e.g.*, Rule 41 and 11 discussed *supra* Parts III.B, III.D.

²⁷⁰ *Order Granting Motion for Entry of Final Judgment and Dismissing Case with Prejudice* at 2, *Estate of Adams v. Fallini*, No. CV 24539 (Nev. 5th Dist. Ct. Apr. 17, 2015).

CASE SUMMARY**CASE NO. A-21-842763-C****Sharon McDowell, Plaintiff(s)****vs.****Southern Hills Medical Hospital, Defendant(s)**§
§
§
§
§Location: **Department 7**Judicial Officer: **Bell, Linda Marie**Filed on: **10/15/2021**

Case Number History:

Cross-Reference Case Number: **A842763****CASE INFORMATION****Statistical Closures**

04/29/2022 Motion to Dismiss by the Defendant(s)

Case Type: **Malpractice - Medical/Dental**Case Status: **04/29/2022 Dismissed****DATE****CASE ASSIGNMENT****Current Case Assignment**

Case Number	A-21-842763-C
Court	Department 7
Date Assigned	07/05/2022
Judicial Officer	Bell, Linda Marie

PARTY INFORMATION**Plaintiff****McDowell, Sharon***Lead Attorneys***Pro Se**

702-328-4269(H)

Defendant**Dr Guita Tabassi****Dr Linda Tran****Hospital Corporation of Americal****Insurance Co vs. Pathologist****Southern Hills Medical Hospital****Sunrise Healthcare System****DATE****EVENTS & ORDERS OF THE COURT****INDEX****EVENTS**

10/15/2021



Complaint

Filed By: Plaintiff McDowell, Sharon

[1] Complaint

10/15/2021



Application to Proceed in Forma Pauperis

[2] Application to Proceed in Forma Pauperis

10/15/2021



Summons Issued

[3] Summons

10/19/2021



Order to Proceed In Forma Pauperis

Granted for: Plaintiff McDowell, Sharon

[4] Order to Proceed In Forma Pauperis

11/05/2021










CASE SUMMARY

CASE NO. A-21-842763-C

	 Notice of Department Reassignment <i>[5] Notice of Department Reassignment</i>
12/11/2021	 Order Setting Medical/Dental Malpractice Status Check <i>[6] Order Setting Medical/Dental Malpractice Status Check and Trial Setting Conference</i>
03/01/2022	 Motion to Dismiss Filed By: Defendant Southern Hills Medical Hospital <i>[7] Defendant Southern Hills Hospital Medical Center LLC d/b/a Southern Hills Hospital & Medical Center's Motion to Dismiss Plaintiff's Complaint</i>
03/01/2022	 Initial Appearance Fee Disclosure <i>[8] Defendant Southern Hills Hospital Medical Center LLC d/b/a Southern Hills Hospital & Medical Center's Initial Appearance Fee Disclosure</i>
03/07/2022	 Clerk's Notice of Hearing Party: Defendant Southern Hills Medical Hospital <i>[9] Notice of Hearing</i>
03/07/2022	 Motion Filed By: Plaintiff McDowell, Sharon <i>[10] Motion Requesting a Hearing, Reassign Case to Dept. 27 to Have This Case Put Back on Calendar Not a Malpractice Case</i>
03/07/2022	 Amended Filed By: Plaintiff McDowell, Sharon <i>[11] Amending the Cause of Action to Surgical Battery Malice, Premeditation. Remove Medical Malpractice as a Cause of Action</i>
03/21/2022	 Motion to Dismiss Filed By: Defendant Southern Hills Medical Hospital <i>[12] Defendant Southern Hills Hospital Medical Center, LLC D/B/A Southern Hills Hospital & Medical Center's Motion to Dismiss Plaintiff's Amended Complaint</i>
03/21/2022	 Motion to Quash Filed By: Defendant Southern Hills Medical Hospital <i>[13] Defendant Southern Hills Hospital Medical Center, LLC D/B/A Southern Hills Hospital & Medical Center's Motion to Quash Plaintiffs Motion</i>
03/21/2022	 Clerk's Notice of Hearing Party: Defendant Southern Hills Medical Hospital <i>[14] Notice of Hearing</i>
03/21/2022	 Clerk's Notice of Hearing Party: Defendant Southern Hills Medical Hospital <i>[15] Notice of Hearing</i>
03/25/2022	 Document Filed <i>[17] Evidence Police Contact for Investigation</i>
03/25/2022	 Document Filed <i>[18] Document in Support of The Police Report 7-2021- I Spoke to R. Warrin #15873 Gave Me his Word to Assist Me in Getting Justice Surgical Battery; Civil Rights Violation - Defendants Never Investigated</i>

CASE SUMMARY


CASE NO. A-21-842763-C

03/25/2022	 Motion Filed By: Plaintiff McDowell, Sharon <i>[16] Motion to Add Include other Name- Southern Hills Hopsital Medical Center LLC dba Southern Hills Hospital & Medical Center</i>
03/25/2022	 Document Filed Filed by: Plaintiff McDowell, Sharon <i>[20] Documents in Support of Include - Doctor Gennadiy Plotnitskiy, DO He Withhold Medical Information Because he Knew Tabassi Personally. Defendant - WHASN Women's Health Associates of Southern Nevada. WHASN Southern Hills- Dr. Plotnitskiy</i>
03/28/2022	 Clerk's Notice of Hearing <i>[21] Notice of Hearing</i>
03/31/2022	 Subpoena Electronically Issued Filed by: Plaintiff McDowell, Sharon <i>[22] Subpoena Duces Tecum for Business Records</i>
04/29/2022	 Order <i>[23] Order Re: Defendant, Southern Hills' Motion to Dismiss Plaintiff's Complaint</i>
04/29/2022	 Notice of Entry Filed By: Defendant Southern Hills Medical Hospital <i>[24] Notice of Entry of Order Re: Defendant Southern Hills Hospital Medical Center, LLC d/b/a Southern Hills Hospital & Medical Center's Motion to Dismiss Plaintiff's Complaint</i>
07/05/2022	Case Reassigned to Department 7 <i>Pursuant to Administrative Order 22-09 - Case Reassigned from Judge Jerry A. Wiese to Judge Linda Marie Bell</i>
07/29/2022	 Notice of Appeal <i>[25] Notice of Appeal</i>
07/29/2022	 Brief <i>[26] Appellate Brief</i>
08/02/2022	 Case Appeal Statement <i>Case Appeal Statement</i>

DISPOSITIONS

04/29/2022	Order of Dismissal Without Prejudice (Judicial Officer: Wiese, Jerry A.) Debtors: Southern Hills Medical Hospital (Defendant) Creditors: Sharon McDowell (Plaintiff) Judgment: 04/29/2022, Docketed: 05/02/2022
------------	---


HEARINGS

11/03/2021	 Minute Order (3:00 AM) (Judicial Officer: Allf, Nancy) <i>Minute Order: Recusal</i> Minute Order - No Hearing Held; Minute Order: Recusal Journal Entry Details: <i>COURT FINDS after review that this case has been assigned to Department 27 COURT FURTHER FINDS Department 27 is exempt from being assigned Med Mal cases. THEREFORE COURT ORDERS for good cause appearing and after review that the case be randomly reassigned to a Med Mal department. ;</i>
------------	---

EIGHTH JUDICIAL DISTRICT COURT

CASE SUMMARY

CASE NO. A-21-842763-C

01/12/2022	 Status Check: Medical/Dental Malpractice (1:00 PM) (Judicial Officer: Wiese, Jerry A.) Matter Heard; Journal Entry Details: <i>No appearances were made. There being no JCCR, COURT ORDERED matter OFF CALENDAR.;</i>
04/27/2022	CANCELED Motion to Dismiss (3:00 AM) (Judicial Officer: Wiese, Jerry A.) <i>Vacated - per Order</i> <i>Defendant Southern Hills Hospital Medical Center LLC d/b/a Southern Hills Hospital & Medical Center's Motion to Dismiss Plaintiff's Complaint</i>
04/27/2022	CANCELED Motion (3:00 AM) (Judicial Officer: Wiese, Jerry A.) <i>Vacated - per Order</i> <i>Plaintiff's Motion Requesting a Hearing, Reassign Case to Dept. 27 to Have This Case Put Back on Calendar Not a Malpractice Case</i>
04/27/2022	CANCELED Motion to Dismiss (3:00 AM) (Judicial Officer: Wiese, Jerry A.) <i>Vacated - per Order</i> <i>Defendant Southern Hills Hospital Medical Center, LLC D/B/A Southern Hills Hospital & Medical Center s Motion to Dismiss Plaintiff s Amended Complaint</i>
04/27/2022	CANCELED Motion to Quash (3:00 AM) (Judicial Officer: Wiese, Jerry A.) <i>Vacated - per Order</i> <i>Defendant Southern Hills Hospital Medical Center, LLC D/B/A Southern Hills Hospital & Medical Center's Motion to Quash Plaintiffs Motion</i>
04/27/2022	CANCELED Motion (3:00 AM) (Judicial Officer: Wiese, Jerry A.) <i>Vacated - per Order</i> <i>Motion to Add Include other Name- Southern Hills Hopsital Medical Center LLC dba Southern Hills Hospital & Medical Center</i>
04/27/2022	CANCELED Motion (3:00 AM) (Judicial Officer: Wiese, Jerry A.) <i>Vacated - per Order</i> <i>Plaintiff's Motion to Add, Include other Name- Southern Hills Hopsital Medical Center LLC dba Southern Hills Hospital & Medical Center</i>

DATE	FINANCIAL INFORMATION	
	Defendant Southern Hills Medical Hospital	
	Total Charges	223.00
	Total Payments and Credits	223.00
	Balance Due as of 8/2/2022	0.00
	Plaintiff McDowell, Sharon	
	Total Charges	294.00
	Total Payments and Credits	270.00
	Balance Due as of 8/2/2022	24.00

DISTRICT COURT CIVIL COVER SHEET

A-21-842763-C

County, Nevada

Dept, 27

Case No. _____

(Assigned by Clerk's Office)

I. Party Information (provide both home and mailing addresses if different)

Plaintiff(s) (name/address/phone):

Sharon McDowell Apt # 3375 Rainbow Blvd 81021
Las Vegas, NV 89117

Defendant(s) (name/address/phone):

702-916-5000
Southern Hills Medical Hospital 9300 W Sunset Rd
Hospital Corporation of America - ONE PARK PLAZA 615-344-9551
Sun Rise Healthcare System - 318 S. Maryland Pkwy 702-1961-5000
DR. GLITA TABASSI 6970 S. Cimarron Rd.

Attorney (name/address/phone):

pro per - UNTIL AN ATTORNEY CAN BE HIRED.

Attorney (name/address/phone):

702-871-0303
vs. Hospital Corporation of America 3186 South Maryland Parkway
Winchester Clark County Nevada**II. Nature of Controversy** (please select the one most applicable filing type below)**Civil Case Filing Types**

Real Property		Torts	
Landlord/Tenant <input type="checkbox"/> Unlawful Detainer <input type="checkbox"/> Other Landlord/Tenant Title to Property <input type="checkbox"/> Judicial Foreclosure <input type="checkbox"/> Other Title to Property Other Real Property <input type="checkbox"/> Condemnation/Eminent Domain <input type="checkbox"/> Other Real Property	Negligence <input type="checkbox"/> Auto <input checked="" type="checkbox"/> Premises Liability NO SMC <input checked="" type="checkbox"/> Other Negligence NO SMC Malpractice <input checked="" type="checkbox"/> Medical/Dental OK <input type="checkbox"/> Legal <input type="checkbox"/> Accounting <input checked="" type="checkbox"/> Other Malpractice NO SMC	Other Torts <input type="checkbox"/> Product Liability <input checked="" type="checkbox"/> Intentional Misconduct NO SMC <input type="checkbox"/> Employment Tort <input checked="" type="checkbox"/> Insurance Tort NO SMC <input checked="" type="checkbox"/> Other Tort NO SMC	
Probate		Judicial Review/Appeal	
Probate (select case type and estate value) <input type="checkbox"/> Summary Administration <input type="checkbox"/> General Administration <input type="checkbox"/> Special Administration <input type="checkbox"/> Set Aside <input type="checkbox"/> Trust/Conservatorship <input type="checkbox"/> Other Probate Estate Value <input type="checkbox"/> Over \$200,000 <input type="checkbox"/> Between \$100,000 and \$200,000 <input type="checkbox"/> Under \$100,000 or Unknown <input type="checkbox"/> Under \$2,500	Construction Defect & Contract Construction Defect <input type="checkbox"/> Chapter 40 <input type="checkbox"/> Other Construction Defect Contract Case <input type="checkbox"/> Uniform Commercial Code <input type="checkbox"/> Building and Construction <input type="checkbox"/> Insurance Carrier <input type="checkbox"/> Commercial Instrument <input type="checkbox"/> Collection of Accounts <input type="checkbox"/> Employment Contract <input checked="" type="checkbox"/> Other Contract NO SMC		Judicial Review <input type="checkbox"/> Foreclosure Mediation Case <input type="checkbox"/> Petition to Seal Records <input type="checkbox"/> Mental Competency Nevada State Agency Appeal <input type="checkbox"/> Department of Motor Vehicle <input type="checkbox"/> Worker's Compensation <input type="checkbox"/> Other Nevada State Agency Appeal Other <input type="checkbox"/> Appeal from Lower Court <input type="checkbox"/> Other Judicial Review/Appeal
Civil Writ		Other Civil Filing	
Civil Writ <input type="checkbox"/> Writ of Habeas Corpus <input type="checkbox"/> Writ of Mandamus <input type="checkbox"/> Writ of Quo Warrantum <input type="checkbox"/> Writ of Prohibition <input type="checkbox"/> Other Civil Writ		Other Civil Filing <input type="checkbox"/> Compromise of Minor's Claim NO <input type="checkbox"/> Foreign Judgment <input checked="" type="checkbox"/> Other Civil Matters SMC	

Business Court filings should be filed using the Business Court civil coversheet.

Oct 15, 2021
DateSharon McDowell
Signature of initiating party or representative

See other side for family-related case filings.

DISTRICT COURT CIVIL COVER SHEET

A-21-842763-C

County, Nevada

Dept. 27

Case No. _____

(Assigned by Clerk's Office)

I. Party Information (provide both home and mailing addresses if different)

Plaintiff(s) (name/address/phone):

Sharon McDowell Apt # 3375 Rainbow Blvd 81021
 Las Vegas, NV 89117
 702-328-4269

Defendant(s) (name/address/phone):

DR. Linda Tran
 Pathology dept
 Insurance Co in place at time of Incident
 W H A S N Southern Hills et al CO

Attorney (name/address/phone):

pro per - until an attorney can be hired.
 702-328-4269

Attorney (name/address/phone):

AMMEND LATER, Add correct business name

II. Nature of Controversy (please select the one most applicable filing type below)**Civil Case Filing Types**

Real Property	Negligence	Torts
Landlord/Tenant <input type="checkbox"/> Unlawful Detainer <input type="checkbox"/> Other Landlord/Tenant Title to Property <input type="checkbox"/> Judicial Foreclosure <input type="checkbox"/> Other Title to Property Other Real Property <input type="checkbox"/> Condemnation/Eminent Domain <input type="checkbox"/> Other Real Property	<input type="checkbox"/> Auto <input checked="" type="checkbox"/> Premises Liability SMC <input checked="" type="checkbox"/> Other Negligence Malpractice <input checked="" type="checkbox"/> Medical/Dental <input type="checkbox"/> Legal <input type="checkbox"/> Accounting <input checked="" type="checkbox"/> Other Malpractice SMC	Other Torts <input type="checkbox"/> Product Liability <input checked="" type="checkbox"/> Intentional Misconduct NO SMC <input type="checkbox"/> Employment Tort <input checked="" type="checkbox"/> Insurance Tort <input checked="" type="checkbox"/> Other Tort
Probate	Construction Defect & Contract	Judicial Review/Appeal
Probate (select case type and estate value) <input type="checkbox"/> Summary Administration <input type="checkbox"/> General Administration <input type="checkbox"/> Special Administration <input type="checkbox"/> Set Aside <input type="checkbox"/> Trust/Conservatorship <input type="checkbox"/> Other Probate Estate Value <input type="checkbox"/> Over \$200,000 <input type="checkbox"/> Between \$100,000 and \$200,000 <input type="checkbox"/> Under \$100,000 or Unknown <input type="checkbox"/> Under \$2,500	Construction Defect <input type="checkbox"/> Chapter 40 <input type="checkbox"/> Other Construction Defect Contract Case <input type="checkbox"/> Uniform Commercial Code <input type="checkbox"/> Building and Construction <input type="checkbox"/> Insurance Carrier <input type="checkbox"/> Commercial Instrument <input type="checkbox"/> Collection of Accounts <input type="checkbox"/> Employment Contract <input checked="" type="checkbox"/> Other Contract SMC	Judicial Review <input type="checkbox"/> Foreclosure Mediation Case <input type="checkbox"/> Petition to Seal Records <input type="checkbox"/> Mental Competency Nevada State Agency Appeal <input type="checkbox"/> Department of Motor Vehicle <input type="checkbox"/> Worker's Compensation <input type="checkbox"/> Other Nevada State Agency Appeal Other <input type="checkbox"/> Appeal from Lower Court <input type="checkbox"/> Other Judicial Review/Appeal
Civil Writ	Other Civil Filing	
Civil Writ <input type="checkbox"/> Writ of Habeas Corpus <input type="checkbox"/> Writ of Mandamus <input type="checkbox"/> Writ of Quo Warrantum <input type="checkbox"/> Writ of Prohibition <input type="checkbox"/> Other Civil Writ	Other Civil Filing <input type="checkbox"/> Compromise of Minor's Claim <input type="checkbox"/> Foreign Judgment <input checked="" type="checkbox"/> Other Civil Matters NO SMC	

Business Court filings should be filed using the Business Court civil coversheet.

04/15, 2021

Date

Sharon McDowell
 Signature of initiating party or representative

See other side for family-related case filings.

**DISTRICT COURT
CLARK COUNTY, NEVADA
-oOo-**

SHARON MCDOWELL,)
)
Plaintiff,)
)
vs.)
)
SOUTHERN HILLS MEDICAL)
HOSPITAL, HOSPITAL)
CORPORATION OF AMERICA,)
SUNRISE HEALTH CARE SYSTEM,)
DR. GUITA TABASSI, DR. LINDA)
TRAN, INSURANCE CO,)
PATHOLOGISTS,)
)
Defendants.)
)

CASE NO.: A-21-842763-C
DEPT. NO.: XXX

**ORDER RE: DEFENDANT,
SOUTHERN HILLS' MOTION
TO DISMISS PLAINTIFF'S
COMPLAINT**

INTRODUCTION

The above-referenced matter is scheduled for a hearing on April 27, 2022, with regard to Defendant, Southern Hills' Motion to Dismiss; Plaintiff's Motion Requesting to Reassign Case to Dept. 27; Plaintiff's Motion to Add Southern Hills Hospital; Plaintiff's Motion to Add Include Other Name; and Defendant Southern Hills' Motion to Quash Plaintiff's Motion. Pursuant to the Administrative Orders of the Court, these matters may be decided with or without oral argument. This Court has determined that it would be appropriate to decide these matters on the pleadings, and consequently, this Order issues.

SUMMARY OF FACTUAL AND PROCEDURAL HISTORY

This matter arises out of allegedly deficient medical treatment. Plaintiff Sharon McDowell alleges that in July 2020, she sought treatment for what she suspected to be, ovarian cancer at Defendant Southern Hills Medical Center. Plaintiff alleges that she underwent a surgical procedure on or about 10/16/20, that resulted in mutilation and extreme pain. Plaintiff contends that she saw a different medical provider sometime in 2021, who informed her that she no longer had ovaries or her left kidney. Plaintiff

1 alleges that attempts to obtain her medical records have been unsuccessful. Plaintiff
2 asserts that in addition to physical deformities, she suffers from emotional distress.

3 Plaintiff filed a Complaint in this matter on 10/15/21, against Southern Hills
4 Medical Hospital, Hospital Corporation of America, Sunrise Healthcare System, Dr.
5 Guita Tabassi, Dr. Linda Tran, Insurance CO., and “Pathologist.” The case was
6 originally assigned to Department 27, but reassigned to Department 30 via minute
7 order on 11/3/21. On 3/1/22, Defendant Southern Hills Medial Center (“Southern
8 Hills”) filed a Motion to Dismiss Plaintiff’s Complaint. On 3/7/22, Plaintiff filed a
9 Motion to Reassign Case to Dept. 27. On the same date, 3/7/22, Plaintiff filed a
10 document which could potentially be considered an Amended Complaint (indicating
11 that it is not a medical malpractice case). On 3/21/22, the Defendant, Southern Hills,
12 filed a Motion to Quash Plaintiff’s Motion to Reassign Case to Dept. 27. On the same
13 date, 3/21/22, Southern Hills filed a Motion to Dismiss Plaintiff’s Amended Complaint.
14 On 3/25/22, Plaintiff filed a “Documents in Support of . . . Civil Rights Violation,” as
15 well as a document entitled “Evidence Police Contact for Investigation.” On the same
16 date, 3/25/22, Plaintiff filed a Motion to Add, Include Southern Hills Hospital Medical
17 Center, LLC d/b/a Southern Hills Hospital & Medical Center. (The Court notes that the
18 Plaintiff argues that the Defendants have withheld medical records and information,
19 but does not contend or provide any indication that she has requested her protected
20 medical information.)

21 Plaintiff’s pro-se pleadings are not clear and have caused some confusion with
22 regard to the status of the pleadings. The Court will first address the Defendant’s
23 Motion to Dismiss.

24 **SUMMARY OF FACTUAL AND LEGAL ARGUMENTS**

25 Defendant Southern Hills argues that Plaintiff’s Complaint must be dismissed
26 pursuant to NRS § 41A.071 and NRCP 4(i) and 12(b)(5). Southern Hills argues that
27 absent a motion to extend the service period and a showing of good cause, the district
28 court lacks discretion to enlarge the service period. See *Saavedra-Sandoval v. Wal-*
Mart Stores, 126 Nev. 592, 596, 245 P.3d 1198, 1201 (2010). Further, Southern Hills
notes that Plaintiff’s Complaint was filed on 10/15/21, and that none of the Defendants
were served with a Summons and Complaint. Because more than 120 days has passed,

1 and Plaintiff has neither successfully served the Defendants, nor demonstrated
2 attempts to serve, Southern Hills argues that dismissal is warranted as a matter of law.

3 Additionally, Southern Hills argues that all of Plaintiff's causes of action are
4 professional negligence claims, as they are inextricable linked to alleged medical
5 malpractice. In *Szymborski v. Spring Mountain Treatment Ctr.*, 133 Nev. 638, 641
6 (Nev. 2017), the Nevada Supreme Court stated that an allegation of a breach of duty
7 involving medical judgment, diagnosis, or treatment "indicates that a claim is for
8 medical malpractice." Also in *Szymborski*, the Court further stated that "it is the nature
9 of the grievance rather than the form of the pleadings that determines the character of
10 the action." See also *Nevada Power Co. v. Dist. Ct.*, 120 Nev. 948, 960 (2004).

11 Here, Plaintiff's Complaint arises out of alleged negligence that took place
12 during a hysteroscopy, dilation and curettage procedure, and a biopsy of a uterine
13 mass/fibroid. Accordingly, Southern Hills argues that Plaintiff's claims are subject to
14 NRS § 41A.071. Even though Plaintiff alleges an intentional cover-up, her claims for
15 intentional conduct require proof or establishment of the underlying medical
16 malpractice or professional negligence. NRS § 41A.071, *Schwartz v. University Medical
17 Center of So. Nevada, et al.*, 460 P.3d 25, Nev. Unpub. Disp., WL 1531401, Docket Nos.
18 77554, 77666 (Filed March 26, 2020).

19 Pursuant to NRS § 41A.071, all medical malpractice actions must be filed with an
20 expert affidavit supporting the allegations contained in the Complaint. The expert
21 affidavit requirement of NRS § 41A.071 is designed to ensure that the "parties file
22 malpractice cases in good faith, i.e., to prevent the filing of frivolous lawsuits," and to
23 ensure that the case is meritorious. *Washoe Medical Center v. Second Judicial District
24 Court*, 122 Nev. 1298, 1304 (2006); *Borger v. Eighth Judicial District Court*, 120 Nev.
25 1021, 1026 (2004). Consequently, Southern Hills argues that Plaintiff's Complaint
26 should be dismissed in its entirety for failing to meet this affidavit requirement and
27 dismissal should be without leave to amend. *Washoe*, 122 Nev. at 1304 (holding that a
28 complaint that does not comply with NRS § 41A.071 is void and must be dismissed and
no amendment is permitted).

Moreover, Southern Hills states that it sent all of Plaintiff's medical records
within one week of her purported request to the address she provided. Nonetheless,
Plaintiff makes no representation that the alleged non-disclosure of medical records

1 hindered her from procuring an expert affidavit. See *Winn v. Sunrise Hospital*, 128
2 Nev. 246, 255, 277 P.3d 458, 464 (2012). In other words, the concealment has not been
3 alleged to interfere with Plaintiff's ability to satisfy the statutory requirement of an
4 accompanying expert affidavit.

5 Finally, Southern Hills argues that, Plaintiff has failed to set forth an actionable
6 claim for relief for "fraudulent concealment." First, fraud requires pleading with
7 particularity. However, Plaintiff's fraud claim is not particularly plead. See *Golden*
8 *Nugget, Inc. v. Ham*, 98 Nev. 311, (1982) (holding that fraudulent concealment must be
9 alleged with particularity). NRCP 9 requires that "[i]n all averments of fraud or
10 mistake, the circumstances constituting fraud or mistake shall be stated with
11 particularity." Heightened pleading requirements for a fraud claim demand that
12 plaintiffs plead the circumstances constituting the alleged fraud with enough specificity
13 to give defendants notice of the particular misconduct so that they can defend against
14 the charge and not just deny that they have done anything wrong. See e.g., *Brown v.*
15 *Kellar*, 97 Nev. 582 (1981); *Risinger v. SOC LLC*, 936 F.Supp.2d 1235, 1242 (2013).
16 Plaintiff has not plead sufficient factual allegations to meet the heightened standard for
17 pleading fraud as against Southern Hills. Plaintiff makes no mention of the specific
18 date and time nor party or person to the concealment alleged or how the concealments
19 are in fact fraud. Therefore, even considering Plaintiff's fraud claim independently, it
20 should still be dismissed.

21 **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

22 Dismissal for failure to state a claim is appropriate when it appears beyond a
23 doubt that the plaintiff could prove no set of facts which, if true, would entitle him to
24 relief. *Buzz Stew, LLC v. City of Las Vegas*, 124 Nev. 224, 181 P. 3d. 670, 672 (2008).
25 Although a court will accept a plaintiff's factual allegations as true for purposes of
26 deciding a motion to dismiss, such allegations must still be legally sufficient to
27 constitute the elements of the claim asserted. See, e.g. *Garcia v. Prudential Ins. Co. of*
28 *Am.*, 129 Nev. 15, 19, 293 22 P.3d 869 (Nev. 2013) (citation omitted).

"The test for determining whether the allegations of a complaint are sufficient to
assert a claim for relief is whether the allegations give fair notice of the nature and basis
of a legally sufficient claim and the relief requested." *Vacation Village, Inc. v. Hitachi*
America, Ltd., 110 Nev. 481, 484, 874 P.2d 744, 746 (1994). "The complaint cannot be

1 dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiff
2 could prove no set of facts which, if accepted by the trier of fact, would entitle him to
3 relief.” *Edgar v. Wagner*, 101 Nev. 226, 228, 699 P.2d 110, 112 (1985).

4 This Court acknowledges that it should “liberally construe the ‘inartful
5 pleadings’ of pro se litigants.” *Eldridge v. Block*, 832 F. 2d 1132 (9th Cir. 1987). A
6 complaint will not be dismissed because of a technical defect in the pleading. *Smith v.*
7 *District Court*, 120 Nev. 1343 (1997). The Pleading must only give the defendant a
8 reasonable advanced notice of an issue to be raised and an opportunity to respond.
9 *Schwartz v. Schwartz*, 95 Nev. 202 (1979). However, the Court must also acknowledge
10 that NRS § 41A.071 provides, If action for professional negligence is filed in the district
11 court, the district court shall dismiss the action, without prejudice, if the action is filed
12 without an affidavit submitted by a medical expert that supports the allegations
13 contained in the complaint. See § 41A.071

14 NRCP 4 states in pertinent part as follows:

15 (e) **Time Limit for Service.**

16 (1) **In General.** The summons and complaint must be served upon a
17 defendant no later than 120 days after the complaint is filed, unless the court grants an
18 extension of time under this rule.

19 (2) **Dismissal.** If service of the summons and complaint is not made upon a
20 defendant before the 120-day service period — or any extension thereof — expires, the
21 court must dismiss the action, without prejudice, as to that defendant upon motion or
22 upon the court’s own order to show cause.

23 (3) **Timely Motion to Extend Time.** If a plaintiff files a motion for an
24 extension of time before the 120-day service period — or any extension thereof — expires
25 and shows that good cause exists for granting an extension of the service period, the
26 court must extend the service period and set a reasonable date by which service should
27 be made.

28 (4) **Failure to Make Timely Motion to Extend Time.** If a plaintiff files a
motion for an extension of time after the 120-day service period — or any extension
thereof — expires, the court must first determine whether good cause exists for the
plaintiff’s failure to timely file the motion for an extension before the court considers
whether good cause exists for granting an extension of the service period. If the plaintiff
shows that good cause exists for the plaintiff’s failure to timely file the motion and for
granting an extension of the service period, the court must extend the time for service
and set a reasonable date by which service should be made.

NRCP 4(e).

Defendants allege that service was not completed within 120 days. Plaintiff does
not contend that service was completed. Plaintiff has not filed a Motion to Extend the
Time to Serve, and has failed to demonstrate that “good cause” exists for not requesting
extra time to serve, and has failed to demonstrate that “good cause” exists for granting
an extension of time. Consequently, pursuant to NRCP 4(e), dismissal seems
appropriate.

1 Additionally, NRS 41A.071 provides the following:

2 **NRS 41A.071 Dismissal of action filed without affidavit of medical expert.**

3 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:

- 4 1. Supports the allegations contained in the action;
- 5 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;
- 6 3. Identifies by name, or describes by conduct, each provider of health care who is alleged to be negligent; and
- 7 4. Sets forth factually a specific act or acts of alleged negligence separately as to each defendant in simple, concise and direct terms.

8 NRS 41A.071.

9 Although the Plaintiff has attempted to modify the Complaint to eliminate a
10 claim for “professional negligence” (previously referred to in Nevada as Medical
11 Malpractice), the gravamen of the Complaint still sounds in “professional negligence.”
12 Professional negligence is defined as “the failure of a provider of health care, in
13 rendering services, to use the reasonable care, skill or knowledge ordinarily used under
14 similar circumstances by similarly trained and experienced providers of health care.”
15 NRS 41A.015. Plaintiff has sued Southern Hills Hospital, and NRS 41A.017 includes
16 hospitals within the definition of “provider of health care.”

17 Plaintiff was obligated by NRS 41A.071 to file an affidavit of merit with her
18 Complaint, which she failed to do. This is an additional basis for Defendant’s requested
19 dismissal. Plaintiff argues that Defendants have withheld medical records, but there is
20 no evidence to support this claim, and Defendants indicate that they provided all
21 requested records immediately after they were requested. Additionally, any
22 withholding of records would be relevant for tolling of the statute of limitations, but not
23 for why an Affidavit of Merit was not attached to the Complaint.

24 Based upon the foregoing, and even viewing the evidence and pleadings in the
25 light most favorable to the non-moving party, this Court finds and concludes that the
26 plaintiff could prove no set of facts which, if true, would entitle her to relief, and
27 dismissal is appropriate. *Buzz Stew, LLC v. City of Las Vegas*, 124 Nev. 224, 181 P. 3d.
28 670, 672 (2008).

Based upon the above-referenced findings and conclusions, the Court further
finds and concludes that Plaintiff’s Motion to Reassign the Case to Dept. 27 is Moot.
Dept. 27 had the authority and discretion, as the Presiding Civil Judge, to reassign this
case. Further, this Court has determined that the case does allege “professional

negligence,” which was the basis for the reassignment from Dept. 27. Plaintiff’s Motion to Amend, to assert claims for “Surgical Battery, Malice, Premeditation,” and to remove Medical Malpractice as a cause of action, is also Moot, as this Court has determined that the gravamen of the Complaint deals with professional negligence, and consequently, the application of NRS 41A is mandatory. The Court finds that the Plaintiff’s request to amend would be futile, based on the above-referenced Findings and Conclusions, and consequently, the Motion to Amend must be denied as moot. Southern Hills’ Motion to Quash Plaintiff’s Motion to Reassign, is being treated as an “Opposition” to that Motion, which has already been addressed, and will be denied. Plaintiff’s Motion to Add or change the Defendant’s name is likewise Moot, as such a change, addition, or modification, would not affect the Court’s determination that the gravamen of the Plaintiff’s Complaint is “professional negligence.”

CONCLUSION/ORDER

Based upon the foregoing, and good cause appearing,

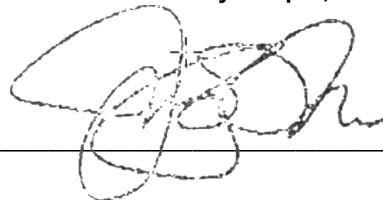
IT IS HEREBY ORDERED that Defendant’s Motion to Dismiss is hereby **GRANTED**, based on NRCP 4, as well as NRS 41A.071. Such dismissal is without prejudice.

IT IS FURTHER ORDERED that all other pending Motions are hereby **DENIED** as set forth herein.

The Court requests that Counsel for the Defendant prepare and process a Notice of Entry with regard to this Order.

Because this matter has been determined on the pleadings, any future hearings relating to the Motions addressed in this Order, are hereby taken off calendar.

Dated this 29th day of April, 2022



18A D6E 45F0 668C
Jerry A. Wiese
District Court Judge

1 **CSERV**

2
3 DISTRICT COURT
4 CLARK COUNTY, NEVADA

5
6 Sharon McDowell, Plaintiff(s) | CASE NO: A-21-842763-C
7 vs. | DEPT. NO. Department 30
8 Southern Hills Medical Hospital,
9 Defendant(s)

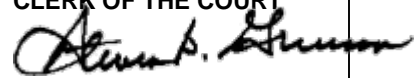
10
11 **AUTOMATED CERTIFICATE OF SERVICE**

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
14 recipients registered for e-Service on the above entitled case as listed below:

15 Service Date: 4/29/2022

16 E-File Admin	efile@hpslaw.com
17 Reina Claus	rclaus@hpslaw.com
18 Mari Schaan	mschaan@HPSLAW.COM
19 Sharon McDowell	mssharonmcdowell@gmail.com

HALL PRANGLE & SCHOONVELD, LLC
1140 NORTH TOWN CENTER DRIVE
SUITE 350
LAS VEGAS, NEVADA 89144
TELEPHONE: 702-889-6400 FACSIMILE: 702-384-6025



NEO
MARI K. SCHAAN, ESQ.
Nevada Bar No. 11268
HALL PRANGLE & SCHOONVELD, LLC
1140 North Town Center Drive, Ste. 350
Las Vegas, Nevada 89144
Phone: 702-889-6400
Facsimile: 702-384-6025
efile@hpslaw.com
Attorney for Defendant
Southern Hills Hospital Medical Center, LLC
d/b/a Southern Hills Hospital & Medical Center

DISTRICT COURT
CLARK COUNTY, NEVADA

SHARON MCDOWELL,

Plaintiff,

vs.

SOUTHERN HILLS MEDICAL
HOSPITAL, HOSPITAL
CORPORATION OF AMERICA,
SUNRISE HEALTH CARE SYSTEM,
DR. GUITA TABASSI, DR. LINDA
TRAN, INSURANCE CO,
PATHOLOGISTS,

Defendants.

CASE NO. A-21-842763-C

DEPT NO. 30

NOTICE OF ENTRY OF ORDER RE:
DEFENDANT SOUTHERN HILLS
HOSPITAL MEDICAL CENTER, LLC d/b/a
SOUTHERN HILLS HOSPITAL &
MEDICAL CENTER'S MOTION TO
DISMISS PLAINTIFF'S COMPLAINT

...

...

...

...

...

...

...

...

PLEASE TAKE NOTICE that an Order Re: Defendant Southern Hills' Motion to Dismiss Plaintiff's Complaint was entered in the above entitled matter on the 29th day of April, 2022, a copy of which is attached hereto.

DATED this 29th day of April, 2022.

HALL PRANGLE & SCHOONVELD, LLC

By: /s/: Mari K. Schaan, Esq.
MARI K. SCHAAN, ESQ.
Nevada Bar No. 11268
1140 North Town Center Drive, Ste. 350
Las Vegas, Nevada 89144
Attorney for Defendant
Southern Hills Hospital Medical Center, LLC
d/b/a Southern Hills Hospital & Medical Center

HALL PRANGLE & SCHOONVELD, LLC
1140 NORTH TOWN CENTER DRIVE
SUITE 350
LAS VEGAS, NEVADA 89144
TELEPHONE: 702-889-6400 FACSIMILE: 702-384-6025

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of HALL PRANGLE & SCHOONVELD, LLC; that on the 29th day of April, 2022, I served a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER RE: DEFENDANT SOUTHERN HILLS HOSPITAL MEDICAL CENTER, LLC d/b/a SOUTHERN HILLS HOSPITAL & MEDICAL CENTER'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT** 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;

 X 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:

Sharon McDowell
3375 Rainbow Blvd., Apt. 8102
Las Vegas, NV 89117
mssharonmcdowell@gmail.com
Pro Se

/s/: Reina Claus
An employee of HALL PRANGLE & SCHOONVELD, LLC

Heather S. Shuman

CLERK OF THE COURT

**DISTRICT COURT
CLARK COUNTY, NEVADA
-oOo-**

SHARON MCDOWELL,

Plaintiff,

vs.

SOUTHERN HILLS MEDICAL
HOSPITAL, HOSPITAL
CORPORATION OF AMERICA,
SUNRISE HEALTH CARE SYSTEM,
DR. GUITA TABASSI, DR. LINDA
TRAN, INSURANCE CO,
PATHOLOGISTS,

Defendants.

CASE NO.: A-21-842763-C
DEPT. NO.: XXX

**ORDER RE: DEFENDANT,
SOUTHERN HILLS' MOTION
TO DISMISS PLAINTIFF'S
COMPLAINT**

INTRODUCTION

The above-referenced matter is scheduled for a hearing on April 27, 2022, with regard to Defendant, Southern Hills' Motion to Dismiss; Plaintiff's Motion Requesting to Reassign Case to Dept. 27; Plaintiff's Motion to Add Southern Hills Hospital; Plaintiff's Motion to Add Include Other Name; and Defendant Southern Hills' Motion to Quash Plaintiff's Motion. Pursuant to the Administrative Orders of the Court, these matters may be decided with or without oral argument. This Court has determined that it would be appropriate to decide these matters on the pleadings, and consequently, this Order issues.

SUMMARY OF FACTUAL AND PROCEDURAL HISTORY

This matter arises out of allegedly deficient medical treatment. Plaintiff Sharon McDowell alleges that in July 2020, she sought treatment for what she suspected to be, ovarian cancer at Defendant Southern Hills Medical Center. Plaintiff alleges that she underwent a surgical procedure on or about 10/16/20, that resulted in mutilation and extreme pain. Plaintiff contends that she saw a different medical provider sometime in 2021, who informed her that she no longer had ovaries or her left kidney. Plaintiff

1 alleges that attempts to obtain her medical records have been unsuccessful. Plaintiff
2 asserts that in addition to physical deformities, she suffers from emotional distress.

3 Plaintiff filed a Complaint in this matter on 10/15/21, against Southern Hills
4 Medical Hospital, Hospital Corporation of America, Sunrise Healthcare System, Dr.
5 Guita Tabassi, Dr. Linda Tran, Insurance CO., and “Pathologist.” The case was
6 originally assigned to Department 27, but reassigned to Department 30 via minute
7 order on 11/3/21. On 3/1/22, Defendant Southern Hills Medial Center (“Southern
8 Hills”) filed a Motion to Dismiss Plaintiff’s Complaint. On 3/7/22, Plaintiff filed a
9 Motion to Reassign Case to Dept. 27. On the same date, 3/7/22, Plaintiff filed a
10 document which could potentially be considered an Amended Complaint (indicating
11 that it is not a medical malpractice case). On 3/21/22, the Defendant, Southern Hills,
12 filed a Motion to Quash Plaintiff’s Motion to Reassign Case to Dept. 27. On the same
13 date, 3/21/22, Southern Hills filed a Motion to Dismiss Plaintiff’s Amended Complaint.
14 On 3/25/22, Plaintiff filed a “Documents in Support of . . . Civil Rights Violation,” as
15 well as a document entitled “Evidence Police Contact for Investigation.” On the same
16 date, 3/25/22, Plaintiff filed a Motion to Add, Include Southern Hills Hospital Medical
17 Center, LLC d/b/a Southern Hills Hospital & Medical Center. (The Court notes that the
18 Plaintiff argues that the Defendants have withheld medical records and information,
19 but does not contend or provide any indication that she has requested her protected
20 medical information.)

21 Plaintiff’s pro-se pleadings are not clear and have caused some confusion with
22 regard to the status of the pleadings. The Court will first address the Defendant’s
23 Motion to Dismiss.

24 **SUMMARY OF FACTUAL AND LEGAL ARGUMENTS**

25 Defendant Southern Hills argues that Plaintiff’s Complaint must be dismissed
26 pursuant to NRS § 41A.071 and NRCP 4(i) and 12(b)(5). Southern Hills argues that
27 absent a motion to extend the service period and a showing of good cause, the district
28 court lacks discretion to enlarge the service period. See *Saavedra-Sandoval v. Wal-*
Mart Stores, 126 Nev. 592, 596, 245 P.3d 1198, 1201 (2010). Further, Southern Hills
notes that Plaintiff’s Complaint was filed on 10/15/21, and that none of the Defendants
were served with a Summons and Complaint. Because more than 120 days has passed,

1 and Plaintiff has neither successfully served the Defendants, nor demonstrated
2 attempts to serve, Southern Hills argues that dismissal is warranted as a matter of law.

3 Additionally, Southern Hills argues that all of Plaintiff's causes of action are
4 professional negligence claims, as they are inextricable linked to alleged medical
5 malpractice. In *Szymborski v. Spring Mountain Treatment Ctr.*, 133 Nev. 638, 641
6 (Nev. 2017), the Nevada Supreme Court stated that an allegation of a breach of duty
7 involving medical judgment, diagnosis, or treatment "indicates that a claim is for
8 medical malpractice." Also in *Szymborski*, the Court further stated that "it is the nature
9 of the grievance rather than the form of the pleadings that determines the character of
10 the action." See also *Nevada Power Co. v. Dist. Ct.*, 120 Nev. 948, 960 (2004).

11 Here, Plaintiff's Complaint arises out of alleged negligence that took place
12 during a hysteroscopy, dilation and curettage procedure, and a biopsy of a uterine
13 mass/fibroid. Accordingly, Southern Hills argues that Plaintiff's claims are subject to
14 NRS § 41A.071. Even though Plaintiff alleges an intentional cover-up, her claims for
15 intentional conduct require proof or establishment of the underlying medical
16 malpractice or professional negligence. NRS § 41A.071, *Schwartz v. University Medical
17 Center of So. Nevada, et al.*, 460 P.3d 25, Nev. Unpub. Disp., WL 1531401, Docket Nos.
18 77554, 77666 (Filed March 26, 2020).

19 Pursuant to NRS § 41A.071, all medical malpractice actions must be filed with an
20 expert affidavit supporting the allegations contained in the Complaint. The expert
21 affidavit requirement of NRS § 41A.071 is designed to ensure that the "parties file
22 malpractice cases in good faith, i.e., to prevent the filing of frivolous lawsuits," and to
23 ensure that the case is meritorious. *Washoe Medical Center v. Second Judicial District
24 Court*, 122 Nev. 1298, 1304 (2006); *Borger v. Eighth Judicial District Court*, 120 Nev.
25 1021, 1026 (2004). Consequently, Southern Hills argues that Plaintiff's Complaint
26 should be dismissed in its entirety for failing to meet this affidavit requirement and
27 dismissal should be without leave to amend. *Washoe*, 122 Nev. at 1304 (holding that a
28 complaint that does not comply with NRS § 41A.071 is void and must be dismissed and
no amendment is permitted).

Moreover, Southern Hills states that it sent all of Plaintiff's medical records
within one week of her purported request to the address she provided. Nonetheless,
Plaintiff makes no representation that the alleged non-disclosure of medical records

1 hindered her from procuring an expert affidavit. See *Winn v. Sunrise Hospital*, 128
2 Nev. 246, 255, 277 P.3d 458, 464 (2012). In other words, the concealment has not been
3 alleged to interfere with Plaintiff's ability to satisfy the statutory requirement of an
4 accompanying expert affidavit.

5 Finally, Southern Hills argues that, Plaintiff has failed to set forth an actionable
6 claim for relief for "fraudulent concealment." First, fraud requires pleading with
7 particularity. However, Plaintiff's fraud claim is not particularly plead. See *Golden*
8 *Nugget, Inc. v. Ham*, 98 Nev. 311, (1982) (holding that fraudulent concealment must be
9 alleged with particularity). NRCP 9 requires that "[i]n all averments of fraud or
10 mistake, the circumstances constituting fraud or mistake shall be stated with
11 particularity." Heightened pleading requirements for a fraud claim demand that
12 plaintiffs plead the circumstances constituting the alleged fraud with enough specificity
13 to give defendants notice of the particular misconduct so that they can defend against
14 the charge and not just deny that they have done anything wrong. See e.g., *Brown v.*
15 *Kellar*, 97 Nev. 582 (1981); *Risinger v. SOC LLC*, 936 F.Supp.2d 1235, 1242 (2013).
16 Plaintiff has not plead sufficient factual allegations to meet the heightened standard for
17 pleading fraud as against Southern Hills. Plaintiff makes no mention of the specific
18 date and time nor party or person to the concealment alleged or how the concealments
19 are in fact fraud. Therefore, even considering Plaintiff's fraud claim independently, it
20 should still be dismissed.

21 **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

22 Dismissal for failure to state a claim is appropriate when it appears beyond a
23 doubt that the plaintiff could prove no set of facts which, if true, would entitle him to
24 relief. *Buzz Stew, LLC v. City of Las Vegas*, 124 Nev. 224, 181 P. 3d. 670, 672 (2008).
25 Although a court will accept a plaintiff's factual allegations as true for purposes of
26 deciding a motion to dismiss, such allegations must still be legally sufficient to
27 constitute the elements of the claim asserted. See, e.g. *Garcia v. Prudential Ins. Co. of*
28 *Am.*, 129 Nev. 15, 19, 293 22 P.3d 869 (Nev. 2013) (citation omitted).

"The test for determining whether the allegations of a complaint are sufficient to
assert a claim for relief is whether the allegations give fair notice of the nature and basis
of a legally sufficient claim and the relief requested." *Vacation Village, Inc. v. Hitachi*
America, Ltd., 110 Nev. 481, 484, 874 P.2d 744, 746 (1994). "The complaint cannot be

1 dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiff
2 could prove no set of facts which, if accepted by the trier of fact, would entitle him to
3 relief.” *Edgar v. Wagner*, 101 Nev. 226, 228, 699 P.2d 110, 112 (1985).

4 This Court acknowledges that it should “liberally construe the ‘inartful
5 pleadings’ of pro se litigants.” *Eldridge v. Block*, 832 F. 2d 1132 (9th Cir. 1987). A
6 complaint will not be dismissed because of a technical defect in the pleading. *Smith v.*
7 *District Court*, 120 Nev. 1343 (1997). The Pleading must only give the defendant a
8 reasonable advanced notice of an issue to be raised and an opportunity to respond.
9 *Schwartz v. Schwartz*, 95 Nev. 202 (1979). However, the Court must also acknowledge
10 that NRS § 41A.071 provides, If action for professional negligence is filed in the district
11 court, the district court shall dismiss the action, without prejudice, if the action is filed
12 without an affidavit submitted by a medical expert that supports the allegations
13 contained in the complaint. See § 41A.071

14 NRCP 4 states in pertinent part as follows:

15 (e) **Time Limit for Service.**

16 (1) **In General.** The summons and complaint must be served upon a
17 defendant no later than 120 days after the complaint is filed, unless the court grants an
18 extension of time under this rule.

19 (2) **Dismissal.** If service of the summons and complaint is not made upon a
20 defendant before the 120-day service period — or any extension thereof — expires, the
21 court must dismiss the action, without prejudice, as to that defendant upon motion or
22 upon the court’s own order to show cause.

23 (3) **Timely Motion to Extend Time.** If a plaintiff files a motion for an
24 extension of time before the 120-day service period — or any extension thereof — expires
25 and shows that good cause exists for granting an extension of the service period, the
26 court must extend the service period and set a reasonable date by which service should
27 be made.

28 (4) **Failure to Make Timely Motion to Extend Time.** If a plaintiff files a
motion for an extension of time after the 120-day service period — or any extension
thereof — expires, the court must first determine whether good cause exists for the
plaintiff’s failure to timely file the motion for an extension before the court considers
whether good cause exists for granting an extension of the service period. If the plaintiff
shows that good cause exists for the plaintiff’s failure to timely file the motion and for
granting an extension of the service period, the court must extend the time for service
and set a reasonable date by which service should be made.

NRCP 4(e).

Defendants allege that service was not completed within 120 days. Plaintiff does
not contend that service was completed. Plaintiff has not filed a Motion to Extend the
Time to Serve, and has failed to demonstrate that “good cause” exists for not requesting
extra time to serve, and has failed to demonstrate that “good cause” exists for granting
an extension of time. Consequently, pursuant to NRCP 4(e), dismissal seems
appropriate.

1 Additionally, NRS 41A.071 provides the following:

2 **NRS 41A.071 Dismissal of action filed without affidavit of medical expert.**

3 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:

- 4 1. Supports the allegations contained in the action;
- 5 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;
- 6 3. Identifies by name, or describes by conduct, each provider of health care who is alleged to be negligent; and
- 7 4. Sets forth factually a specific act or acts of alleged negligence separately as to each defendant in simple, concise and direct terms.

8 NRS 41A.071.

9 Although the Plaintiff has attempted to modify the Complaint to eliminate a
10 claim for “professional negligence” (previously referred to in Nevada as Medical
11 Malpractice), the gravamen of the Complaint still sounds in “professional negligence.”
12 Professional negligence is defined as “the failure of a provider of health care, in
13 rendering services, to use the reasonable care, skill or knowledge ordinarily used under
14 similar circumstances by similarly trained and experienced providers of health care.”
15 NRS 41A.015. Plaintiff has sued Southern Hills Hospital, and NRS 41A.017 includes
16 hospitals within the definition of “provider of health care.”

17 Plaintiff was obligated by NRS 41A.071 to file an affidavit of merit with her
18 Complaint, which she failed to do. This is an additional basis for Defendant’s requested
19 dismissal. Plaintiff argues that Defendants have withheld medical records, but there is
20 no evidence to support this claim, and Defendants indicate that they provided all
21 requested records immediately after they were requested. Additionally, any
22 withholding of records would be relevant for tolling of the statute of limitations, but not
23 for why an Affidavit of Merit was not attached to the Complaint.

24 Based upon the foregoing, and even viewing the evidence and pleadings in the
25 light most favorable to the non-moving party, this Court finds and concludes that the
26 plaintiff could prove no set of facts which, if true, would entitle her to relief, and
27 dismissal is appropriate. *Buzz Stew, LLC v. City of Las Vegas*, 124 Nev. 224, 181 P. 3d.
28 670, 672 (2008).

Based upon the above-referenced findings and conclusions, the Court further
finds and concludes that Plaintiff’s Motion to Reassign the Case to Dept. 27 is Moot.
Dept. 27 had the authority and discretion, as the Presiding Civil Judge, to reassign this
case. Further, this Court has determined that the case does allege “professional

negligence,” which was the basis for the reassignment from Dept. 27. Plaintiff’s Motion to Amend, to assert claims for “Surgical Battery, Malice, Premeditation,” and to remove Medical Malpractice as a cause of action, is also Moot, as this Court has determined that the gravamen of the Complaint deals with professional negligence, and consequently, the application of NRS 41A is mandatory. The Court finds that the Plaintiff’s request to amend would be futile, based on the above-referenced Findings and Conclusions, and consequently, the Motion to Amend must be denied as moot. Southern Hills’ Motion to Quash Plaintiff’s Motion to Reassign, is being treated as an “Opposition” to that Motion, which has already been addressed, and will be denied. Plaintiff’s Motion to Add or change the Defendant’s name is likewise Moot, as such a change, addition, or modification, would not affect the Court’s determination that the gravamen of the Plaintiff’s Complaint is “professional negligence.”

CONCLUSION/ORDER

Based upon the foregoing, and good cause appearing,

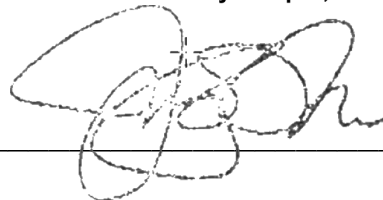
IT IS HEREBY ORDERED that Defendant’s Motion to Dismiss is hereby **GRANTED**, based on NRCP 4, as well as NRS 41A.071. Such dismissal is without prejudice.

IT IS FURTHER ORDERED that all other pending Motions are hereby **DENIED** as set forth herein.

The Court requests that Counsel for the Defendant prepare and process a Notice of Entry with regard to this Order.

Because this matter has been determined on the pleadings, any future hearings relating to the Motions addressed in this Order, are hereby taken off calendar.

Dated this 29th day of April, 2022

A handwritten signature in black ink, appearing to read "J. Wiese", is written over a horizontal line.

18A D6E 45F0 668C
Jerry A. Wiese
District Court Judge

1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
6 Sharon McDowell, Plaintiff(s) | CASE NO: A-21-842763-C
7 vs. | DEPT. NO. Department 30
8 Southern Hills Medical Hospital,
9 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: 4/29/2022

15 E-File Admin	efile@hpslaw.com
16 Reina Claus	rclaus@hpslaw.com
17 Mari Schaan	mschaan@HPSLAW.COM
18 Sharon McDowell	mssharonmcdowell@gmail.com

19
20
21
22
23
24
25
26
27
28

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Malpractice - Medical/Dental

COURT MINUTES

November 03, 2021

A-21-842763-C Sharon McDowell, Plaintiff(s)
vs.
Southern Hills Medical Hospital, Defendant(s)

November 03, 2021

3:00 AM

Minute Order

**Minute Order:
Recusal**

HEARD BY: Allf, Nancy

COURTROOM: No Location

COURT CLERK: Nicole McDevitt

RECORDER:

REPORTER:

**PARTIES
PRESENT:**

JOURNAL ENTRIES

- COURT FINDS after review that this case has been assigned to Department 27

COURT FURTHER FINDS Department 27 is exempt from being assigned Med Mal cases.

THEREFORE COURT ORDERS for good cause appearing and after review that the case be randomly reassigned to a Med Mal department.

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Malpractice - Medical/Dental

COURT MINUTES

January 12, 2022

A-21-842763-C Sharon McDowell, Plaintiff(s)
vs.
Southern Hills Medical Hospital, Defendant(s)

**January 12, 2022 1:00 PM Status Check:
Medical/Dental
Malpractice**

HEARD BY: Wiese, Jerry A.

COURTROOM: RJC Courtroom 14A

COURT CLERK: Michelle Jones
Nicole Cejas
Stephanie Rapel
David Gibson
Pharan Burchfield

RECORDER: Vanessa Medina

REPORTER:

**PARTIES
PRESENT:**

JOURNAL ENTRIES

- No appearances were made.

There being no JCCR, COURT ORDERED matter OFF CALENDAR.

Certification of Copy

State of Nevada }
County of Clark } SS:

I, Steven D. Grierson, the Clerk of the Court of the Eighth Judicial District Court, Clark County, State of Nevada, does hereby certify that the foregoing is a true, full and correct copy of the hereinafter stated original document(s):

NOTICE OF APPEAL; CASE APPEAL STATEMENT; APPELLATE BRIEF;
DISTRICT COURT DOCKET ENTRIES; CIVIL COVER SHEET; ORDER RE: DEFENDANT,
SOUTHERN HILLS' MOTION TO DISMISS PLAINTIFF'S COMPLAINT; NOTICE OF ENTRY OF
ORDER RE: DEFENDANT SOUTHERN HILLS HOSPITAL MEDICAL CENTER, LLC D/B/A
SOUTHERN HILLS HOSPITAL & MEDICAL CENTER'S MOTION TO DISMISS PLAINTIFF'S
COMPLAINT; DISTRICT COURT MINUTES

SHARON MCDOWELL,

Plaintiff(s),

vs.

SOUTHERN HILLS MEDICAL HOSPITAL;
HOSPITAL CORPORATION OF AMERICA;
SUNRISE HEALTHCARE SYSTEM; DR.
GUITA TABASSI; DR. LINDA TRAN;
INSURANCE CO.; PATHOLOGIST,

Defendant(s),

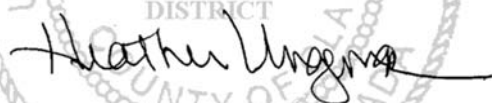
Case No: A-21-842763-C

Dept No: VII

now on file and of record in this office.

IN WITNESS THEREOF, I have hereunto
Set my hand and Affixed the seal of the
Court at my office, Las Vegas, Nevada
This 2 day of August 2022.

Steven D. Grierson, Clerk of the Court



Heather Ungermann, Deputy Clerk