IN THE SUPREME COURT OF THE STATE OF NEVADA

DIGNITY HEALTH D/B/A ST. ROSE DOMINICAN HOSPITAL – SIENA CAMPUS,

Petitioner,

v.

THE EIGHT JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA *er rel.* **THE COUNTY OF CLARK**, and **THE HONORABLE JUDGE MARIA GALL**,

Respondents,

And,

LIVIU RADU CHISIU, as special administrator for the Estate of **ALINA BADOI**, and as parent of **SOPHIA RELINA CHISIU**, a minor and heir of the Estate,

Real Parties in Interest.

Supreme Court Case No.:

Dist. Ct. Case No.: A-18-775572-C

PETITION FOR WRIT OF MANDAMUS AND/OR PROHIBITION

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NRAP 26.1 DISCLOSURE

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

1. Dignity Health d/b/a St. Rose Dominican Hospital, a California non-profit public benefit corporation, is owned by CommonSpirit Health, a Colorado nonprofit corporation, and no publicly held corporation owns 10% or more of its stock.
2. Names of all law firms whose attorneys have appeared for the party or amicus in this case (including proceedings in the district court or before an administrative agency) or are expected to appear in this court: Hall Prangle & Schoonveld, LLC.
3. If litigant is using a pseudonym, the litigant's true name: N/A

Dated this 5th day of January 2023.

HALL PRANGLE & SCHOONVELD, LLC

/s/ Tyson J. Dobbs, Esq.

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PETITION FOR WRIT OF MANDAMUS

Petitioner, Dignity Health d/b/a St. Rose Dominican Hospital – Siena Campus (hereinafter "Petitioner" or "St. Rose"), by and through its attorneys of record, Hall Prangle & Schoonveld, LLC, pursuant to NRAP 21 and based on this Court's original jurisdiction as set forth in Article 6 Section 4 of the Nevada Constitution and NRS 34.160, respectfully petitions this Honorable Court to issue a Writ of Mandamus directing the Honorable Maria Gall ("Respondent") to vacate her Order Granting Leave to Amend entered on August 2, 2022 (and her Order denying Motion for Reconsideration entered on September 23, 2022)(Vol.3, PA655-63; Vol.5, PA992-95); and to vacate her Orders denying Petitioner's Motion to Dismiss, Or Alternatively Motion to Strike (October 4, 2022 (minute) and November 14, 2022 (implementing)) (Vol.5, PA1012, 1116-24), in relation to the amended complaint filed by Plaintiff Liviu Radu Chisiu, as special administrator for the Estate of Alina Badoi, and as parent of Sophia Relina Chisiu, a minor and heir of the Estate ("Plaintiffs") (Vol.3, PA664-79; Vol.4, 680-796).

Petitioner asks this Court to direct Respondent to dismiss the Amended Complaint against Petitioner as leave to amend should not have been granted in the first instance and because the Amended Complaint is time-barred. In support, Petitioner states as follows:

1. On June 5, 2018, Plaintiffs filed a complaint ("Original Complaint") arising out of the June 3, 2017 death of Alina Badoi following her May 15, 2017, admission to St. Rose for induction of labor. (Vol.1, PA1-126). The Original Complaint contained six causes of action including Professional Negligence and Ostensible Agency/Vicarious Liability. (*Id*.). The only named defendants were anesthesiologist, Joon Young Kim, M.D., and St. Rose. (*Id.).* The professional negligence claim against Dr. Kim for allegedly causing a hemorrhage in Alina Badoi's spine was supported by the declarations of two physicians, Yaakov Beilin, M.D., and Bruce Hirschfeld, M.D. (*Id.*).

2. On March 16, 2022, after approximately four years of discovery, Plaintiffs' counsel stipulated – and the district court ordered – that Plaintiffs' Original Complaint "is limited to a cause of action for professional negligence based on a theory of vicarious liability (i.e., actual agency/ostensible agency) for the alleged professional negligence of Defendant Joon Young Kim, M.D." (Vol.2, PA343; Vol.3, PA491-92).

3. On May 2, 2022, one judicial day after the April 29, 2022 formal order confirming the stipulation and the last day to file motions to amend pleadings or add parties, Plaintiffs filed a Motion for Leave to File Amended Complaint. ("Motion to Amend") (Vol.2, PA351-74). The Motion to Amend sought to assert multiple claims for vicarious liability against St. Rose for the professional negligence of nonparty

nurses and physicians. (*Id.*). The proposed amended complaint attached to the Motion to Amend stated that a declaration of Jonathan Lanzkowsky, M.D, was attached thereto. (Vol.2, PA356, 369 (¶43)). The Motion to Amend also stated repeatedly that it was brought "to conform to the evidence unearthed in discovery." (Vol.2, PA351-52, 356, 358).

4. Petitioner filed an Opposition to the Motion to Amend, maintaining that the proposed amended complaint did not comply with EDCR 2.30 and NRS 41A.071 as Dr. Lanzkowsky's Declaration was not attached. (Vol.2, PA377). Petitioner further maintained that Plaintiffs' Motion to Amend should be denied because it was dilatory, not in good faith, prejudicial, futile, and untimely. (*Id.*). Plaintiffs filed a Reply denying Petitioner's assertions. (Vol.3, PA612-54).

5. At a June 22, 2022 hearing before the Honorable Mark Gibbons, Petitioner was granted summary judgment on the sole theory of liability remaining against it. (Vol.4, PA797-809, 866). This ruling would have been dispositive to Petitioner, but at that same hearing Plaintiffs were granted leave to amend the Original Complaint to assert the aforementioned vicarious liability claims against St. Rose for the alleged negligent conduct of nonparty nurses and physicians. (Vol.4, PA867-68). Respondent entered the Order granting Plaintiffs leave to amend their complaint on August 2, 2022. (Vol.3, PA655-63).

6. Plaintiffs filed their amended complaint ("Amended Complaint") on August 9, 2022. (Vol.3, PA664-79; Vol.4, PA680-796). Attached to it was Dr. Lanzkowsky's Declaration, dated May 24, 2022, a date more than 3 weeks after Plaintiffs' Motion to Amend was filed. (Vol.4, PA790-92).

7. Petitioner filed a Motion for Reconsideration of the Motion to Amend on August 19, 2022. (Vol.4, PA810-70). Petitioner maintained that since the Motion to Amend was granted, new facts were disclosed showing that Plaintiffs' Motion to Amend "was not evaluated under the appropriate standard of review and should have been denied." (Vol.4, PA812). Petitioner explained that the Lanzkowsky Declaration attached to the filed Amended Complaint (and absent from the proposed amended complaint) was dated May 24, 2022, three weeks after the Motion to Amend was filed and three weeks after the deadline to file a motion to amend, making Plaintiffs' representation that the declaration was attached and supported the proposed amended complaint knowingly false. (*Id.*).

8. Moreover, Petitioner asserted that, while Plaintiffs' Motion to Amend was presented to the district court as a motion "to conform to the evidence unearthed in discovery," the revelations in the Declaration itself showed that Dr. Lanzkowsky had not reviewed any discovery conducted in the four years of this litigation, but had reviewed the same medical records Plaintiffs had possessed for five years. (Vol.4, PA812-13). Petitioner maintained that Plaintiffs' misrepresentations led the district

court to evaluate the merits of the Motion to Amend under NRCP 15(a) only, although it first should have been evaluated for "good cause" under NRCP 16(b). (Vol.4, PA813, 821-23). Petitioner further contended that had the Motion to Amend been analyzed under NRCP 16(b), it would have failed the "good cause" test and been denied. (Vol.4, PA812, 823-25).

9. Plaintiffs filed an Opposition to this motion disputing any misrepresentations or the existence of new facts, and asserting that Plaintiffs had good cause for amending their complaint. (Vol.4, PA901-02, 906-07). Petitioner filed a reply asserting that Plaintiffs' Opposition failed to offer facts or argument that the Motion to Amend could have withstood good cause analysis or to prove that the Motion to Amend was not dilatory or unduly delayed. (Vol.5, PA974-91).

10. On September 23, 2022, without oral argument, Respondent denied Petitioner's Motion for Reconsideration. (Vol.5, PA992-95).

11. On August 23, 2022, Petitioner filed a Motion to Dismiss, Or Alternatively, Motion to Strike[1] seeking to dismiss Plaintiffs' Amended Complaint, as the vicarious liability allegations therein were time-barred having been brought more than five years after Alina Badoi's death and more than four years after the

[1] Petitioner sought to strike the Lanzkowsky Declaration under NRCP 12(f), as it was not the declaration referenced in the proposed amended complaint approved for filing. (Vol.4, PA888). Petitioner maintained that if the Lanzkowsky Declaration were struck, the newly added claims against St. Rose should be dismissed for lack of expert support under NRS 41A.071. (*Id.*).

Original Complaint was filed. (Vol.4, PA877-84). Petitioner maintained that Plaintiffs could neither circumvent the limitations/repose periods in NRS 41A.097 by asserting claims against a principal that would otherwise be time-barred against the agent, nor undercut NRS 41A.071 and this Court's precedent by asserting claims against nonparty healthcare providers that were "void" since they were not set forth in the expert declarations attached to the Original Complaint. (Vol.4, PA877-81). Petitioner further maintained that relation back was not warranted under NRCP 15(c)(1) or (c)(2). (Vol.4, PA882-84).

12. Plaintiffs filed an Opposition to this Motion arguing they were not precluded by Nevada law from bringing a vicarious liability claim only against the principal and that the claims in the Amended Complaint related back under NRCP 15(c)(1). (Vol.5, PA952-55).[2] Petitioner filed a Reply asserting that none of Plaintiffs' Opposition arguments justified denying Petitioner's Motion to Dismiss. (Vol.5, PA996-1011). On October 4, 2022 (minute) and November 14, 2022 (implementing), Respondent denied Petitioner's Motion to Dismiss, including alternative relief. (Vol.5, 1012, 1116-24).

13. Petitioner respectfully contends that Respondent erred in granting Plaintiffs' Motion to Amend and denying Petitioner's Motion for Reconsideration.

[2] Plaintiffs denied any basis for striking the Lanzkowsky Declaration. (Vol.5, PA956-58).

Plaintiffs' Motion to Amend was dilatory, not in good faith, prejudicial, futile and untimely, and should have been denied under NRCP 15(a). Moreover, Respondent should have evaluated the Motion to Amend under NRCP 16(b) and denied it as there was no "good cause" for Plaintiffs' delay in bringing the Motion to Amend.

14. Further, Petitioner respectfully contends that Respondent erred in finding that Plaintiffs' vicarious liability claims in the Amended Complaint related back to the Original Complaint pursuant to NRCP 15(c)(1). Relation back is inapplicable where Plaintiffs seek to circumvent the one-year statute of limitations and three-year statute of repose of NRS 41A.097 by asserting claims against St. Rose as principal which would otherwise be time-barred against the alleged agents. Moreover, allowing relation back thwarted the purpose of N.R.S. 41A.071 and this Court's precedent in *Washoe Medical Center v. Second Judicial District Court*, 122 Nev. 1298, 1304, 148 P.3d 790, 794 (2006). And, even if relation back were relevant, Respondent's reliance on NRCP 15(c)(1) is misplaced. NRCP 15(c)(1) does not contemplate the addition of new claims based on an entirely separate fact pattern and causation theory.

Wherefore, based on the foregoing and the accompanying Points and Authorities, Petitioner respectfully requests this Court issue a Writ of Mandamus ordering Respondent to vacate her August 2, 2022, September 23, 2022, and October 4, 2022 and November 14, 2022 Orders and dismiss St. Rose from this case.

VERIFICATION

Under penalty of perjury, the undersigned declares that he is the attorney for Petitioner and knows the contents of the foregoing Petition; that the pleading is true of his own knowledge, except as to those matters stated on information and belief, and that as to such matters he believes to be true. This verification is made by the undersigned attorney pursuant to NRS 15.010, on the ground that the matters stated, and relied upon, in the foregoing Petition are all contained in the prior pleadings and other records of the District Court, true and correct copies of which have been attached hereto.

TYSON J. DOBBS, ESQ.

SUBSCRIBED AND SWORN to before me
on this 4th day of January 2023

NOTARY PUBLIC in and for said
County of Clark and State of Nevada

CAMIE DEVOGE
NOTARY PUBLIC
STATE OF NEVADA
APPT. NO. 00-60019-1
MY APPT. EXPIRES NOVEMBER 12, 2023

POINTS AND AUTHORITIES

I. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did Respondent err in granting Plaintiffs' Motion to Amend and denying Petitioners' Motion for Reconsideration where:

(1) the Motion to Amend was dilatory, not in good faith, prejudicial, futile and untimely; and

(2) new facts disclosed that the Motion to Amend should have been evaluated under NRCP 16(b) and denied?

2. Did Respondent err in finding that Plaintiffs' claims against St. Rose contained in the Amended Compliant related back to the Original Complaint where:

(1) Plaintiffs are attempting to use the doctrine to circumvent the one-year statute of limitations and three-year statute of repose of NRS 41A.097 by asserting claims against St. Rose as principal which would otherwise be time-barred against the alleged agents;

(2) allowing relation back thwarted the purpose of NRS 41A.071 and Nevada Supreme Court precedent, as Plaintiffs' claims against nonparty healthcare providers were "void" since they were not contained in the expert declarations attached to the Original Complaint; and

(3) relation back is not permitted under NRCP 15(c)(1) to add new vicarious liability claims premised on an entirely separate fact pattern and theory?

II. ROUTING STATEMENT

This Petition falls within one of the case categories retained by this Court pursuant to NRAP 17(a) because it raises an issue of "statewide public importance." *See* NRAP 17(a)(12). This Petition raises an issue applicable to any vicarious liability litigant in this State regarding the viability of vicarious liability claims against a principal for the conduct of alleged agents when any direct claims against the agents would otherwise be time-barred under NRA 41A.097.

III. STATEMENT OF FACTS

A. Factual Background

Alina Badoi was admitted to St. Rose on May 15, 2017, for labor induction. (Vol.3, PA664-679; Vol.4, PA680-796). Anesthesiologist, Dr. Joon Young Kim, placed an epidural catheter for pain. (*Id.*). Ms. Badoi developed spastic paraparesis, an intradural hematoma, and underwent a laminectomy from T8 to L3. (*Id.*). She died on June 3, 2017, from pulmonary thromboemboli. (*Id*).

B. Procedural History

On June 5, 2018, Plaintiffs filed the Original Complaint alleging: (1) Professional Negligence; (2) Negligent Credentialing; (3) Fraudulent Concealment

and/or Omissions; (4) Negligent Hiring, Training, Retention and Supervision; (5) Ostensible Agency/Vicarious Liability; and (6) Wrongful Death under NRS 41.085. (Vol.1, PA1-126). Dr. Kim and St. Rose were the only defendants. (*Id.*).

The Original Complaint alleged that Dr. Kim failed to "fully assess Alina Badoi's bleeding risk prior to placing the epidural catheter for labor analgesia;" and erred by placing "the epidural in a patient at significant risk for bleeding." (*Id*. at ¶ 22). The Original Complaint attached two Declarations from physicians, Yaakov Beilin, M.D., and Bruce Hirschfeld., M.D. (Vol.1, PA15-126). Anesthesiologist Dr. Beilin reviewed the hospital records and autopsy report and opined that Dr. Kim was negligent by failing to fully assess Ms. Badoi's bleeding risk and placing the epidural catheter despite this risk, and that these failures caused the hematoma in Ms. Badoi's spine. (Vol.1, PA15-86). Dr. Hirschfeld reviewed numerous records (including prenatal and hospital records, death certificate and coroner's report), provided a comprehensive treatment timeline, and opined that Dr. Kim's epidural placement caused the bleed that caused the pulmonary embolism resulting in Ms. Badoi's death. (Vol.1, PA86-126).

On December 4, 2019, Petitioner took the deposition of the administrator of Alina Badoi's Estate, Plaintiff Liviu Chisiu. (Vol.2, PA443-47). Mr. Chisiu was Ms. Badoi's partner and father of her child (*Id*.). He testified that even before Alina Badoi's death, he requested and received her medical records because he realized

that something was "not quite right" with her treatment. (Vol.2, PA444 (143:14-144:10)). Plaintiff testified that within a month of Alina's death, he consulted an attorney for a potential lawsuit. (Vol.2, PA445 (149:23-150:12)). Plaintiff testified about his observations of the treatment provided regarding high blood pressure, even having raised these concerns with the nurses and physicians at the time. (Vol.2, PA446 (173:1-175:15)). Plaintiff also testified regarding the timing of the MRIs performed to diagnose the hematoma. (Vol.2, PA446-47 (175:16-179:22)).

On January 29, 2021, Judgment on the Pleadings was granted under NRS 41A.071 as to Plaintiffs' claims for Negligent Credentialing and Negligent Hiring, Training, Retention and Supervision. (Vol.1, PA127-28).

In February 2021—just under three years from the filing of the Original Complaint, Plaintiffs began taking depositions. (Vol.4, PA816). Between Feb. 18, 2021, and November 22, 2021, Plaintiffs took ten depositions of nurses and physicians involved in Ms. Badoi's treatment. (*Id*.). Plaintiffs also deposed treating physicians, Drs. Herpolsheimer and Garg. (*Id*.).

At a March 16, 2022 hearing on Petitioner's Motion for Partial Judgment on the Pleadings, Plaintiffs' counsel stipulated – and the district court ordered – that Plaintiffs' Original Complaint "is limited to a cause of action for professional negligence based on a theory of vicarious liability (i.e., actual agency/ostensible agency) for the alleged professional negligence of Defendant Joon Young Kim,

M.D." (Vol.2, PA343; Vol.4, PA845-46). The formal order with this stipulation followed on April 29, 2022. (Vol.2, PA343).

On May 2, 2022, Plaintiffs filed a Motion for Leave to File Amended Complaint. ("Motion to Amend") (Vol.2, PA351-74). Petitioner filed an Opposition on May 18, 2022, and Plaintiffs filed a Reply on May 30, 2022. (Vol.2, PA375-479; Vol.3, PA480-519, 612-54).

On May 18, 2022, Petitioner filed a Motion for Summary Judgment on the only remaining claim against it, ostensible agency/vicarious liability for Dr. Kim's alleged professional negligence. (Vol.3, PA520-611). At a June 22, 2022 hearing before the Honorable Mark Gibbons, Petitioner was granted summary judgment was granted (Vol.4, PA797-809, 865-66).

Also, at this June hearing, and with the district court not entertaining argument, Plaintiffs were granted leave to file an amended complaint. (Vol.4, PA867-68). Senior Judge Mark Gibbons stated: "I have to give leave freely to amend, and then you can file a Rule 12 Motion or whatever afterwards." (*Id*.). The Honorable Maria Gall entered the formal Order on August 2, 2022. (Vol.3, PA655-63).

Plaintiffs filed their amended complaint ("Amended Complaint") on August 9, 2022, attaching Lanzkowsky's Declaration, dated May 24, 2022, a date more than 3 weeks after Plaintiffs' Motion to Amend. (Vol.3, PA664-79; Vol.4, 680-796).

On August 19, 2022, Petitioner filed a Motion for Reconsideration of the Motion to Amend. (Vol.4, PA810-70). Plaintiffs filed an Opposition on September 2, 2022. (Vol.4, PA896-929; Vol.5, PA930-1011). Petitioner filed a Reply on September 15, 2022. (Vol.5, PA974-91). On September 23, 2022, without oral argument, Judge Gall denied Petitioner's Motion for Reconsideration, finding that "[t]he fact that Dr. Lanzkowsky's affidavit was referenced in but unattached to the [proposed] amended complaint is not a new fact" and that there was "no legal authority for the proposition that an affidavit of merit must be attached to a motion for leave to amend and that, instead, it is merely the filing of the amended complaint that must be supported by an affidavit of merit." (Vol.5, PA992-95). Judge Gall stated that "the fact that Dr. Lanzkowsky did not execute his affidavit until May 24, 2022, has little meaning for this Court." (*Id.* at 993).

On August 23, 2022, Petitioner filed a Motion to Dismiss, based upon statute of limitations/statute of repose or alternatively, Motion to Strike, the Lanzkowsky Declaration. (Vol.4, PA871-95). Plaintiffs filed an Opposition on September 9, 2022. (Vol.5, PA945-73). Petitioner filed a Reply on September 28, 2022. (Vol.5, 974-91). Judge Gall denied Petitioner's Motion to Dismiss, including alternative relief on October 4, 2022 (minute) and November 14, 2022 (implementing). (Vol.5, PA1012, 1116-24). Judge Gall declined oral argument because the Motion "largely asserts arguments this Court has already addressed in granting Plaintiffs leave to

amend the complaint." (Vol.5, PA1012). Judge Gall found that the claims set forth in the Amended Complaint related back to the Original Complaint under NRCP 15(c)(1) as "they arise out of the 'same conduct, transaction or occurrence set out in the original pleading.'" (Vol.5, PA1117). Judge Gall refused to strike the Lanzkowsky Declaration. (Vol.5, PA1117).

On December 13, 2022, St. Rose was granted summary judgment on Plaintiffs' vicarious liability claims against two nonparty treating physicians, Drs. Herpolsheimer and Garg, leaving Plaintiffs' claims for vicarious liability based on the conduct of certain nurses the sole remaining claim against St. Rose. (Vol.5, PA1125-41). On December 15, 2022, Dr. Kim was dismissed with prejudice. (Vol.5, PA1142-08).

IV. REASONS WHY A WRIT OF MANDAMUS SHOULD ISSUE

A. Writ Standard

A writ of mandamus is available (1) "to compel the performance of an act which the law requires as a duty resulting from an office, trust, or station," NRS 34.160, (2) "to control a manifest abuse of or arbitrary or capricious exercise of discretion" or (3) "to clarify 'an important issue of law.'" *Bennett v. Eighth Jud. Dist. Ct.*, 121 Nev. 802, 806, 121 P.3d 605, 608 (2005). When a district court's findings raise questions of law, such as in this Petition, they are reviewed *de novo*. *Marquis & Aurbach v. Eighth Jud. Dist. Ct.*, 122 Nev. 1147, 1156, 146 P.3d 1130,

1136 (2006); *Anderson v. Mandalay Corp.*, 131 Nev. 825, 832, 358 P.3d 242, 247 (2015) (futility is an issue of law subject to de novo review); *Klingensmith v. Eighth Jud. Dist. Ct.*, No. 82403, 2021 WL 4261541, *1, 494 P.3d 904 (Nev. 2021) (unpublished dispo) (in action involving writ petition applying de novo review to question of statutory interpretation of NRS 41A.071's affidavit requirement). The writ shall be issued in cases where the petitioner does not have a plain, speedy and adequate remedy in the ordinary course of law, NRS 34.170, or where "no disputed factual issues exist" and summary judgment is clearly required by statute or rule. *Libby v. Eighth Jud. Dist. Ct.*, 130 Nev. 359, 362, 325 P. 3d 1276, 1278 (2014) and *Nevada Assn' Servs., Inc. v. Eighth Jud. Dist. Ct.*, 130 Nev. 949, 953, 338 P.3d 1250, 1253 (2014).

A writ of mandamus should issue here because the district court manifestly abused its discretion in granting leave to amend and in denying Petitioner's Motion to Dismiss. Respondent's decision permitted Plaintiffs to circumvent NRS 41A.097 by asserting claims against a principal that would otherwise be time-barred against the alleged agents and to undercut the purpose of NRS 41A.071 and Nevada Supreme Court precedent. Moreover, Petitioner's issues are better addressed now, as a writ of mandamus will be dispositive of this matter since the other named defendant Dr. Kim was dismissed with prejudice on December 15, 2022, and the sole remaining allegations against St. Rose stem from its alleged vicarious liability

for the conduct of certain nurses. (Vol.5, PA1125-08). Resolution of this matter on appeal after a trial will not avoid the prejudice to Petitioner and the State of Nevada of the time and expense burden of a trial that should never have occurred in the first place.

B. Respondent should have denied Plaintiffs leave to file their Amended Complaint.

1. Plaintiffs' Motion to Amend was dilatory, not in good faith and prejudicial. [3]

Under NRCP 15, leave to amend should be freely given when justice so requires. However, a denial of leave to amend is warranted if undue delay, bad faith, or dilatory motives exist. *Stephens v. Southern Nevada Music Co.*, 89 Nev. 104, 105-06, 507 P.2d 138, 139 (1973); *Kantor v. Kantor*, 116 Nev. 886, 891-92, 8 P.3d 825, 828 (2000) (denying motion to amend where movant was "dilatory in requesting leave to amend"); *see also State, Univ. & Cmty. Coll. Sys. v. Sutton,* 120 Nev. 972, 988, 103 P.3d 8, 19 (2004) (upholding denial of leave to amend where information subject to the motion to amend was within movant's knowledge nine months prior).

[3] Leave to amend should not be granted if the proposed amendment would be futile. *Halcrow, Inc. v. Eighth Jud. Dist. Ct.*, 129 Nev. 394, 302 P.3d 1148, 1152 (2013), *as corrected* (Aug. 14, 2013). For further discussion of the futility and untimeliness of Plaintiffs' efforts, *infra* Point IV.C.

Here, Plaintiffs filed their Motion to Amend four years into this litigation and five years after treatment. (Vol.2, PA351-74). It was also filed on the last day to amend the pleadings, after the tenth extension of deadlines and a stipulation and order limiting St. Rose to vicarious liability for Dr. Kim's negligence. (Vol.2, PA377).

The new claims that Plaintiffs asserted – an alleged failure to "monitor or treat Decedent's elevated blood pressure" and negligence in "awaiting necessary treatment which resulted in delays in diagnosing Decedent's condition" (Vol.3, PA670-71) – involved information available when the Original Complaint was filed in June 2018. This is demonstrated in the declarations (Drs. Belin and Hirschfeld) attached to the Original Complaint providing a detailed timeline of Alina Badoi's medical treatment. (Vol.1, PA15-126). Plaintiff even addressed these issues at his December 2019 deposition. (Vol.2, PA379, 444).

When Plaintiffs filed their Motion to Amend on May 2, 2022, they knew that summary judgment was inevitable on the sole claim they had maintained against St. Rose for four years – vicarious liability for Dr. Kim's alleged negligence. It was undisputed that Dr. Kim was not a hospital employee. Plaintiffs' dilatory Motion to Amend was simply a belated attempt to change the theory of liability to avoid summary judgment – which was ultimately entered in St. Rose's favor. (Vol.4, PA797-809). Such improper tactics should have been denied. *See Nutton v. Sunset*

Station, Inc., 131 Nev. 279, 289, 357 P.3d 966, 973 (Nev. App. 2015) (proposed amended complaint should be denied if it is a "last-second amendment[] alleging meritless claims in an attempt to save a case from summary judgment" (citation omitted)).

Leave to amend should also have been denied because the proposed amendments would cause significant prejudice to St. Rose. Prejudice to the opposing party is yet another reason to deny leave to amend. *See Nutton*, Id. at 284, 357 P.3d at 970 (Nev. App. 2015) (citing *Stephens v. Southern Nevada Music Co.*, 89 Nev. 104, 105, 507 P.2d 138, 139 (1973)). Indeed, for four years this action was a vicarious liability case for the conduct of Dr. Kim placing an epidural catheter. And, for four years, Plaintiffs' theory of liability was that the placement of this catheter caused a hemorrhage. But, one month before expert disclosures – and approximately two months after Plaintiffs stipulated their claims against St. Rose were limited to its alleged vicarious liability for Dr. Kim – Plaintiffs sought to add new claims against St. Rose, not for its own conduct, but for the conduct of nonparty medical providers based on an entirely new injury (brain bleed). The prejudicial impact that Plaintiffs' dilatory conduct has on St. Rose's efforts to pursue indemnity and contribution claims, and their inability to conduct further discovery, hire other experts, and re-evaluate defense strategy, cannot be understated. Accordingly, for all these reasons, leave to amend should never have been granted.

2. Plaintiffs' Motion to Amend should have been evaluated for good cause under NRCP 16(b) and denied.

In refusing to reconsider her decision to grant Plaintiffs leave to amend, Respondent stated that "the fact that Dr. Lanzkowsky did not execute his affidavit until May 24, 2022, has little meaning for this Court." (Vol.5, PA993). Petitioner respectfully maintains that Respondent missed the point. This was not a case involving a failure to attach an existing declaration. Rather, Petitioner's argument was that Plaintiffs' assertion in the Motion to Amend that a declaration existed – when it did not (a fact that only became apparent upon filing the Amended Complaint) – was to gain an unfair advantage, namely to avoid the heightened scrutiny of the good cause analysis under NRCP 16(b).

Plaintiffs' Motion to Amend was filed on the last day to file motions to amend pleadings, May 2, 2022 – again, after the case was litigated for four years and after Plaintiff's stipulation acknowledging the limited scope of their claim against St. Rose. The proposed amended complaint stated that Lanzkowsky's Declaration was "attached" and "supported" the allegations in the proposed amended complaint. (Vol.2, PA369). However, the referenced declaration was not attached, despite the requirement in EDCR 2.30. *See id.* (stating that "[a]ll amended pleadings must contain copies of all exhibits referred to in such amended pleadings" and that "[a] copy of a proposed amended pleading must be attached to any motion to amend the pleading").

The reason why the Declaration was not attached only became clear when Plaintiffs filed their Amended Complaint – the Declaration simply did not exist. In fact, the Declaration was created on May 24, 2022, three weeks after the Motion to Amend was filed and three weeks after the deadline to file a motion to amend expired. The representation that the Declaration was attached and supported the proposed amended complaint was knowingly false.

Additionally, Plaintiffs' Motion to Amend was presented as a motion "to conform to the evidence unearthed in discovery." (Vol.2, PA358). The Declaration itself confirmed that this, too, was false. The Declaration showed that Dr. Lanzkowsky did not review any of the discovery conducted during the four years of litigation. Instead, he reviewed the same medical records Plaintiffs had possessed for five years – the same ones that were the basis for the two expert declarations attached to the Original Complaint. (Vol.1, PA16, 88; Vol.4, PA790).

These misrepresentations[4] are critical to Respondent's ruling on the Motion to Amend as it led Respondent to evaluate the merits of the motion only under NRCP 15(a), when it should have first been evaluated under NRCP 16(b). *See Nutton , Id. at* 281, 357 P.3d at 968 (Nev. App. 2015) (holding that "when a motion seeking leave to amend a pleading is filed after the expiration of the deadline for filing such

[4] These misrepresentations are also further evidence that the Motion itself was dilatory and not in good faith. *Supra*, Point IV.B.1.

motions, the district court must first determine whether 'good cause' exists for missing the deadline under NRCP 16(b) before the court can consider the merits of the motion under the standards of NRCP 15(a)").

Here, no NRCP 16(b) "good cause" analysis occurred because Plaintiffs misrepresented the timeliness of their Motion to Amend. Pursuant to EDCR 2.30, the Motion could not, and should not, have been filed until May 24, 2022, when the Declaration was created. However, if Plaintiffs had waited until that date, they would have been beyond the May 2, 2022 deadline for filing motions for leave to amend and would need to show good cause for the delay.

Had an NRCP 16(b) analysis occurred here, Plaintiffs' Motion to Amend would have been denied as there was no "good cause" for Plaintiffs' delay in bringing these claims. To determine "whether 'good cause' exists under Rule 16(b), the basic inquiry for the trial court is whether the filing deadline cannot reasonably be met despite the diligence of the party seeking the amendment." *Nutton*, *Id*. at 286-87, 357 P.2d at 971 (citation omitted). Four factors may be considered in evaluating a party's diligence, including: "(1) the explanation for the untimely conduct, (2) the importance of the requested untimely action, (3) the potential prejudice in allowing the untimely conduct, and (4) the availability of a continuance to cure such prejudice." *Id*. at 287, 357 P.2d at 971-72.

The four factors are not exclusive. Indeed, "if the moving party was not diligent in at least attempting to comply with the deadline, 'the inquiry should end.'" *Id*. (quoting *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992). As further explained in *Nutton*, the first factor – the explanation for the untimely motion – "is by far the most important and may in many cases be decisive by itself." *Id.* An example of lack of diligence is "when a party was aware of the information behind its amendment before the deadline, yet failed to seek amendment before it expired." *Id.*

Here, it was undisputed that Plaintiffs were aware of, and conducted discovery related to the information supporting the proposed amended complaint years before the deadline. Moreover, the proposed amended complaint completely changed the theory of liability against St. Rose, and the Motion to Amend gave no legitimate explanation for the four-year delay in moving to amend. That it took Plaintiffs four years to obtain Dr. Lanzkowsky's Declaration is inexcusable, particularly given Plaintiff's deposition testimony three years ago regarding the issues raised in the Motion to Amend and Plaintiffs' silence during the pendency of St. Rose's Motion for Partial Judgment on the Pleadings, which resulted in Plaintiffs stipulating to the limited scope of their claims against St. Rose. Accordingly, the Motion to Amend should have been denied under the first factor alone.

Nor do the other factors support any finding of good cause here. The impact of bringing vicarious liability claims against nonparty health care providers four years into litigation cannot be disregarded. If St. Rose is to seek indemnity or contribution for such providers, it would be at exceptional expense in subsequent litigation as the timeframe for bringing those providers into this case has expired. Moreover, prejudice to St. Rose is substantial. Petitioner has spent years and significant resources exploring and developing a defense theory premised on a defense of Dr. Kim's treatment. That defense, including theories regarding causation are entirely different than those appliable to other physicians and nurses involved in the treatment in different roles and at different stages. St. Rose is left to conduct additional discovery, hire additional experts, and re-evaluate its entire defense theory and strategy.

C. Respondent should have dismissed Plaintiffs' claims against St. Rose in the Amended Complaint as time-barred.

Respondent denied St. Rose's Motion to Dismiss upon finding that the allegations in Plaintiffs' Amended Complaint "arise out of the 'same conduct, transaction or occurrence set out in the original pleading'" under NRCP 15(c)(1). But relation back is inapplicable where, as here, Plaintiffs' belated claims seek to circumvent the procedural limitations contained in both NRS 41A.071 and NRS 41A.097. Even if relation back were relevant, NRCP 15(c)(1) cannot save Plaintiffs' dilatory Amended Complaint.

1. Plaintiffs cannot circumvent NRS 41A.097 by asserting claims against a principal that would otherwise be time-barred against the alleged agents.

Creative pleading tactics, similar to those Plaintiffs employed here, were denounced by this Court in *Estate of Curtis v. South Las Vegas Medical Investors*, 136 Nev. 350, 353-54, 466 P.3d 1263, 1267 (2020). In that case, plaintiffs brought claims against a nursing home for a nurse's alleged negligent treatment of a patient. Plaintiffs argued they did not need to comply with the affidavit requirement of NRS 41A.071 as the complaint named only the principal (the nursing home)—not the nurse—as a defendant. This Court, however, determined that a party could not "circumvent" the NRS 41A requirements by asserting administrative claims against a principal which are "inextricably linked" to the professional negligence of a nonparty medical provider. *Id*. at 353-54, 466 P.3d at 1267.

Similarly, Plaintiffs should not be allowed to "circumvent" the statute of limitations/statute of repose contained in NRS 41A.097 that would normally apply to the nonparty agent/employee by bringing their claims against the principal/hospital only, more than 5 years after the allegedly negligent medical treatment occurred. While Petitioner has not found a Nevada case directly addressing the factual situation present here, a nearly identical situation arose in *Huber v. Marlow*, 2008 WL 2199827 (Tenn. Ct. App. May 28, 2008). There, plaintiffs filed suit against multiple defendants for alleged malpractice in causing a

fall and intracranial hemorrhage. Two of the initial defendants were a physician practice group, Internists of Knoxville, PLLC ("Internists") and its employee (Dr. Marlow). Later, plaintiffs amended their complaint to bring additional vicarious liability claims against Internists for the alleged negligence of a nonparty employed physician (Dr. Rankin) also involved in the treatment. As the time for bringing suit directly against Dr. Rankin had passed, Internists filed a summary judgment motion arguing that it could not be liable for its agent's negligence as the plaintiffs' claims against the agent were time-barred. The district court agreed and granted summary judgment for Internists.

The appellate court affirmed. In rejecting plaintiffs' reliance on relation back, the *Huber* court explained that while relation back "would allow Plaintiffs to amend their complaint to include further allegations against Dr. Marlow (who was timely sued) and/or Internists of Knoxville *in its capacity as Dr. Marlow's employer*," relation back "cannot be used to support an 'end-run' around the statute of repose as against Dr Rankin or Internists of Knoxville in its capacity as Dr. Rankin's employer." *Id*. at *5 (emphasis in original).

Additionally, the *Huber* court equated the amendment asserting a new vicarious liability claim against a nonparty with adding a new party to the litigation, stating:

> [A]lthough Plaintiffs did not add Dr. Rankin as a defendant, they have, for all practical purposes and effect, tried to add a new party defendant

> more than three years after the alleged negligence and injury—Internists of Knoxville, *in its capacity as Dr. Rankin's employer*—based solely upon the actions of Dr. Rankin, a nonparty employee against whom the Plaintiffs' cause of action has been extinguished by the statute of repose. The relation back doctrine of Tenn. R. Civ. P. 15.03 does not contemplate nor permit such a result.

Id. at *5 (emphasis in original); *Abshure v. Methodist Healthcare-Memphis Hosps.*, 325 S.W. 3d 98, 110 (Tenn. 2010) (reasoning that "plaintiffs should not be permitted to engage in an 'encircling movement' against the principal when they cannot pursue a 'frontal attack' on the agent" and concluding that a plaintiff cannot pursue vicarious liability claims against a principal "after its right to assert a claim against the agent has become procedurally barred.").

Plaintiffs here are bringing new vicarious liability claims against St. Rose that are time-barred under NRA 41A.097, as to the alleged agents. Under NRS 41A.097(2), health care malpractice actions "may not be commenced *more than 3 years after the date of injury or 1 year after the plaintiff discovers or should have discovered the injury*, whichever occurs first…" (emphasis added). Plaintiffs must "satisfy both the one-year discovery rule *and* the three-year injury period." *Winn v. Sunrise Hosp. & Med. Ctr.*, 128 Nev. 246, 251, 277 P.3d 458, 461 (2012) (emphasis in original).

Here, the alleged negligence of the nonparty physicians and nurses (the alleged agents), occurred on May 16-17, 2017. (Vol.3, PA667-68; Vol.4, PA790-92). Ms. Badoi died on June 3, 2017. (Vol.3, PA669). Plaintiffs filed suit on June

5, 2018. (Vol.1, PA1-126). Even if the filing date of the Original Complaint is considered the statute of limitations accrual date,[5] the limitations and repose periods expired on any claims against the nurse and physicians involved in Ms. Badoi's treatment on June 5, 2019 and June 3, 2020—both more than two years ago. Accordingly, Plaintiffs should not be permitted to use relation back as an "end-run" around NRS 41 A.097.

2. Plaintiffs' actions undercut the purpose of 41A.071 and Nevada Supreme Court precedent.

Plaintiffs' Amended Complaint alleging vicarious liability claims against nonparties in relation to treatment provided five years ago is also an improper attempt to cure a defect in their Original Complaint and have it comply with NRS 41A.071. Indeed, NRS 41A.071 mandates that any complaint against a provider of health care must be filed with an affidavit/declaration that: (1) supports the complaint allegations; (2) was prepared by a medical expert in a field "substantially similar" to that of the healthcare provider alleged to be negligent; (3) identifies by name or conduct the healthcare provider alleged to be negligent; and (4) identifies the "specific act or acts of alleged negligence *separately* as to each defendant…." (emphasis added).

[5] In *Barcelona v. Eighth Judicial Dist.*, 2019 WL 4390487, 135 Nev. 611, 448 P.3d 544, (Nev. Sept. 12, 2019) (unpublished disposition), the Court used the filing date of the initial complaint against the defendant hospital as the date on which the statute of limitations began to run.

Here, while declarations attached to Plaintiffs' Original Complaint met this requirement as to a claim for professional negligence against Dr. Kim, the Original Complaint did not meet these requirements as to any claims against any other providers. Where an affidavit of merit does not comply with NRS 41A.071 as to any defendant, the complaint "is void and must be dismissed; no amendment [under NRCP 15(a)] is permitted." *Washoe Med. Ctr. v. Second Jud. Dist. Ct.*, 122 Nev. 1298, 1304, 148 P.3d 790, 794 (2006). A defective affidavit of merit means the complaint "*does not legally exist and thus it cannot be amended*." *Id.*, 148 P.3d at 794 (emphasis added).

As between NRCP 15 and NRS 41A.071, *Washoe* is clear that the latter controls. There is no relation back of Plaintiffs' Amended Complaint since the Original Complaint did not set forth any viable claims against the nonparty nurses or physicians. Plaintiffs cannot circumvent 41A.071 by asserting claims that should have been raised in the Original Complaint filed four years ago. This is particularly true given that summary judgment was granted on the only claim ever properly brought before the district court against St. Rose (vicarious liability for Dr. Kim). The entire theory against St. Rose is brand new and independent of the claims asserted in the Original Complaint. Simply put, there is nothing to relate back to.

3. Relation back is not permitted under NRCP 15(c)(1) to add new vicarious liability claims premised on an entirely separate fact pattern and theory.

Respondent denied Petitioner's Motion to Dismiss finding that the claims in Plaintiffs' Amended Complaint related back to their Original Complaint under NRCP 15(c)(1) as "they arise out of the 'same conduct, transaction or occurrence set out in the original pleading.'" (Vol.5, PA1116-24). This is perplexing as the conduct or occurrence set out in the Original Complaint alleged negligence by Dr. Kim in placing an epidural catheter during Ms. Badoi's labor that is alleged to have caused an epidural hematoma. (Vol.1, PA6). In contrast, Plaintiffs' new claims—supported by a new expert declaration[6]—are premised on alleged negligence by obstetricians and nurses in treating Ms. Badoi's hypertension "especially during the postpartum period." (Vol.3, PA670-71; Vol.4, PA792). While, similar to the *Huber* reasoning, relation back under NRCP 15(c)(1) may contemplate additional claims or allegations against Dr. Kim, it does not contemplate the addition of new claims against nonparties, premised on an entirely separate fact pattern and causation theory.

In fact, in *Nelson v. City of Las Vegas*, 99 Nev. 548, 556, 665 P.2d 1141, 1146 (1983), this Court noted that if an amendment "states a new cause of action that describes a new and entirely different source of damages, the amendment does not

[6] Petitioner argued below that the Declaration of obstetrician Dr. Lanzkowsky should not be used to support allegations of nursing negligence, but Respondent disagreed. (Vol.4, PA890-94).

relate back, as the opposing party has not been put on notice concerning the facts in issue." The *Nelson* court found a second amended complaint for battery was time-barred where the "original complaint and first amended complaint gave absolutely no indication that a claim for battery existed." *Id*. at 557, 665 P.2d at 1146. In *Nelson*, this Court relied on the fact that the earlier complaints did not allege the factual predicate for the battery, the "physical contact" between the parties. *Id*. at 557, 665 P.2d at 1146.

Here, the Original Complaint "gave absolutely no indication" that claims for negligence against nonparty obstetricians and nurses existed. Indeed, the lack of notice is even more apparent here since such claims were, as a matter of law, an impossibility given that they required expert support under NRS 41A.071. Until Plaintiffs produced and attached a declaration specifically detailing the conduct of the nurses and physicians believed to be negligent, the complaint could only be premised on the alleged negligence of Dr. Kim in misplacing the epidural, which allegedly caused the bleeding in Ms. Badoi's spine. Moreover, only a few months before the Amendment Complaint was filed, Plaintiffs' counsel stipulated that the only theory set forth in the Original Complaint was alleged negligence by Dr. Kim, for which St. Rose was alleged to be vicariously liable. (Vol.4, PA845-46).

Finally, that the alleged negligence of the nonparty nurses and physicians contemplates "a new cause of action that describes a new and entirely different

source of damages" is evident from the fact that there are no other claims pending against St. Rose, as summary judgment was previously granted on the last remaining claim (vicarious liability against Dr. Kim). Plaintiffs cannot save their dilatory Amended Complaint via NRCP 15(c)(1). It is time-barred and should have been dismissed.

V. CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court issue a Writ of Mandamus directing Respondent to vacate its prior Orders entered on August 2, 2022, September 23, 2022, October 4, 2022, and November 14, 2022 and dismiss the Amended Complaint against Petitioner as leave to amend should not have been granted in the first instance and because the Amended Complaint is time-barred.

DATED this 5th day of January 2023.

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CERTIFICATE OF COMPLIANCE

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

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

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 21(d) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 6,995 words.

3. I have read this Petition, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose, and that it complies with all applicable Nevada Rules of Appellate Procedure.

4. I understand that I may be subject to sanctions if the accompanying Petition is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 5th day of January 2023.

HALL PRANGLE & SCHOONVELD, LLC

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of HALL PRANGLE & SCHOONVELD, LLC; that on the 5th day of January 2023, I served a true and correct copy of the foregoing **PETITIONER DIGNITY HEALTH D/B/A ST. ROSE DOMINICAN HOSPITAL – SIENA CAMPUS PETITION FOR WRIT OF MANDAMUS** via the E-Service Master List for the above referenced matter in the Nevada Supreme Court e-filing System in accordance with the electronic service requirements of Administrative Order 14-2 and the Nevada Electronic Filing and Conversion Rules, to the following:

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