No. 24-____

IN THE

Supreme Court of the United States

GAVIN DE BECKER AND BRIAN DE BECKER,

Petitioners,

v.

UHS OF DELAWARE, INC., DBA
DESERT SPRINGS HOSPITAL MEDICAL CENTER,

Respondent.

On Petition for a Writ of Certiorari to the Nevada Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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December 10, 2024

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QUESTIONS PRESENTED

1. Does the Public Readiness and Emergency Preparedness Act of 2005, 42 U.S.C. §§ 247d-6d, 247d-6e (the "PREP Act"), immunize medical providers from liability for acts and omissions that do *not* involve "a "covered countermeasure" under the PREP Act?

2. Does administering a "covered countermeasure" at some point during treatment automatically immunize a medical provider against liability for unrelated acts and omissions?

LIST OF ALL PARTIES

The petitioners are Gavin de Becker, in his individual capacity, and Brian de Becker, as the representative of their father Hal de Becker's estate. The respondents are UHS of Delaware, Inc., which does business in Nevada as Desert Springs Hospital Medical Center ("Desert Springs Medical Center"). Though the complaint also alleged claims against three doctors who oversaw Hal's treatment, those claims are not at issue in this petition.

CORPORATE DISCLOSURE STATEMENT

Petitioners have no information to disclose under Rule 29.6.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Gavin de Becker and Hal de Becker respectfully request that the Court issue a writ of certiorari to review the judgment of the Nevada Supreme Court affirming the dismissal of their claim against Desert Springs Medical Center based on the PREP Act.

OPINIONS BELOW

The opinion of the Nevada Supreme Court was reported at 555 P.3d 1192 (2024) and is included in its original form in Appendix ("App.") A. The amended opinion of the Clark County District Court dismissing the case was not reported but is included in its original form in App. B.

FEDERAL STATUTORY PROVISIONS AT ISSUE

The PREP Act provides, in relevant part: "Subject to the other provisions of this section, a covered person shall be immune from suit and liability under Federal and State law with respect to all claims for loss caused by, arising out of, relating to, or resulting from the administration to or the use by an individual of a covered countermeasure if a declaration under subsection (b) has been issued with respect to such countermeasure." 42 U.S.C. § 247d–6d.

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257. The Nevada Supreme Court issued its opinion on September 19, 2024. The petition is timely as it was filed within ninety days of that.

INTRODUCTION

This petition raises important questions about the scope of the PREP Act, a federal statute that was designed to shield medical providers from liability for using experimental drugs during a state of emergency but which the Nevada Supreme Court has used to protect a hospital from litigation over its refusal to treat its patient, Hal de Becker, with ivermectin, a drug that indisputably does not fall within the PREP Act.

The Nevada Supreme Court reached an extraordinary conclusion. It found that a complaint that, on its face, focused on the hospital's refusal to provide Hal with *ivermectin* was somehow a case about the doctors' decision to separately treat Hal with *remdesivir*, a drug that *does* fall within the PREP Act. The Nevada Supreme Court did that because it was confused about what the breadth of PREP Act immunity means. Review is warranted to clarify that meaning.

Review is necessary to ensure uniformity among the highest state courts about this matter, as the Nevada Supreme Court's decision in this case is directly inconsistent with the decision rendered by the Connecticut Supreme Court on the same issue (PREP Act causation) at the same procedural posture (motion to dismiss). *Mills v. Hartford Healthcare Corp.*, 347 Conn. 524, 298 A.3d 605 (2023). *Mills* correctly recognized that "the fact that a covered countermeasure may have been a cause of the plaintiff's injuries does not mean that a defendant is entitled to immunity under the PREP Act if the plaintiff has alleged that the defendant engaged in tortious conduct that constituted a distinct and independent cause of the plaintiff's injuries that itself has no causal relationship to the countermeasure." *Id.* at 576.

It is impossible to reconcile the reasoning, and the results, in this present case and *Mills*. It is also impossible to reconcile the Nevada Supreme Court's reasoning with the Ninth Circuit Court of Appeals' reasoning in *Hampton v. California*, 83 F.4th 754 (2023), which, like *Mills*, interpreted the PREP Act's causation more narrowly. The Court should grant certiorari to determine which of the directly contradictory decisions is correct. That will prevent confusion in all courts about a federal statute that is still being used to immunize medical providers from liability, even after the COVID pandemic ended.

STATEMENT OF THE CASE

This is primarily a case about ivermectin, a drug that has long been used successfully to treat diseases around the world, including COVID-19, but got caught up in the political debate over COVID-19 during the recent pandemic and which, in this case, has gotten tied up in a legal debate about a federal statute designed to protect first responders against liability for decisions made during the heat of a public health emergency.

Congress passes the PREP Act as part of the post-9/11 regulatory state, to respond to public health emergencies.

During the summer of 2005, Congress was already working on bioterrorism legislation in the wake of 9/11 and the 2002 anthrax attacks. 151 Cong. Rec. 30726 (2005) (remarks of Sen. Hatch). Then President George W. Bush read a book about the 1918 flu pandemic. Matthew Mosk, ABC News, *George W. Bush in 2005: 'If we wait for a pandemic to appear, it will be too late to prepare'* (Apr. 5, 2020), https://tinyurl.com/4t3b2pma. At the President's urging, the White House worked

with Congress and others to pass the PREP Act, which President Bush signed into law on December 30, 2005.

Congress enacted the PREP Act to protect Americans "against acts of terrorism like the 2001 anthrax attacks and natural disease outbreaks such as … the avian flu." 151 Cong. Rec. at 30725. Part of its goal was to prevent the "climate of apprehension" regarding "litigation exposure" that might "chill[ ] the necessary private sector activity" needed to respond to a public health emergency. *Id.* at 30727. The new law included "liability[ ] and compensation reform" to protect the healthcare industry. *Id.* at 30726.

Th new provisions do not kick in until the Secretary of Health and Human Services declares a "public health emergency." 42 U.S.C. § 247d-6d(b)(1). The declaration must identify the specific health threat and specifically designate "covered countermeasures" recommended to respond to that threat. *Id.* § 247d-6d(b)(1), (2)(A). The statutory grant of immunity includes measures "to diagnose, mitigate, prevent, treat, or cure a pandemic or epidemic" as well as measures to "limit the harm such pandemic or epidemic might otherwise cause." *Id.* § 247d-6d(i)(7)(A)(i)(II). When it applies, the PREP Act grants a covered person "immunity from suit and liability under Federal and State law with respect to all claims for loss caused by, arising out of, relating to, or resulting from the administration to or use by an individual of a covered countermeasure." *Id.* § 247d-6d(a)(2)(B).

This immunity provision is buttressed by a preemption provision that bars any state "law or legal requirement" that is "different from, or is in conflict with," the PREP Act. *Id.* § 247d-6d(b)(8)(A). There is an exception for willful misconduct, for which the PREP Act provides an exclusive federal cause of

action. *Id.* § 247d-6d(d)(1). Non-willful misconduct claims that fall within the PREP Act are subject to a compensation fund established by Congress to compensate individuals and their families for damage caused by medical providers during public health emergencies. *Id.* § 247d-6e(a).

The Secretary of Health and Human Services declares a public health emergency in response to COVID-19, which Hal de Becker contracts during the spring of 2021.

President Trump declared COVID-19 to be a national emergency during March 2020. 85 Fed. Reg. 153337, 15337 (Mar. 18, 2020). Around the same time, the Secretary of Health and Human Services declared COVID-19 to be a public health emergency. 85 Fed. Reg. 15198, 15201 (Mar. 17, 2020). That declaration triggered PREP Act immunity for certain covered countermeasures. *Id.* at 15202. It has been renewed numerous times since then, including through December 31, 2024. 88 Fed. Reg. 30769, 30771 (May 12, 2023).

The list of COVID-19 related covered countermeasures includes remdesivir, an experimental drug that was covered by an emergency use authorization from 2020 to 2022. 87 Fed. Reg. 44407, 44407-44408 (July 26, 2022). Ivermectin is not a covered countermeasure and thus its use does not trigger the PREP Act.

During the spring of 2021, Hal de Becker developed symptoms of COVID-19.[1] App. 43a. His personal physician started treating him with ivermectin. *Id.* Hal responded favorably to it. *Id.* Still, in an abundance of caution, Hal was admitted to Desert Springs Medical Center to

[1] To avoid confusion, this petition refers to each de Becker family member by his first name.

ensure he received 24/7 medical treatment in case his symptoms worsened. *Id.*

That was a fateful decision. Though Hal's personal doctor instructed and expected that Hal would continue to receive ivermectin, regardless of what other treatments were administered, the staff doctors who oversaw Hal's treatment at Desert Springs stopped treating Hal with ivermectin without consent. The doctors refused to give Hal ivermectin despite his family's and physician's wishes, and despite many written and spoken requests. They also refused to communicate with Hal's family, preventing them from having any input in Hal's care. *Id.; see also* App. 47a-52a.

Eventually, Hal died. App. 52a. The operative complaint in the wrongful death lawsuit filed by his sons, Gavin and Brian, alleged that his death resulted both from the doctors' professional negligence and from the ordinary negligence of people who worked for Desert Springs Medical Center, who bowed to political pressure and media smear campaigns about ivermectin instead of adhering to the ordinary standard of care in the hospital setting. App. 52a-55a.

For example, the complaint alleged that the decision to stop Hal's ivermectin treatment was "made without consulting Hal or his family or his personal physician." App. 43a. The complaint alleged that hospital officials did this not for legitimate medical reasons but in response to political and media pressure about ivermectin that was rampant in 2021, and which was unwarranted, given that studies had shown ivermectin to be effective in treating COVID patients and given that at least two state courts had ordered hospitals to provide ivermectin to their patients, despite the political/media campaign against it. App. 43a-45a, 47a-49a, 51a.

The complaint also alleged that hospital officials ignored written instructions from Gavin, Hal's son and authorized surrogate, who had specifically instructed his father's providers to continue treating Hal with ivermectin and who offered to sign a waiver of liability to assuage any concerns they had about using the drug. App. 43a. They also ignored a letter from a lawyer who represented Hal and his family, and they repeatedly refused to respond to phone calls, letters, and emails from Hal's family. App. 43a-44a.

In sum, petitioners' complaint contained numerous allegations about the hospital's negligent refusal to treat Hal with ivermectin despite his wishes and the wishes of his family and physician. Petitioners' complaint made clear that petitioners were "not trying to hold the defendants liable for treating Hal with remdesivir [a drug that the PREP Act does cover]. Rather, they are trying to hold the defendants liable for the negligent failure to communicate with Hal or his family, for failing to get informed consent during Hal's treatment, and for interrupting a treatment that was showing helpul results. They are trying to hold the defendants liable for making decisions based on political and media narratives instead of established standards of medical care." App. 49a.

Despite those detailed allegations, the trial court in Las Vegas dismissed the case. App. 23a. It relied primarily on the PREP Act, as it believed the "gravamen of Plaintiffs' claims [against them] boil down to the use of remdesivir over ivermectin to treat [Hal]." App. 36a. The trial court also found that an affidavit from petitioners' expert witness (a pre-filing requirement in Nevada designed to deter frivolous cases) was not detailed enough to support their claims. App. 36a-37a.

The Nevada Supreme Court then affirmed, albeit without holding oral argument.[2] App. 2a. The Nevada Supreme Court disagreed with the trial court's conclusion about the adequacy of the expert affidavit, finding the affidavit to be adequate. App. 12a-14a.

Nonetheless, the Nevada Supreme Court concluded that the PREP Act shielded the hospital from liability. It focused on "whether the de Beckers' claim for Hal's death was caused by, arose out of, related to, or resulted from Desert Spring administering him remdesivir." App. 18a. It construed the complaint to allege that the "hospital breached its duty of care by not ensuring that its staff obtained Hal's or his surrogate's informed consent" App. 19a; *see also id.* (construing complaint to allege "that Desert Springs was negligent by failing to obtain informed consent to use remdesivir").

The Nevada Supreme Court said nothing about ivermectin, the drug that sparked the case and which was the focus of petitioners' allegations against the hospital. Indeed, the word "ivermectin" does not even appear in the Nevada Supreme Court's analysis of the PREP Act, despite the fact that the failure to continue Hal's ivermectin treatment was the central issue of the litigation.

The Nevada Supreme Court also said nothing about *Mills*, the Connecticut Supreme Court opinion that petitioners cited and discussed at length in their briefing. And it ignored many federal cases decided during the COVID-19 pandemic that had refused to apply the PREP Act to state law "inaction" claims,

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[2] Nevada recently created an intermediate appellate court, but it only hears certain cases. This case went straight from the trial court to the Supreme Court because of the novel issues of state and federal law it raised. *See* Nev. R. App. P. 17(a)(11)-(12).

including claims that alleged a general failure to adhere to the standard of care in the hospital setting. Instead, the Nevada Supreme Court discussed two cases that involved a medical provider's failure to get informed consent while using a product that indisputably constituted a covered countermeasure (remdesivir and a vaccine). App. 20a.

REASONS FOR GRANTING THE PETITION

I THERE IS A CONFLICT BETWEEN THE NEVADA SUPREME COURT'S DECISION AND THE CONNECTICUT SUPREME COURT'S OPINION IN *MILLS* THAT WARRANTS REVIEW

Certiorari may be granted when "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeal …." U.S. Supreme Court Rules, R. 10. The Nevada Supreme Court's opinion regarding the breadth of the PREP Act directly conflicts with the Connecticut Supreme Court's opinion about the same issue in *Mills,* and the Ninth Circuit's opinion regarding PREP Act causation in *Hampton*. Indeed, particularly with respect to this case and *Mills*, the opinions are irreconcilable.

Mills involved a medical provider's negligence in providing cardiological care to a woman during March 2020, the earliest stage of the COVID-19 pandemic. Specifically, a group of doctors refused to admit the decedent for cardiological treatment until she had first obtained a negative Covid test. Shortly after getting the negative test back, she died while awaiting treatment. *Mills*, 347 Conn. at 535-39 (describing these facts). The trial court "determined that the PREP Act

conferred immunity on the defendants for all acts and omission, negligent or grossly negligent, occurring before receipt of the negative COVID-19 test result 'because such claims are plainly related to, and arise out of, a COVID-19 diagnostic countermeasure, specifically, [the decedent's] COVID-19 test.'" *Id.* at 540-41. Thus, it dismissed the case.

The Connecticut Supreme Court reversed and took pains to explain why. For example, it noted that the plaintiff "did *not* allege that the decedent's death was caused by the defendants' improper administration, prescription, dispensing, or use of the COVID-19 test." *Id.* at 573 (original emphasis). It also acknowledged that "the delay in treatment attendant to the COVID-19 test may in fact have had a causal relationship to the decedent's death …. But the mere fact that the defendants administered and used a COVID-19 test did not, in and of itself, dictate whether they should or should not proceed with treatment while the test result was pending. There would have been no delay attributable to the defendants if they had immediately diagnosed her STEMI or, despite suspecting that she suffered from COVID-19, had immediately admitted her to the catheterization lab while the COVID-19 test result was pending, as the plaintiff alleges they should have done." *Id.* at 574.

In this vein, *Mills* emphasized that the mixed-causation argument made by the defendant did not matter. It recognized that "the fact that a covered countermeasure may have been a cause of the plaintiff's injuries does not mean that a defendant is entitled to immunity under the PREP Act if the plaintiff has alleged that the defendant engaged in tortious conduct that constituted a distinct and independent cause of the plaintiff's injuries that itself

has no causal relationship to the covered countermeasure. Put another way, there is no immunity for medical malpractice that does not involve the administration of a covered countermeasure, even if the countermeasure was employed during the plaintiff's treatment and had a distinct and independent causal relationship with the loss." *Id.* at 576.

A similar situation occurred in *Hampton*, where the spouse of a prisoner who died of COVID-19 while in custody sued California prison officials for a host of state and federal claims. The officials moved to dismiss the complaint under the PREP Act, as they contended either that "Hampton's death was caused (at least in part) by Defendants' failure to administer COVID test [the covered countermeasure]" or, in the alternative, by "the decision to test the transferred inmates twice, once roughly three weeks prior to the transfer, and again after the transfer." *Hampton*, 83 F.4th at 763. Like the Desert Springs Medical Center in this case, the state officials pushed for a broad reading of the PREP Act's causation standard. But the Ninth Circuit rejected that.

As *Hampton* explained: "It is not enough that some countermeasure's use could be described as relating to the events underpinning the claim in some broad sense" *Id.* Instead, "for PREP Act immunity to apply, the underlying use or administration of the covered countermeasure must have played some role in bringing about or contributing to the plaintiff's injury." *Id.*

The same facts exist here. Petitioners alleged that Desert Springs Medical Center acted negligently in failing to continue Hal's treatment with ivermectin, which is not a covered countermeasure under the PREP Act. Petitioners alleged that negligently interrupting ivermectin treatment was a distinct and

independent cause of Hal's death. App. 43a-45a, 51a-52a. Under *Mills* and *Hampton*, not to mention numerous other federal cases, that should have been enough to survive a motion to dismiss based on the PREP Act.

Indeed, until the Nevada Supreme Court decided this case, courts had universally rejected such an expansive interpretation of the PREP Act. For example, in *Smith v. Colonial Care Center, Inc.*, No. 2:21-CV-00494-RGK-PD, 2021 WL 1087284, at *3-4 (C.D. Cal. Mar. 19, 2021), a federal judge in California rejected the defendant's invocation of the PREP Act in a wrongful death case because the plaintiffs' "claims d[id] not relate to the use or administration of any such drug, device or product" but alleged injuries that were caused by entirely unrelated medical decisions. Similarly, the plaintiff in *Lawler v. Cedar Operations, LLC*, No. EDCV 21-01017-CJC(SHKx), 2021 WL 4622414, at *4 (C.D. Cal. Oct. 7, 2021), alleged that his father died because the defendant "fail[ed] to inform the Deceased or his family of a COVID-19 outbreak at [the defendant's] Cedar Mountain [facility] before readmitting the Deceased", something that the court said "has nothing to do with the administration of covered countermeasures." The same [went] for Defendant's alleged failure to enforce social distancing, cancel group activities, restrict visitation, and ensure adequate staff." *Id.*

Likewise, in *Kulhanek v. Pensasquitos*, No. 21-cv-01917-H-MDD, 2022 WL 126343, at *4 (S.D. Cal. Jan. 13, 2022), the court refused to apply the PREP Act because the case was "based on, among other things, allegations that Defendants knowingly failed to timely seek medical treatment for [the deceased's] worsening COVID-19 symptoms, and that Defendants failed to implement basic infection prevention protocols." As one court explained, "there is only immunity for

'inaction claims'" like this one "when the failure to administer a covered countermeasure to one individual has a close causal relationship to the administration of that covered countermeasure to another individual." *Lyons v. Cucumber Holdings, LLC*, 520 F. Supp. 3d 1277, 1285-86 (C.D. Cal. 2021) (quotations omitted).

Moreover, throughout the pandemic, courts rejected immunity claims, or remanded cases back to state court, because they found the complaint to "describe overall inattention rather than conscious decision-making about covered countermeasures while delivering care." *Estate of McCalebb v. AG Lynwood, LLC*, No. 2:20-cv-09746-SB-PVC, 2021 WL 911951, at *5 (C.D. Cal. Mar. 1, 2021); *see also Crupi v. Heights of Summerlin, LLC*, No. 2:21-cv-00954-GMN-DJA, 2022 WL 489857, at *6 (D. Nev. Feb. 17, 2022) (same). That led to a "'growing consensus among courts across the country' that state-law claims for failure to protect are not covered by the PREP Act because they involve nonfeasance as opposed to misfeasance ...." *Walsh v. SSC Westchester Operating Co. LLC*, 592 F. Supp. 3d 737, 744 (N.D. Ill. 2022) (quoting *Dupervil v. Alliance Health Operations, LLC*, 516 F. Supp. 3d 238, 255-56 (E.D.N.Y. 2021)).

This Court seemed to agree. It denied certiorari in a case that sought to broadly construe the PREP Act to displace state law claims that do not involve willful misconduct. *Glenhaven Healthcare LLC v. Saldana*, 143 S. Ct. 444, 214 L. Ed. 2d 253 (2022).

The Nevada Supreme Court's opinion casts doubt on those authorities. Indeed, the Nevada Supreme Court did the opposite of what every other court that has considered the scope of the PREP Act has done. It ignored petitioners' allegations of negligence in failing to continue Hal's treatment with ivermectin, the non-

covered countermeasure, and focused only on Desert Spring's argument that all of Hal's injuries stemmed from the doctors' use of remdesivir, the covered countermeasure. Of course, the Nevada Supreme Court could only do that by construing the complaint in the light most favorable to the defendant, something this Court has repeatedly reminded courts not to do, especially when they are dealing with federal law. *See, e.g., National Rifle Association of America v. Vullo*, 602 U.S. 175, 194-95 (2024).

But that was just one error. The Nevada Supreme Court's refusal to follow *Mills*—its decision to do the opposite of what *Mills* did without even acknowledging *Mills*—will lead to confusion throughout the courts. Indeed, the decision has already led to confusion in the Nevada Supreme Court itself, with that court recently concluding that, "[b]ecause a general lack of action is not a covered countermeasure under the PREP Act, and because [the plaintiff] alleged that the lack of an adequate COVID-19 policy, rather than a [covered] drug or device, led to [the decedent's] death, the PREP Act does not apply. *Heights of Summerlin, LLC v. Eighth Jud. Dist. Ct.*, 556 P. 3d 959, 965 (Nev. 2024). It is difficult to square that reasoning with the Nevada Supreme Court's reasoning here.

The Nevada Supreme Court's opinion also raises a larger question about the scope of the PREP Act. Does the mere use of a covered countermeasure at some point during treatment trigger the PREP Act, even if the plaintiff alleges damage caused by other unrelated types of negligence? The Court should grant certiorari to decide that question.

II THE SCOPE OF THE PREP ACT IS AN IMPORTANT ISSUE OF FEDERAL LAW THAT IS LIKELY TO RECUR

We understand that this Court does not exist simply to correct errors committed by other courts, even a state's highest court. But this error involves a question of federal law that has been litigated extensively in state and federal courts during the past four years. And it appears in a published opinion rendered by the highest court of a state. Thus, it is the type of error that warrants review. *See, e.g., England v. La. State Bd. of Medical Examiners*, 375 U.S. 411, 415-16 (1964) (discussing "primacy of the federal judiciary in deciding questions of federal law").

Moreover, the PREP Act is a federal law that this Court has never construed. In fact, before the COVID-19 pandemic, the Secretary of Health and Human Services had hardly ever declared a public health emergency that invoked the PREP Act. *See* 84 Fed. Reg. 764 (Jan. 31, 2019) (Ebola); 83 Fed. Reg. 38701 (Aug. 7, 2018) (Zika virus); 80 Fed. Reg. 76514 (Dec. 9, 2015) (anthrax); 72 Fed. Reg. 4710 (Feb. 1, 2007) (avian flu). Before the COVID pandemic, only three cases involving the PREP Act had been decided, all of which involved vaccines (clearly a covered countermeasure). *See Casabianca v. Mount Sinai Med. Ctr.*, No. 112790/10, 2014 WL 10413251 (N.Y. Sup. Ct. Dec. 2, 2014); *Parker v. St. Lawrence Cnty. Pub. Health Dep't*, 102 A.D.3d 140 (N.Y. App. Div. 2012); *Kehler v. Hood*, No. 4:11CV1416 FRB, 2012 WL 1945952 (E.D. Mo. May 30, 2012). And this Court has never granted certiorari in a medical malpractice case.

Given the likelihood of another public health emergency, and the importance of the federal policy that the PREP Act reflects, the facts here counsel in

favor of grating review. When it applies, the PREP Act does not eliminate liability. It provides an exclusive federal cause of action for willful misconduct claims, and it requires that all other claims be exhausted through the no-fault compensation fund established by Congress to cover medical expenses, lost employment income, and survivor benefits. 42 U.S.C. § 247d-6e. Courts across America need a uniform standard to decide what those claims are, as do litigants like petitioners. They are already dealing with the pain of losing a family member. They should not have to spend years (and hundreds of thousands of dollars) fighting in the lower courts about whether a negligence claim is, or is not, subject to the PREP Act. The sheer number of such cases, and the millions of people affected, speak to the need for this Court's review.

Finally, this Court is uniquely positioned to handle the sensitive balance of state versus federal interests that arise when interpreting the PREP Act.

The federal question upon which the Nevada Supreme Court decided this case was dispositive, though, at least with respect to Desert Springs Medical Center. Thus, it cannot be avoided. And it should not be avoided. The case gives this Court the unique opportunity to clarify the meaning of a federal law for an important industry and for millions of Americans, and of whom might someday face the same situation petitioners faced: trying to figure out how to assert their rights while dealing with the tragedy of losing a family member.

CONCLUSION

For those reasons, petitioners respectfully request that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

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December 10, 2024

APPENDIX

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APPENDIX A

IN THE SUPREME COURT OF
THE STATE OF NEVADA

[Filed Sept. 19, 2024]

No. 85968

GAVIN DE BECKER, AN INDIVIDUAL; AND BRIAN DE BECKER, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF HAL DE BECKER, DECEASED,

Appellants,

vs.

UHS OF DELAWARE, INC., D/B/A DESERT SPRINGS HOSPITAL MEDICAL CENTER, A PENNSYLVANIA CORPORATION; KHUONG T. LAM, D.O., AN INDIVIDUAL; AND SHFALI BHANDARI, M.D., AN INDIVIDUAL,

Respondents.

Appeal from a district court order dismissing a medical malpractice/tort action. Eighth Judicial District Court, Clark County; Veronica Barisich, Judge.

Affirmed.

Bertoldo Baker Carter Smith & Cullen and Cliff W. Marcek, Las Vegas; JW Howard Attorneys, Ltd., and Scott J. Street, Pasadena, California, for Appellants.

Hall Prangle & Schoonveld, LLC, and Kenneth M. Webster and Zachary J. Thompson, Las Vegas, for Respondent Desert Springs Hospital Medical Center.

Hutchison & Steffen, PLLC, and David J. Mortensen, Courtney Christopher, and Derek Linford, Las Vegas,

for Respondents Khuong T. Lam, D.O., and Shfali Bhandari, M.D.

BEFORE THE SUPREME COURT, STIGLICH, PICKERING, and PARRAGUIRRE, JJ.

OPINION

By the Court, STIGLICH, J.:

In this opinion, we revisit several issues surrounding claims for professional negligence, and we address, as a matter of first impression, whether a state law claim is barred by the federal Public Readiness and Emergency Preparedness Act (PREP Act). Specifically, we revisit the requirements for expert affidavits under NRS 41A.071 and the dismissal of complaints with deficient expert affidavits. We confirm that a complaint that lacks an expert affidavit satisfying NRS 41A.071 cannot be amended to cure the deficiency and that the unsupported professional negligence claim must be dismissed. Moreover, we hold that the PREP Act bars a claim alleging a failure to obtain informed consent before administering a covered countermeasure.

Because appellants Gavin de Becker, individually, and Brian de Becker, as personal representative of the Estate of Hal de Becker, filed an expert declaration that was deficient as to the defendant doctors, dismissal of their professional negligence claim as to the doctors was proper. And although the claims against the defendant hospital were supported by a sufficient expert declaration, the claims were nevertheless barred by the PREP Act because the allegation that the hospital failed to obtain consent to administer remdesivir was related to the administration of a covered countermeasure. Accordingly, we affirm the dismissal of the complaint.

FACTS AND PROCEDURAL HISTORY

In 2021, Hal de Becker contracted COVID- I 9, and his personal physician began administering ivermectin to him.[1] The de Beckers alleged that Hal responded favorably to it. Subsequently, Hal was admitted to respondent Desert Springs Hospital. Medical Center to ensure that he received constant medical attention should his symptoms worsen. Between May 9 and 12, 2021, respondent Dr. Khuong T. Lam was the attending physician who oversaw and was responsible for Hal's treatment. Respondent Dr. Shfali Bhandari assumed that role on May 11, 2021.

Attending doctors and hospital administrators at Desert Springs abruptly stopped Hal's ivermectin treatment. Without consent from or consultation with Hal, Hal's family, or Hal's personal physician, the attending doctors managing Hal's care instead treated him with remdesivir. The de Beckers alleged that one doctor at the hospital approved the requested ivermectin, but an unspecified person at the hospital overruled that decision and forbade the treatment without explanation. During this time, a lawyer representing Hal and his family attempted to address the matter with hospital executives but received no response. The doctors responsible for Hal's treatment also refused to respond to correspondence from Hal's son and surrogate Gavin and from Hal's family. The de Beckers alleged that Hal's condition deteriorated when ivermectin treatment was abruptly interrupted,

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[1] These factual allegations are drawn from the complaint and expert declaration and deemed true for purposes of this appeal. *See* Buzz *Stew, LLC v. City of North Las Vegas,* 124 Nev. 224, 228, 181 P.3d 670, 672 (2008).

and within hours of being discharged by the hospital, Hal died.

The de Beckers sued Dr. Lam, Dr. Bhandari, and Desert Springs, alleging claims of negligence, professional negligence, and wrongful death and seeking punitive damages.[2] The de Beckers alleged that the attending doctors and hospital were aware of scientific reports suggesting ivermectin's effectiveness. Yet, even after the doctors and hospital had exhausted all treatments that they had selected, after they were certain Hal would soon die, and after they suggested Hal be moved to hospice care, the doctors and hospital continued to refuse to treat Hal with ivermectin. The de Beckers alleged that the doctors and hospital made treatment decisions based on political or media narratives. Additionally, they alleged that no medical professional had reviewed Hal's medical history, consulted with Hal's family or physician, informed Hal or his surrogate of all available treatment options, or made a professional judgment about how to treat him.

The de Beckers' complaint included an expert declaration made under penalty of perjury in lieu of an NRS 41A.071 affidavit. *See Baxter v. Dignity Health,* 131 Nev. 759, 762, 357 P.3d 927, 929 (2015) ("The 'affidavit' can take the form of either 'a sworn affidavit or an unsworn declaration made under penalty of perjury.'" (quoting *Buckwalter v. Eighth Jud. Dist. Ct.,* 126 Nev. 200, 202, 234 P.3d 920, 922 (2010))). The expert described scientific findings about the use of ivermectin and remdesivir to treat COVID-19. The expert opined

[2] The de Beckers also sued Dr. Amir Z. Qureshi, alleging that he oversaw Hal's treatment throughout his stay at the hospital. Dr. Qureshi, however, was dismissed from the action, and that dismissal is not challenged on appeal.

that ivermectin is extremely beneficial in treating COVID-19 but remdesivir has limited, if any, benefit in treating COVID-19 and remdesivir's benefit is substantially outweighed by its potential serious side effects. The expert indicated that he reviewed the complaint and some of the medical records from Desert Springs. He concluded that the physicians who treated Hal refused to treat him with ivermectin despite pleas from Hal through his surrogate, Hal's family, and Hal's personal physician and instead treated him with remdesivir without consent. The expert concluded that the physicians violated the doctrine of informed consent. that the physicians' decisions fell below the standard of care, and that the physicians' and hospital's failure to meet standards of care resulted in Hal's death.

Drs. Lain and Bhandari, collectively, and Desert Springs, individually, moved to dismiss.[3] The district court determined that the crux of the de Beckers' allegations was twofold: (1) Hal was given remdesivir rather than ivermectin, and (2) Drs. Lam and Bhandari failed to communicate with Hal, his family, and his personal physician regarding the course of Hal's treatment. The district court dismissed the de Beckers' claims against Drs. Lam and Bhandari, finding that the Public Readiness and Emergency Preparedness Act (PREP Act) barred the claims concerning the use of remdesivir rather than ivermectin to treat Hal. It found the doctors' decisions to treat Hal with remdesivir and not to consult Hal, Hal's family, or Hal's personal

[3] The doctors' motion to dismiss was based on the de Beckers' original complaint. Although that complaint was subsequently amended, the district court found that it could assess the doctors' motion to dismiss because there were only a few differences between the two complaints and those differences did not affect its analysis.

physician all fell under the broad protection of the PREP Act. The district court also found that the de Beckers' ordinary negligence claim was actually a claim for professional negligence. Further, the district court found that even if the de Beckers' claims against the doctors were not barred by the PREP Act, the affidavit requirement under NRS 41A.071 for professional negligence claims was not met because the assertions therein were general and not specifically delineated as to each doctor. Therefore, the district court dismissed the complaint as to the doctors.

As to Desert Springs, the district court dismissed those claims as well, finding that the hospital asserted essentially the same arguments against the de Beckers' claims that the doctors did. The district court also found that the de Beckers' allegation that Desert Springs refused to prescribe ivermectin due to media narratives alleged professional negligence rather than ordinary negligence. The de Beckers appealed.[4]

DISCUSSION

"We review a district court order granting a motion to dismiss de novo." *Zohar v. Zbiegien,* 130 Nev. 733, 736, 334 P.3d 402, 404 (2014). We "liberally construe pleadings" because "Nevada is a notice-pleading jurisdiction." *Hay v. Hay,* 100 Nev. 196, 198, 678 P.2d 672, 674 (1984). In adjudicating a motion to dismiss, all factual allegations in the complaint are deemed as true and all inferences are drawn in the plaintiffs favor. *Buzz Stew,* 124 Nev. at 228, 181 P.3d at 672. A "complaint should be dismissed only if it appears

[4] On appeal, the de Beckers do not challenge the dismissal of the wrongful death claim, the dismissal of the punitive damages request, or the district court's finding that Desert Springs was not liable under a theory of vicarious liability.

beyond a doubt that [the plaintiffs] could prove no set of facts, which, if true, would entitle [them] to relief." *Id.* We also review a "district court's decision to dismiss [a] complaint for failing to comply with NRS 41A.071 de novo." *Yafchak u. S. Las Vegas Med. Invs., LLC,* 138 Nev., Adv. Op. 70, 519 P.3d 37, 40 (2022). In addition, we "review issues of statutory construction de novo." *Zohar,* 130 Nev. at 737, 334 P.3d at 405. "If a statute is clear on its face, we will not look beyond its plain language." *Id.*

The de Beckers argue that their claims are exempt from the NRS 41A.071 expert affidavit requirement because they sound in ordinary negligence and allege lack of consent; that even if required, their expert declaration was sufficient or they should have been permitted to amend it; and that their claims are not barred by the PREP Act. Addressing each argument in turn, we agree that the de Beckers' expert declaration was sufficient as to the hospital, but we disagree with all other contentions.

The de Beckers' claims allege professional negligence

The de Beckers argue that their claims sound in ordinary negligence because jurors do not need expert testimony to decide whether the physicians and hospital failed to communicate with Hal's representatives or whether it was negligent to give Hal a treatment that he did not consent to. We disagree.

Professional negligence is "the failure of a provider of health care, in rendering services, to use the reasonable care, skill or knowledge ordinarily used under similar circumstances by similarly trained and experienced providers of health care." NRS 41A.015. In *Limprasert v. PAM Specialty Hospital of Las Vegas, LLC,* we held that "to distinguish professional from

ordinary negligence the relevant question is whether the claim pertains to an action that occurred within the course of a professional relationship." 140 Nev., Adv. Op. 45, 550 P.3d 825, 835 (2024). "If it does, it sounds in professional negligence and requires an affidavit under NRS 41A.071," unless it falls under one of the five, narrow statutory res ipsa loquitur exceptions enumerated in NRS 41A.100. *Id.*

The de Beckers alleged that Drs. Lam and Bhandari and Desert Springs are all providers of health care. They further alleged that the doctors and hospital failed to communicate with Hal and his family, failed to obtain Hal's informed consent, and allowed media narratives to dictate which drugs they used to treat Hal. Thus, the nature of the de Beckers' allegations is that, when rendering services within a professional relationship, providers of health care were negligent by failing to communicate, failing to obtain consent, and allowing outside narratives to dictate treatment. Accordingly, we conclude that the de Beckers' claims allege professional negligence. Moreover, none of the five res ipsa loquitur exceptions enumerated in NRS 41A.100 are alleged. Therefore, we conclude that the de Beckers' claims require an expert affidavit.

The de Beckers' consent claim also requires an expert affidavit

The de Beckers also contend that they are exempt from the affidavit requirement because they allege a total lack of consent, which amounts to a general tort claim for battery. We disagree.

In *Humboldt General Hospital v. Sixth Judicial District Court,* we recognized that "when consent to a treatment or procedure is completely lacking, the justifications supporting a medical expert affidavit are

diminished." 132 Nev. 544, 549, 376 P.3d 167, 171 (2016). Therefore, we concluded, "where a plaintiff claims not to have consented at all to the treatment or procedure performed by a physician or hospital . . . such an allegation constitutes a battery claim." *Id.* at 550, 376 P.3d at 172. We further concluded, however, that "where general consent is provided for a particular treatment or procedure, and a question arises regarding whether the scope of that consent was exceeded, an expert medical affidavit is necessary." *Id.* at 550-51, 376 P.3d at 172.

Humboldt dealt with facts similar to those presented here, and we concluded there that the plaintiff needed to provide an expert affidavit where she had consented to an intrauterine device (IUD) procedure but alleged that she had not consented to receive an IUD that lacked FDA approval. *Id.* at 551, 376 P.3d at 172. We similarly conclude that the de Beckers' consent claim is a professional negligence claim rather than a battery claim. Hal's consent to treatment was not completely lacking; instead, Hal consented to receive COVID-19 treatment from the doctors and Desert Springs by being admitted to receive constant medical attention. What Hal assertedly did not consent to was the administration of remdesivir. Accordingly, we conclude that the de Beckers' claim is about whether the scope of Hal's consent was exceeded. Thus, it is a claim for professional negligence, and an expert affidavit is required.

The sufficiency of the expert declaration pursuant to NRS 41A.071

Determining that the de Beckers' claims are for professional negligence and require an expert affidavit, we next turn to whether the de Beckers' expert declaration met the statutory requirements. The de

Beckers argue that their expert declaration complies with NRS 41A.071 as to the doctors and the hospital. We disagree that it is sufficient as to the doctors, but we agree that it is sufficient as to the hospital.

In relevant part, NRS 41A.071 provides that

> [i]f 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:
>
> . . .
>
> 3. Identifies by name, or describes by conduct, each provider of health care who is alleged to be negligent; and
>
> 4. Sets forth factually a specific act or acts of alleged negligence separately as to each defendant in simple, concise and direct terms.

To fulfill the statute's "purpose of deterring frivolous claims and providing defendants with notice of the claims against them, while also complying with the notice-pleading standards for complaints, the district court should read a medical malpractice complaint and affidavit of merit together when determining whether the affidavit meets the requirements of NRS 41A.071." *Zohar,* 130 Nev. at 735, 334 P.3d at 403.

To determine whether NRS 41A.071(4) was satisfied, we evaluate whether allegations relating to the standard of care and a breach of that standard are present. *See Monk v. Ching,* 139 Nev., Adv. Op. 18, 531 P.3d 600, 602 (2023). In *Monk,* we read the declaration in conjunction with the complaint and concluded that NRS 41A.071 was not satisfied when neither document "adequately identifie [d] the specific roles played by each individual respondent" or identified "the relevant

standards of care or any opinion as to how, or even whether, each respondent breached that standard to a reasonable degree of medical probability." *Id.; see also Valley Health Sys., LLC v. Eighth Jud. Dist. Ct.,* No. 85096, 2023 WL 2799438, at *2 (Nev. Apr. 5, 2023) (Order Granting Petition) (concluding the district court erred by denying a motion to dismiss when plaintiff and her experts detailed the negligence of providers and failed to state in simple, concise, and direct terms how the hospital was *separately* negligent from its providers); *Soong v. Eighth Jud. Dist. Ct.,* No. 82472, 2021 WL 2935695, at *1-2 (Nev. July 12, 2021) (Order Granting Petition for Writ of Mandamus) (instructing the district court to dismiss because the declarations were defective as to the doctor when they opined only that the doctor, along with other named members of the surgical team, acted below the standard of care when positioning and approving the positioning of the patient for surgery; conceded medical records did not indicate who positioned the patient for surgery; and contained no evidence confirming whether the doctor followed the standards during the surgery).

The declaration is insufficient as to the doctors

Specific to Dr. Lam, the de Beckers allege that "[b]etween May 9 and May 12, 2021[,] Dr. Lam was the attending physician who oversaw and was responsible for Hal's treatment on each of those days." Other than indicating where Dr. Lam was residing and doing business for jurisdiction and venue purposes, neither the complaint nor the expert declaration otherwise mentioned Dr. Lam separately. Specific to Dr. Bhandari, the de Beckers allege that "Dr. Bhandari served in that role on May 11, 2021," referring to the role of attending physician who oversaw and was responsible for Hal's

treatment. There were no statements in either the complaint or the expert declaration describing Dr. Bhandari's actions separately, apart from a statement related to jurisdiction and venue. The complaint also indicated that another doctor, whose dismissal from the action is not being challenged on appeal, "Dr. Quereshi [sic][,] oversaw Hal's treatment throughout his stay at the hospital."

Both doctors are identified by name in the complaint and expert declaration as required by NRS 41A.071(3). We conclude, however, that there are no acts of alleged negligence in the complaint and expert declaration that are set forth separately and specifically as to either Dr. Lam or Dr. Bhandari. Rather, the allegations about Drs. Lam and Bhandari are almost exclusively allegations against the treating physicians generally or the two of them collectively. The de Beckers argue that information in the complaint regarding the dates on which each doctor worked clarifies which allegation pertains to which doctor. The date information, however, does not clarify the matter because the date ranges are overlapping. In particular, Dr. Lam is alleged to have been Hal's attending physician on *each* of the days between May 9 and 12, 2021, yet Dr. Bhandari is alleged to have been Hal's attending physician on May 11, 2021. Thus, the allegations cannot be parsed by sorting allegations pertaining to Dr. Lam and Dr. Bhandari by date. Because there are no allegations relating to the specific acts of negligence as to Dr. Lam individually or Dr. Bhandari individually, we conclude that the expert declaration does not satisfy NRS 41A.071(4) as to the claims against the two doctors.

The declaration was sufficient as to the hospital

Specific to Desert Springs, the de Beckers allege that Hal was admitted to Desert Springs to ensure he

received treatment should his symptoms worsen. They also allege that Hal's surrogate "made it clear to the hospital in writing that he wished to have his father continue taking ivermectin, and he was willing to sign a waiver of liability for the hospital and doctor(s)." The de Beckers further allege that the hospital refused to respond to a lawyer representing Hal and his family or to other correspondence. Moreover, the de Beckers assert that, generally, hospital administrators often overruled doctors who were prescribing ivermectin because hospital administrators wanted to curry favor with the federal government, which was "pushing COVID-19 vaccines, and other novel treatments, as the only 'treatment' for COVID-19." Their complaint states, "That is exactly what happened at Desert Springs while it had Hal in its care." Specifically, "[o]ne doctor at the hospital would approve ivermectin, consistent with the professional opinion of Hal's personal physician (and the patient's and family's wishes) while someone else at the hospital would overrule that decision and forbid the treatment without explanation." Further, the de Beckers allege that "Desert Springs breached its duty of care as a healthcare provider by not requiring and/or not ensuring that hospital staff obtained informed consent from Hal or his surrogate while Hal was being treated in a non-urgent setting."

Although the expert declaration does not include specific allegations identifying acts of negligence as to the hospital individually, we read the affidavit in conjunction with the complaint. Doing so, the complaint and expert declaration identify Desert Springs. Even when the documents simply refer to "the hospital," it is clear the allegations refer to the only hospital involved in the case, Desert Springs. Accordingly, we conclude the de Beckers' declaration satisfied NRS 41A.071(3) as to the hospital.

To evaluate whether NRS 41A.071(4) was satisfied as to the hospital, we look to the separate allegations that pertain to Desert Springs. Specific to Desert Springs, the de Beckers allege that the hospital breached its duty of care by not ensuring that its staff obtained Hal's or his surrogate's informed consent. We conclude that this allegation is sufficient to satisfy NRS 41A.071(4) as to the hospital because the allegation sets forth separately and specifically the standard of care and the breach by Desert Springs. Accordingly, we conclude that the de Beckers' expert declaration was sufficient as to the hospital.

The district court did not err by dismissing the complaint as to the doctors

Having determined that the expert declaration is insufficient as to the doctors, we next turn to the propriety of dismissal under such circumstances. The de Beckers argue that they should have been granted leave to amend to add more details if there was any doubt as to the sufficiency of their allegations. We disagree.

When an action is filed against a provider of health care for professional negligence without a sufficient supporting affidavit as required by NRS 41A.071, the complaint cannot be amended to cure the deficiency and the professional negligence claim must be dismissed.[5]

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[5] We recognize that under facts not presented here, a complaint may satisfy the affidavit requirement by referring to an existing affidavit even if that affidavit was not filed along with the complaint. For example, in *Baxter v. Dignity Health,* we determined that "where the complaint incorporates by reference a preexisting affidavit of merit, which is thereafter filed and served with the complaint, and no party contests the authenticity of the affidavit or its date, the affidavit of merit may properly be treated as part of the pleadings in evaluating a motion to dismiss." 131 Nev. 759,

Washoe Med. Ctr. v. Second Jud. Dist. Ct., 122 Nev. 1298, 1300, 148 P.3d 790, 792 (2006). In a case that we decided before *Washoe Medical Center,* we addressed, in dicta, a plaintiffs alternative argument that he should have been able to amend his complaint to include a new affidavit. Specifically, we stated that

> [b]ecause NRS 41A.071 contains no explicit prohibition against amendments, and because legislative changes in the substantive law may not unduly impinge upon the ability of the judiciary to manage litigation, we conclude that a district court, within its sound discretion and considering the need for

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765, 357 P.3d 927, 931 (2015). In such circumstances, the district court need not dismiss the complaint for want of an affidavit physically attached to the complaint when the complaint was filed or even contemporaneously filed itself. *Id.* at 764-65, 357 P.3d at 931. The court may "consider unattached evidence on which the complaint necessarily relies if: (1) the complaint refers to the document; (2) the document is central to the plaintiffs claim; and (3) no party questions the authenticity of the document." *Id.* at 764, 357 P.3d at 930 (internal quotation marks omitted). In *Limprasert v. PAM Specialty Hospital of Las Vegas LLC,* we similarly concluded that dismissal was not warranted under NRS 41A.071. 140 Nev., Adv. Op. 45, 550 P.3d 825, 834 (2024). There, the declaration of merit supporting the claims was referenced in the complaint but not filed until after the medical provider moved to dismiss. *Id.* The declaration, however, was dated the same day as the complaint, central to the theory of relief, and made under penalty of perjury. *Id.* Further, counsel attested that the complaint was not filed until the declaration had been received in their office, and the medical provider's counsel trusted plaintiffs counsel's representation regarding the declaration's authenticity. *Id.* Under such circumstances, NRS 41A.071 did not compel dismissal. *Id.* In sum, that an affidavit is not physically attached to the complaint on filing does not excuse the district court of considering the relevant circumstances in assessing whether a complaint runs afoul of NRS 41A.071.

> judicial economy, may grant leave to amend malpractice complaints supported by disputed affidavits under circumstances where justice so requires.

Borger u. Eighth Jud. Dist. Ct., 120 Nev. 1021, 1029-30, 102 P.3d 600, 606 (2004). In an unpublished order, we identified the more recent decision in *Washoe Medical Center* as controlling and the language relating to potential amendments in *Borger* as dictum to which stare decisis need not be applied. *See Alemi v. Eighth Jud. Dist. Ct.,* No. 66917, 2016 WL 115651, at *2 n.3 (Nev. Jan. 7, 2016) (Order Granting Petition for Writ of Mandamus). We now clarify that *Washoe Medical Center* controls and that the language in *Borger* is dictum because *Borger* was decided on other grounds. Accordingly, we clarify that when an accompanying expert affidavit fails to satisfy NRS 41A.071, a complaint alleging a professional negligence claim may not be amended to cure the deficiency but must be dismissed as to that claim.

Here, the expert declaration is deficient as to Drs. Lam and Bhandari. Accordingly, we conclude that the district court did not err by dismissing the complaint as to the doctors. The expert declaration was not deficient, however, as to Desert Springs. Therefore, we conclude the motion to dismiss was impermissibly granted as to Desert Springs on this basis. Nevertheless, we further conclude that the claim against Desert Springs is barred by the PREP Act.

The PREP Act bars the de Beckers' surviving claim against Desert Springs

Finally, we turn to whether the de Beckers' surviving claim against the hospital is barred by the PREP Act. The de Beckers argue that the PREP Act does not

bar their claims because Hal's death was independent from him being administered remdesivir. We disagree.

The PREP Act allows the Health and Human Services Secretary "to limit legal liability for losses relating to the administration of medical countermeasures such as diagnostics, treatments, and vaccines" during a public health emergency. *Cannon v. Watermark Ret. Cmtys., Inc.,* 45 F.4th 137, 139 (D.C. Cir. 2022) (internal quotation marks omitted). PREP Act immunity "is triggered by a declaration from the Secretary identifying the threat to public health, the period during which immunity is in effect, and other particulars." *Id.* During the effective period, the PREP Act preempts state law claims. 42 U.S.C. § 247d-6d(b)(8).

In relevant part, the PREP Act provides that "a covered person shall be immune from suit and liability under Federal and State law with respect to all claims for loss caused by, arising out of, relating to, or resulting from the administration to or the use by an individual of a covered countermeasure" following a triggering declaration as to that countermeasure. *Id.* § 247d-6d(a)(1). This immunity is limited to "any claim for loss that has a *causal* relationship with the administration to or use by an individual of a covered countermeasure, including a causal relationship with . . . dispensing, prescribing, administration, . . . or use of such countermeasure." *Id. §* 247d-6d(a)(2)(B) (emphasis added).

"The PREP Act does not explicitly define the term 'administration' but does assign the Secretary the responsibility to provide relevant conditions in the Declaration." Declaration Under the Public Readiness and Emergency Preparedness Act for Medical Countermeasures Against COVID-19, 85 Fed. Reg. 15198-01 (Mar. 17, 2020). Accordingly, in relevant part, the Secretary provided in the 2020 Declaration related

to COVID-19 that "Administration of a Covered Countermeasure means physical provision of the countermeasures to recipients." *Id.* The Secretary continued, defining "administration" as extending, in relevant part, "to physical provision of a countermeasure to a recipient, such as vaccination or handing drugs to patients." *Id.*

Here, there is no dispute that Desert Springs was a covered person under the Act, that the loss suffered was Hal's death, that remdesivir was physically provided to Hal, that remdesivir was a covered countermeasure, or that any other requirement under the PREP Act was not met, aside from the issue on appeal. Thus, the question before us is whether the de Beckers' claim for Hal's death was caused by, arose out of, related to, or resulted from Desert Springs administering him remdesivir.

The term "caused by" denotes actual cause, meaning a plaintiff must prove that "but for" the event, the plaintiffs damages would not have occurred. *Goodrich & Pennington Mortg. Fund, Inc. v. J.R. Woolard, Inc.,* 120 Nev. 777, 784, 101 P.3d 792, 797 (2004); *see also MT. ex rel. M.K.v. Walmart Stores, Inc.,* 528 P.3d 1067, 1083 (Kan. Ct. App. 2023) (referring to causally related as a "but for" test). The term "arise out of requires "only a general causal connection" because it is broader than "caused by." *See Rivera v. Nev. Med. Liab. Ins. Co.,* 107 Nev. 450, 452-53, 814 P.2d 71, 72 (1991) (internal quotation marks omitted). "The ordinary meaning of [relating to] is a broad one—'to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with,'—and the words thus express a broad pre-emptive purpose." *Morales v. Trans World Airlines, Inc.,* 504 U.S. 374, 383 (1992) (quoting *Black's Law Dictionary* 1158 (5th ed.

1979)); *see also Metro. Life Ins. Co. v. Massachusetts,* 471 U.S. 724, 739 (1985) (interpreting "relates to" "in the normal sense of the phrase" as denoting having "a connection with or reference to" (internal quotation and alteration marks omitted)). In its ordinary meaning, "a thing 'results' [from something] when it [a]rise[s] as an effect, issue, or outcome *from* some action, process or design." *Bur-rage v. United States,* 571 U.S. 204, 210-11 (2014) (quoting 2 *The New Shorter Oxford English Dictionary* 2570 (1993)). "Results from imposes . . . a requirement of actual causality . . . [or] proof that the harm would not have occurred in the absence of—that is, but for—the defendant's conduct." *Id.* at 211 (internal quotation marks omitted).

The plain language of caused by, arising out of, relating to, and resulting from is clear on its face because each term's definition is commonly understood to have a single meaning in the legal context. Therefore, we will not go beyond the plain language.

The de Beckers' only sufficient allegation under NRS 41A.071 is that the hospital breached its duty of care by not ensuring that its staff obtained Hal's or his surrogate's informed consent. Therefore, the question is whether the de Beckers' claim that Hal's death was caused by Desert Springs' failure to obtain informed consent for remdesivir treatment is related to its administration of remdesivir. We conclude that it is. The de Beckers alleged that Desert Springs was negligent by failing to obtain informed consent to use remdesivir and that the professional negligence of Desert Springs caused Hal's death. Because the failure to obtain consent to administer remdesivir has a connection with the administration of remdesivir, such that it causally relates to the administration of a

covered countermeasure, we conclude the claim is barred by the PREP Act.

Other jurisdictions have likewise determined that failing to obtain informed consent to use a covered countermeasure is a claim barred by the PREP Act. For example, the Court of Appeals of Kansas concluded that a mother's claims that her minor child was administered a COVID-19 vaccine without parental consent arose out of and related to the administration of the vaccine and thus fell within PREP Act immunity. *See Walmart Stores, Inc.,* 528 P.3d at 1070. A federal district court also held that "the PREP Act applies to claims based on failure to obtain consent" when a decedent was administered two drugs that were both covered countermeasures, one of which was remdesivir, without an explanation of the side effects or the consent of the decedent or any family members. *Baghikian v. Providence Health & Servs.,* No. CV 23-9082-JFW(JPRx), 2024 WL 487769, at *1, *4 (C.D. Cal. Feb. 6, 2024). Additionally, a New York intermediate court similarly concluded that a claim that a minor was administered a vaccine without parental consent was barred by the PREP Act because the Act preempts "all state law tort claims arising from the administration of covered countermeasures by a qualified person pursuant to a declaration by the Secretary, including one based upon a defendant's failure to obtain consent." *Parker v. St. Lawrence Cnty. Pub. Health Dept,* 954 N.Y.S.2d 259, 261-62 (App. Div. 2012).

We agree with these courts. We hold that failing to obtain informed consent before administering a covered countermeasure is a claim barred by the PREP Act. Because the allegation about the cause of the de Beckers' loss is related to the administration of remdesivir, a covered countermeasure, the claim is

barred under the plain language of the PREP Act. Accordingly, we conclude that the district court did not err in dismissing, finding the de Beckers' claim that Desert Springs failed to obtain informed consent to treat Hal with remdesivir was barred.

CONCLUSION

We clarify that a professional negligence claim must be dismissed when NRS 41A.071 requires a supporting affidavit but one is not provided or the affidavit provided is insufficient. Any suggestion in *Borger* that amendment may be available when expert affidavits are deficient was dictum. Our controlling decision in *Washoe Medical Center* makes clear that the complaint cannot be amended to cure the deficiency but must be dismissed as to the professional negligence claim(s) in that instance. Further, we hold that the PREP Act bars a claim for failing to obtain informed consent before administering a covered countermeasure. Although the de Beckers filed an expert declaration for their professional negligence claims, the declaration was insufficient as to the doctors under NRS 41A.071. Thus, the district court did not err by dismissing the complaint as to the doctors. The declaration was sufficient as to Desert Springs; however, that claim is barred by the PREP Act. Accordingly, we affirm the dismissal of the complaint.

/s/ Stiglich, J.
Stiglich

We concur:

/s/ Pickering, J.
Pickering

/s/ Parraguirre, J.
Parraguirre

APPENDIX B

DISTRICT COURT
CLARK COUNTY, NEVADA

Case No. A-22-851679-C
Dept. No. V

GAVIN DE BECKER, an individual; BRIAN DE BECKER, as personal representative of the Estate of HAL DE BECKER, deceased

Plaintiff,

vs.

UHS OF DELAWARE, INC., dba DESERT SPRINGS HOSPITAL MEDICAL CENTER, a Pennsylvania corporation; KHUONG T. LAM, D.O., an individual; SHFALI BHANDARI, M.D., an individual; AMIR Z. QURESHI, M.D., an individual; and DOES 1 through 20, inclusive,

Defendants

AMENDED ORDER GRANTING DEFENDANTS KHUONG T. LAM, D.O. AND SHFALI BHANDARI, M.D.'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT AND DESERT SPRINGS HOSPITAL MEDICAL CENTER'S MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

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On July 12, 2022, Defendants Dr. Lam and Dr. Bhandari filed a Motion to Dismiss Plaintiffs' Complaint. Subsequently, Plaintiffs opposed this Motion, and Defendants filed a Reply. On August 16, 2022, this Motion to Dismiss came before this Court for hearing before the Honorable Veronica M. Barisich. Thereafter, on August 18, 2022, Defendant Desert Springs Hospital Medical Center (hereinafter "Desert Springs") filed a Motion to Dismiss Plaintiffs' First Amended Complaint. Plaintiffs also opposed this Motion, and Defendant Desert Springs filed a Reply. A hearing on this second Motion was set for September 27, 2022, but was vacated. Pursuant to the arguments of said hearing, the pleadings and papers on file, and good cause appearing, the Court hereby GRANTS Defendants Dr. Lam and Bhandari's Motion to Dismiss, and hereby GRANTS Defendant Desert Springs' Motion to Dismiss as follows:

COURT'S FINDINGS

I. APPLICABLE LAW

a. Motion to Dismiss Standard

NRCP 12(b)(5) governs a motion to dismiss for failure to state a claim upon which relief can be granted. The Court must accept all factual allegations in the complaint

as true and draw all inferences in the plaintiff's favor. *Buzz Stew, LLC v. City of Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008). 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 the legally sufficient claim and relief requested. *Breliant v. Equities Corp.*, 109 Nev. 842, 846, 858 P.3d 1258, 1260 (1993). Dismissal is proper if it appears beyond a doubt that [plaintiff] could prove no set of facts, which, if true, would entitle it to relief. *Buzz Stew*, 124 Nev. at 228, 181 P.3d 672. Additionally, NRCP 8(a) allows notice pleading, where all that is required in a complaint is a short and plain statement of the grounds for the court's jurisdiction, claim showing that the pleader is entitled to relief, a demand for the relief sought, and at least $15,000 in monetary damages sought.

"As a general rule, the court may not consider matters outside the pleading being attacked." *Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 847, 858 P.2d 1258, 1261 (1993). "However, the court may take into account matters of public record, orders, items present in the record of the case, and any exhibits attached to the complaint when ruling on a motion to dismiss for failure to state a claim upon which relief can be granted.' *Id.* Additionally, "a document is not outside the complaint if the complaint specifically refers to the document and if its authenticity is not questioned." *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir.1994) (overruled on other grounds by *Galbraith v. Cnty. Of Santa Clara*, 307 F.3d 1119, 1125 26 (9th Cir.2002). Material which is properly submitted as part of the complaint may be considered on a motion to dismiss. *Hal Roach Studios Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990). The document is not "outside" the complaint if the complaint specifi-

cally refers to the document and if its authenticity is not questioned. *Branch v. Tunnell*, 14 F. 3d 449, 453 (9th Cir. 1994). If matters outside the pleadings are presented and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion. NRCP 12(d). A party may move for summary judgment at any time, and the motion must be granted if the pleadings and affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Villescas v. CNA Ins. Companies.*, 109 Nev. 1075, 1078, 864 P.2d 288, 290 (1993).

b. Professional Negligence (Medical Malpractice) vs. Ordinary Negligence

NRS 41A.015 provides: "'Professional negligence' means the failure of a provider of health care, in rendering services, to use the reasonable care, skill or knowledge ordinarily used under similar circumstances by similarly trained and experienced providers of health care."

"In determining whether an action is on the contract or in tort, we deem it correct to say that it is the nature of the grievance rather than the form of the pleadings that determines the character of the action." *State Farm Mut. Auto. Ins. Co. v. Wharton*, 88 Nev. 183, 495 P.3d 359 (1972). The Court must look to the "gravamen of the complaint" in order to determine the nature of the action." *Id.* In *Syzmborski v. Spring Mountain Treatment Ctr.*, 133 Nev. 638, 403 P.3d 1280 (2017), the Nevada Supreme Court set for the test for differentiating ordinary negligence versus professional negligence for medical malpractice. Even in a suit claiming medical malpractice, Plaintiff can still make a claim

for ordinary negligence if the "alleged negligence or breach of duty does not involve medical judgment, treatment, or diagnosis, and would not require medical expert testimony at trial." Furthermore, if the claims made were necessarily and inextricably connected to the claims of negligent medical treatment, such claims cannot be used to circumvent the NRS Chapter 41A requirements governing professional negligence lawsuits. *Estate of Curtis v. S. Las Vegas Med. Inv'rs, LLC*, 136 Nev. Adv. Op. 39, 466 P.3d 1263 (2020). However, if the reasonableness of the health care provider's actions can be evaluated by jurors on the basis of their common knowledge and experience, the claim is likely based in ordinary negligence. *Id.*

c. Professional Negligence (Medical Malpractice) Affidavit Requirement

In an action for medical malpractice, under NRS 41A.071, the district court is required to dismiss the action without prejudice if the complaint is filed without an affidavit that meets the following requirements:

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

If the complaint was filed without an affidavit, it is deemed void *ab initio*, meaning that it is of no force and effect. Thus, if there was no affidavit filed with the Complaint, the Complaint cannot be amended. *Washoe Medical Center v. Second Judicial Dist. Court*, 122 Nev. 1298, 148 P.3d 790 (2006). However, if the complaint is filed with an affidavit that is deemed defective, because NRS 41A.071 does not contain "explicit prohibition against amendments", the district court "may grant leave to amend malpractice complaints supported by disputed affidavits under circumstances where justice so requires." *Borger v. Eighth Judicial District Court*, 120 Nev. 1021, 102 P.3d 600 (2004). However, in reading these cases together, the Nevada Supreme Court ruled that "although dictum of Borger anticipates allowing amendments, our more recent decision in *Washoe Medical Center* is controlling." Thus, even though the complaint was filed with an affidavit that was later deemed deficient, the district court's decision to grant the leave to amend was overturned. *Alemni v. Eighth Judicial Dist. Court*, 2016 WL 115651, fn. 3 (2016) (unpublished). This unpublished decision must be contrasted with the Nevada Court of Appeals' more recent unpublished decision in *Estate of Orschel v. Valley Health System, LLC*. In a footnote, the Nevada Court of Appeals noted the difference between *Washoe Med.* and *Borger* and ruled that "a complaint is void ab initio only for total failure to include an affidavit." *Estate of Orschel v. Valley Health System, LLC*, 2019 WL 3337092, fn. 7 (Ct. App. 2019) (unpublished).

As to the determination of whether the affidavit meets the NRS 41A.071 requirements, the Nevada Supreme Court ruled that the expert affidavit must be read together with the complaint to determine if the affidavit meets the statutory requirement. *Zohar v. Zbiegien*, 130 Nev. 733, 344 P.3d 402 (2014). This

statute was deemed to be a preliminary procedural rule subject to the notice-pleading standard and thus, it was to be liberally construed in a manner that is consistent with the Nevada's NRCP 12 jurisprudence. *Id.* Thus, so long as the complaint gives fair notice of the nature and basis of a legally sufficient claim and the relief requested, the statutory requirements are met. Strict interpretation of the statute should not be adopted because at the preliminary point in the proceedings, when little or no discovery has been conducted, litigants would be prejudiced because the medical records available to the plaintiffs may not necessarily identify the negligent actor by name. Thus, the affidavit is sufficient if it tends to corroborate and support the allegations of negligence. Individual names are not required within the affidavit. *Id*; *see Estate of Orschel v. Valley Health System, LLC*, 2019 WL 3337092, n. 5 (Ct. App. 2019) (unpublished). District Courts must evaluate the factual allegations contained in the affidavit and the complaint to "determine whether the affidavit adequately supports or corroborates the plaintiff['s] allegations." *Zohar v. Zbiegien*, 130 Nev. 733, 344 P.3d 402 (2014).

d. The PREP Act

The Public Readiness and Emergency Preparedness Act ("PREP Act"), codified at 42 USC Sections 247d-6d, *et seq.*, enacted in 2005, provides that upon the declaration of emergency by the Secretary of the United States Department of Health and Human Services, certain individuals and entities, who are engaged in the designing, manufacturing, testing, distributing and administration of the countermeasures to the emerging public health emergency, are entitled to protections against liability during the public health emergency. Specifically, those covered individuals and

entities are shielded from liability for losses caused by, arising out of, relating to, or resulting from the administration to or the use by an individual of a "covered countermeasure". However, the individuals who sustained serious injuries or death due to the countermeasure may be compensated by the Countermeasures Injury Compensation Program, which is a fund established under the PREP Act and administered by the United States Department of Health and Human Services, including unreimbursed medical expenses, lost-employment income, and survivor death benefits.

The scope of immunity is broad. The liability protection applies to conduct by a "covered person" engaged in qualified activities, related to a "covered countermeasure" while the public health emergency is in effect. "Covered persons" includes manufacturers, distributors, program planners, qualified persons and their official and agents. "Qualified persons" is defined as a licensed health professional or other individual who is authorized to prescribe, administer, or dispense covered countermeasures.

Immunity is afforded to "covered persons" who were engaged in "recommended activities", which is defined as the manufacture, testing, development, distribution, administration and use of a countermeasure. The recommended activity must be related to or be authorized in accordance with the public health and medical response. This is interpreted as the any activity that is part of an authorized emergency response at the federal, regional or state level.

To qualify as a "covered countermeasure", the product must fulfill two requirements. First, the product must be an antiviral, drug, biologic, diagnostic, device, or any vaccine used to prevent, diagnose, treat, cure, or mitigate the disease or any device used in the admin-

istration of any such product. Second, the product must fall within one of the following categories: (1) qualified pandemic or epidemic products; (2) security countermeasures; (3) drugs, biological products, or devices authorized for investigational or emergency use; or (4) any respiratory protective device approved by the National Institute for Occupational Safety.

Immunity under the PREP Act is only effective during the time-period triggered by the declaration until its expiration. Also, there is no immunity for criminal, civil, or administrative federal enforcement actions as well as federal law claims for equitable relief. In addition, there is no immunity for acts of "willful misconduct", which is defined as acts that are taken: (i) intentionally to achieve a wrongful purpose; (ii) knowingly without legal or factual justification; and (iii) in disregard of a known or obvious risk that is so great as to make it highly probable that the harm will outweigh the benefit. However, the burden is on plaintiff to prove by clear and convincing evidence that the covered entity committed willful misconduct and that such misconduct caused serious injury or death. For suits alleging "willful misconduct", such cases may only be filed in the United States District Court for the District of Columbia.

II. DR. LAM AND DR. BHANDARI'S MOTION TO DISMISS

a. Operative Complaint

The Court FINDS and CONCLUDES that the operative pleading is the First Amended Complaint filed on July 27, 2022, wherein Plaintiffs brought claims for (1) ordinary negligence, (2) professional negligence, and (3) wrongful death. Plaintiffs also sought punitive

damages. An affidavit of merit from Pierre Kory, M.D. was attached.

The Court FINDS and CONCLUDES that Plaintiffs' Opposition to Defendants Dr. Bhandari and Dr. Lam's Motion was untimely. Under NEFCR 13(c), all counsels must provide an email to which the electronic filing system will send notices. It is counsels' responsibility to ensure that the electronic filing system has the correct email address. Furthermore, under NEFCR 9(b), when a document is electronically submitted and filed, the electronic filing system will send a notice via email, which constitutes a valid and effective service of the document and has the same legal effect as service of a paper document. Plaintiffs cannot blame lack of procedural rules since under NEFCR 9(d), as Dr. Bhandari and Dr. Lam's counsel also served their Motion on Plaintiffs' counsel via email on the date the Motion was filed. Nonetheless, the policy of the courts is to consider the arguments on the merits. Thus, the Court considered Plaintiffs' Opposition and their counsel's arguments at the hearing.

The Court FINDS and CONCLUDES that although Defendants Dr. Bhandari and Dr. Lam sought to dismiss the Complaint (and reserving the right to file a Motion to Strike the First Amended Complaint as Untimely Filed), there are only a few differences between the Complaint and the First Amended Complaint. Amendment was made to correct the identity of Defendant Desert Springs. Other minor changes appear to have been made on paragraphs 6, 14, 17, 22, 32, 43, 44, 50, 54 and 148. There were more substantial changes made to paragraphs 32, 33, 36, 37, 49, 51, 52, and 53, but they do not affect the Court's analysis. Furthermore, the deletion of paragraphs 45 and 50 from the Complaint also does not affect the Court's

analysis. Additional paragraphs found on paragraphs 33 and 49 of the First Amended Complaint also do not affect the Court's analysis. Thus, the Court can still consider and rule on Defendants Dr. Bhandari and Dr. Lam's Motion as to Dismiss the First Amended Complaint, which is the operative pleading.

The Court FINDS and CONCLUDES that the crux of Plaintiffs' allegations are two-fold: (1) Decedent was given remdesivir instead of ivermectin; and (2) Defendants Dr. Bhandari and Dr. Lam failed to communicate with decedent, his family and his personal physician regarding the course of treatment for Decedent.

b. Dismissal under the PREP Act

The Court FINDS and CONCLUDES that the Court takes judicial notice of the fact that on March 10, 2020, in response to the COVID-19 pandemic, the Secretary of the United States Department of Health and Human Services declared an emergency, effective retroactively to February 4, 2020. The declaration specifically stated that PREP Act immunity applied to COVID-19 pandemic. There is no dispute that this declaration was in effect in May 2021, when the facts relevant to this case took place.

The Court FINDS and CONCLUDES that PREP Act is applicable to Plaintiffs' claims against Defendants Dr. Bhandari and Dr. Lam, and the claims are preempted pursuant to federal law. There is no dispute that Defendants Dr. Bhandari and Dr. Lam are "covered persons" under the PREP Act. There is also no dispute that the relevant events, which took place in May 2021, fall under the "covered period". Again, the gravamen of Plaintiffs' claims boils down to the use of remdesivir over ivermectin to treat Decedent. There

is no dispute that remdesivir is approved by the FDA for COVID treatment. Thus, Defendants Dr. Bhandari and Dr. Lam's alleged decision to treat Decedent with remdesivir and their decision not to consult with Decedent, Decedent's family and Decedent's personal physician still fall under the broad protection under the PREP Act as an administration of a "covered countermeasure". "Administration" as defined in the Declaration that invoked the PREP Act for the COVID-19 pandemic includes not only the physical provision of a countermeasure (as took place here), but also the decision making as to when and how to use, allocate and otherwise administer a countermeasure (which also took place here). Thus, the appropriate step for Plaintiffs appears to be either seeking compensation from the Countermeasures Injury Compensation Program or, if they believe that Defendants Dr. Bhandari and Dr. Lam acted with willful misconduct, filing a suit in the in the United States District Court for the District of Columbia. Thus, dismissal against Defendants Dr. Bhandari and Dr. Lam is proper under the PREP Act.

c. Dismissal under NRS 41A.071

The Court FINDS and CONCLUDES that even if the Court ignores the application of the PREP Act, the First Amended Complaint also did not meet the affidavit requirement of NRS 41A.071. That is, the affidavit failed to set forth factually a specific act or acts of alleged negligence separately as to each defendant in simple, concise and direct terms. Even if the Court reviews the affidavit and the First Amended Complaint together, they are devoid of specific acts that Defendants Dr. Bhandari and Dr. Lam took action or failed to take action which fell below the applicable standard of care. The claims made against them were general and were

not specifically delineated against each physician. Furthermore, Plaintiffs failed to make any cogent arguments as to why they should be given leave to amend. Thus, under *Washoe Med. Center*, the First Amended Complaint must be deemed *void ab initio*.

However, the Court does not agree with Defendants Dr. Bhandari and Dr. Lam that the case should be dismissed under expert's failure to review all medical records. This argument is based on *Fam. Health Care Servs. v. Eighth Jud. Dist. Ct.*, 463 P.3d 481 (Ct. App. 2020), an unpublished Court of Appeals case which cannot be used for support in this case.

The Court FINDS and CONCLUDES that, as to Plaintiffs' claim for ordinary negligence, it appears that the basis of this claim is on the purported lack of communication by Defendants Dr. Bhandari and Dr. Lam with Decedent, Decedent's family and Decedent's personal physician. Plaintiffs argue that this claim is separate from Defendants Dr. Bhandari and Dr. Lam's claim regarding their decision to treat Decedent with remdesivir. However, Plaintiffs' Opposition failed to argue, or even cite to, *Szymborski* and *Curtis*. The analysis on whether a claim sounds in ordinary or professional negligence is based on whether the alleged breach involves medical judgment, diagnosis or treatment – that is, whether the medical provider's actions can be evaluated by jurors based on their common knowledge and experience. However, no such argument was made by Plaintiffs in their Opposition or at the hearing. Furthermore, the decision to consult generally falls under medical judgment, diagnosis or treatment. At a minimum, even if the claims are deemed to be not involving involve medical judgment, treatment, or diagnosis, they are necessarily and inextricably connected to the claims of negligent

medical treatment as they involve the fundamental question of the use of remdesivir over ivermectin. Thus, the ordinary negligence claim is subsumed within the professional negligence claim.

The Court FINDS and CONCLUDES that Plaintiffs' claim for wrongful death also falls under ordinary negligence, which is subsumed by the professional negligence claim.

d. Plaintiffs' Claim for Punitive Damages

The Court FINDS and CONCLUDES that there were insufficient allegations of any acts that constitute conscious disregard by Defendants Dr. Bhandari and Dr. Lam. Thus, the claim for punitive damages is not viable. Furthermore, the damages for professional negligence is capped under NRS 41A.035.

III. DESERT SPRINGS' MOTION TO DISMISS

The Court FINDS and CONCLUDES that a hearing on Defendant Desert Springs' Motion is unnecessary and, thus, it will be vacated under EDCR 2.23(c). This Motion asserts virtually the same arguments as Defendants Dr. Bhandari and Dr. Lam's Motion regarding the application of the PREP Act, inadequacy of the affidavit of merit, subsuming of the ordinary negligence and wrongful death claims by the professional negligence claim, and failure of punitive damages. Defendant Desert Springs also brings an argument that there was no allegation made against its employees made in the affidavit with claims only made against Defendants Dr. Bhandari and Dr. Lam; and thus, vicarious liability against Defendant Desert Springs is not possible. The Court agrees with Defendant Desert Springs' analysis and thus, dismissal is proper as to this defendant as well.

a. Dismissal under the PREP Act

The Court FINDS and CONCLUDES that PREP Act is also applicable to Plaintiffs' claims against Defendant Desert Springs, and the claims are preempted pursuant to federal law. There is no dispute that Defendant Desert Springs is a "covered entity" under the PREP Act. Again, there is also no dispute that the relevant events, which took place in May 2021, fall under the "covered period". Again, the gravamen of Plaintiffs' claims boils down to the use of remdesivir over ivermectin to treat Decedent. The alleged decision to treat Decedent with remdesivir and the decision not to consult with Decedent, Decedent's family and Decedent's personal physician, still fall under the broad protection under the PREP Act as an administration of "covered countermeasure". "Administration" as defined in the Declaration that invoked the PREP Act for the COVID-19 pandemic includes not only the physical provision of a countermeasure (as it took place here), but also the decision making as to when and how to use, allocate and otherwise administer a countermeasure (which also took place here). The COVID-19 treatment constitutes a covered countermeasure. Thus, the appropriate step for Plaintiffs appears to be either seeking compensation from the Countermeasures Injury Compensation Program or, if they believed that Defendant Desert Springs acted with willful misconduct, filing a suit in the in the United States District Court for the District of Columbia. Thus, dismissal against Defendant Desert Springs is proper under the PREP Act.

b. Dismissal under NRS 41A.071

The Court FINDS and CONCLUDES that even if the Court ignores the application of the PREP Act, the First Amended Complaint also did not meet the affidavit requirement of NRS 41A.071. That is, the

affidavit failed to set forth factually a specific act or acts of alleged negligence separately as to Defendant Desert Springs in simple, concise and direct terms. Even if the Court reviews the affidavit and the First Amended Complaint together, they are devoid of specific acts that Defendant Desert Springs took action or failed to take action which fell below the applicable standard of care. The claims made against Defendant Desert Springs were general and at best, they only supported vicarious liability for acts of the physicians – Defendants Dr. Bhandari and Dr. Lam (which the Court found to be insufficient to be a viable claim as set forth above). To Plaintiffs' credit, the Opposition to Defendant Desert Springs' Motion sought leave to amend. However, Plaintiffs failed to provide a copy of the proposed amended pleading in violation of EDCR 2.30(a). Plaintiffs also failed to make any cogent arguments as to why they should be given leave to amend and failed to discuss why *Washoe Med. Center* should not apply. Thus, the First Amended Complaint must be deemed *void ab initio*.

To clarify, although the Court recognizes that Plaintiffs' claim for vicarious liability against Defendant Desert Springs for the acts of Defendants Dr. Bhandari and Dr. Lam may be viable, as the professional negligence claim against Defendants Dr. Bhandari and Dr. Lam is being dismissed and as vicarious liability is not a standalone claim, without the underlying claim, it must be dismissed as well.

The Court FINDS and CONCLUDES that Plaintiffs, in their prior opposition filed on August 2, 2022, argued that the basis of their ordinary negligence claim is the "lack of communication with [Decedent's] representatives concerning [Decedent's] medical care and treatment not that Defendants administered

remdesivir." However, in this Motion, as against Defendant Desert Springs, Plaintiffs' claim for ordinary negligence is limited to their belief that Defendant Desert Springs "directed its medical professional to not treat anybody with ivermectin during 2021" as that decision was not based on medical judgment, but "based on political, media and corporate pressure." To Plaintiffs' credit, the Opposition to Defendant Desert Springs' Motion discussed both *Szymborski* and *Curtis* on page 9. However, the arguments are without merit. Details of the discussion as to treatment options with Decedent and Decedent's family fall within the medical judgment, treatment, or diagnosis that must be addressed by experts. Thus, the lack of discussion with Plaintiffs and their counsel regarding the appropriate treatment, namely the request to treat Decedent with ivermectin, falls under medical judgment, treatment, or diagnosis. Refusal to allow prescription of ivermectin for COVID-19 treatment also falls under medical judgment, treatment, or diagnosis. Refusal to allow drugs to be brought in to treat Decedent also falls under medical judgment, treatment, or diagnosis. As the communication with Decedent and Decedent's family, that also falls within the medical judgment, treatment, or diagnosis regardless of whether they objected to the treatment used at Defendant Desert Springs' facility. At a minimum, even if these claims are deemed to not involve medical judgment, treatment, or diagnosis, they are necessarily and inextricably connected to the claims of negligent medical treatment as they involve the fundamental question of the use of remdesivir over ivermectin. Thus, the ordinary negligence claim against Defendant Desert Springs is subsumed within the professional negligence claim. And the same analysis applies to the claim for wrongful death.

c. Plaintiffs' Claim for Punitive Damages

The Court FINDS and CONCLUDES that there were insufficient allegations of any acts that constitute conscious disregard by Defendant Desert Springs. Thus, the claim for punitive damages are not viable. Furthermore, the claims for damages for professional negligence is capped under NRS 41A 035

Respectfully submitted by:

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ORDER

Pursuant to the foregoing, and good cause appearing therefrom:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendants Dr. Lam and

Dr. Bhandari's Motion to Dismiss is GRANTED, for the reasons stated herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant Desert Springs'

Motion to Dismiss is GRANTED, for the reasons stated herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the hearing set for

September 27, 2022 on Defendant Desert Springs' Motion to Dismiss is VACATED.

IT IS SO ORDERED.

Dated this 30th day of December, 2022

/s/ Veronica M. Barisich
848 0C6 DFA7 CCAC
Veronica M. Barisich
District Court Judge

Respectfully submitted by:

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APPENDIX C

DISTRICT COURT
CLARK COUNTY, NEVADA

Case No.: A-22-851679-C
Dept No.: 5

GAVIN DE BECKER, an individual; BRIAN DE BECKER, as personal representative of the Estate of HAL DE BECKER, deceased,

Plaintiffs,

v.

UHS OF DELAWARE, INC., dba DESERT SPRINGS HOSPITAL MEDICAL CENTER, a Pennsylvania corporation; KHUONG T. LAM, D.O., an individual; SHFALI BHANDARI, M.D., an individual; AMIR Z. QURESHI, M.D., an individual; and DOES I through 20, inclusive,

Defendants.

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FIRST AMENDED COMPLAINT FOR DAMAGES

1. Negligence
2. Professional Negligence
3. Wrongful Death

JURY TRIAL DEMANDED

ARBITRATION EXEMPTION: Medical Malpractice

FIRST AMENDED COMPLAINT

Plaintiffs Gavin de Becker, individually, and Brian de Becker, as personal representative of the Estate of Hal de Becker, deceased, by and through their counsel of record, JW Howard/ Attorneys, Ltd., do hereby allege as follows:

INTRODUCTION

1. A 2011 paper published through the National Institutes of Health (NIH) makes the clearest possible case: "There are few drugs that can seriously lay claim to the title of 'Wonder drug,' penicillin and aspirin being two that have perhaps had the greatest beneficial impact on the health and wellbeing of Mankind. But ivermectin can also be considered alongside those worthy contenders, based on its versatility, safety and the beneficial impact it has had, and continues to have, worldwide—especially on hundreds of millions of the world's poorest people."

2. The doctors who discovered the drug received the 2015 Nobel Prize for medicine.

3. Nonetheless, during the Coronavirus disease ("COVID-19") pandemic, ivermectin got caught up in a political battle over how to prevent and treat COVID-

19. That political battle affected numerous people, including Plaintiffs' father, Hal de Becker ("Hal"), now deceased.

4. In the spring of 2021, Hal developed systems of COVID-19. His personal physician began administering ivermectin to him shortly thereafter. Hal responded favorably to it.

5. In May of 2021, Hal was admitted to the Desert Springs Medical Center to ensure he received 24/7 medical attention should his symptoms worsen. But Hal's ivermectin treatment was abruptly interrupted and stopped by the attending doctors and hospital administrators at Desert Springs Hospital Medical Center. Without consent, the attending doctors managing Hal's care treated him with remdesivir, a drug that has limited, if any, benefit in treating COVID-19 patients and which has unknown side effects and known serious and sometimes lethal side effects, especially in elderly patients.

6. These decisions were made without consulting Hal or his family or his personal physician. Gavin, as Hal's authorized surrogate, also had made it clear to the hospital in writing that he wished to have his father continue taking ivermectin, and he was willing to sign a waiver of liability for the hospital and doctor(s).

7. In refusing to follow the wishes of the patient (via his surrogate, Gavin), the personal physician, and the family, and their failure to obtain authorization for treatment, the hospital and doctors violated the standard of care that governs them, including without limitation informed consent.

8. Among other things, hospital executives refused to respond to a lawyer representing Hal and his family,

and refused to respond to letters, emails, and phone calls. The doctors responsible for Hal's treatment refused to respond to phone calls, letters, emails, and texts from Hal's surrogate and family as well.

9. The hospital and attending doctors were aware that, as of that time, two separate state courts had ordered two separate hospitals to administer ivermectin to two patients in critical condition. Despite low odds of survival, both patients survived and went home.

10. The hospital and attending doctors were aware that a double-blind, placebo-controlled randomized clinical trial of ivermectin in human patients had been published in The Lancet, the world's most prestigious medical journal, and reported:

- "Patients in the ivermectin group reported fewer patient days of any symptoms than those in the placebo group."
- "... a reduction of cough and a tendency to lower viral loads..."
- "The median viral load for both genes was lower at days 4 and 7 post treatment in the ivermectin group with differences increasing from threefold lower at day 4 to around 18 fold lower at day seven."
- "... lower chance of presenting any symptoms was observed in the ivermectin arm [group]."
- "5-fold less shortness of breath"

11. The hospital and attending doctors were aware that a prominent advisor to the World Health Organization ("WHO") reported that patients treated with ivermectin had a 75 percent reduction in mortality, and that, "[i]vermectin showed significantly shorter duration of hospitalization compared to control. In six

RCTs of moderate or severe infection, there was a 75% reduction in mortality... with favorable clinical recovery and reduced hospitalization."

12. Even after the hospital and doctors exhausted all treatments they selected (with or without consent), even after they were certain Hal would soon die, even after they disregarded the family's, personal physician's and patient's (via his surrogate) wishes concerning ivermectin treatment, even after they suggested he be moved to hospice care, they continued to refuse to administer or allow treatment of ivermectin. Within hours of being discharged from the hospital, Hal died.

13. Plaintiffs bring this action to seek damages for the hospital's and attending doctors' negligence in causing Hal's death.

14. Per NRS 41A.071, the Complaint is supported by the Affidavit of Merit signed by Pierre Kory, M.D, which is attached as Exhibit "A" and incorporated by reference as though fully set forth herein. Dr. Kory's area of practice is the same as or substantially similar to that of all doctor defendants to the extent that it involves the evaluation and treatment of hospital patients, such as Hal, in an acute medical setting and the treatment of COVID-19.

PARTIES, JURISDICTION AND VENUE

15. Plaintiff Gavin de Becker is, and at all relevant times was, an individual residing in Los Angeles County, California. He brings this action in his individual capacity, as an heir under NRS 41.085.

16. Plaintiff Brian de Becker is, and at all relevant times was, an individual residing in Clark County, Nevada. He brings this action as the personal representative of the Estate of Hal de Becker, deceased.

17. Defendant Valley Health System, LLC, doing business as Desert Springs Hospital Medical Center (erroneously sued as UHS of Delaware, Inc. dba Desert Springs Hospital Medical Center, a Pennsylvania corporation) ("Desert Springs") is, and at all relevant times was, a Delaware registered limited liability company doing business in this judicial district, in Clark County, Nevada. At all relevant times, Desert Springs employed Andre Setaghian, a certified physician's assistant, at the hospital who is, and at all relevant times was, an individual residing in Clark County, Nevada.

18. Defendant Khuong T. Lam, D.O., is, and at all relevant times was, an individual residing and doing business in Clark County, Nevada.

19. Defendant Shfali Bhandari, M.D., is, and at all relevant times was, an individual residing and doing business in Clark County, Nevada.

20. Defendant Amir Z. Qureshi, M.D., is and at all relevant times was, an individual residing and doing business in Clark County, Nevada.

21. Defendants Desert Springs, Lam, Bhandari, and Qureshi and Setaghian are providers of health care as defined under NRS 630 and/or 633, *et seq*.

22. Defendant Desert Springs is responsible for the acts of Setaghian as an employer. Defendant Desert Springs is also responsible for the acts of defendant Drs. Lam, Bhandari, Qureshi, and DOES, as it held itself out as the provider of the medical services and treatment complained of herein and Plaintiffs' believed the physicians to be hospital employees.

23. Plaintiffs are ignorant of the true names and capacities of defendants sued herein as DOES 1-20, inclusive, and therefore sue these defendants by such

fictitious names. Plaintiffs will further amend this complaint to allege their true names and capacities when ascertained. Plaintiffs are informed and believe that each of these defendants is an agent and/or employee of defendant Desert Springs, and proximately caused Plaintiffs' damages as herein alleged while acting in such capacity.

24. Venue in this Court is proper under NRS 13.040 as the hospital, at which the events alleged in this Complaint occurred, is located in Clark County, Nevada.

GENERAL FACTUAL ALLEGATIONS

25. Hal was admitted to Desert Springs hospital in May of 2021 with symptoms of COVID-19.

26. Prior to admittance, Hal's personal physician had started treating him with ivermectin, without any issues. In fact, Hal responded favorably to the treatment. That should come as no surprise. Ivermectin has been used to treat COVID-19 in thousands of people all over the world. Ivermectin has also been used to treat other illnesses. The medical community has long lauded ivermectin as a "wonder drug," touting its "versatility, safety and the beneficial impact that it has had, and continues to have, worldwide..." At the time of Hal's hospitalization, ivermectin as a treatment for COVID-19 had already been approved in several states and countries. Importantly, there were at that time at least 70 trials worldwide testing the clinical benefit of ivermectin to treat or prevent COVID-19.

27. Nonetheless, for unknown reasons, ivermectin became controversial in 2021 when it was used to treat patients suffering from COVID-19. Television analysts derided ivermectin as "horse paste" and made unsubstantiated statements that people were being hospitalized

because they used the drug to treat COVID-19. They said ivermectin was dangerous and urged doctors not to prescribe it.

28. Doctors on the ground knew these statements were not true and continued to prescribe ivermectin to treat patients infected with COVID-19, especially the elderly. But their opinions were often overruled by corporate hospital administrators. Hospital administrators also wanted to curry favor with the federal government, which has been aggressively pushing COVID-19 vaccines, and other novel treatments, as the only "treatment" for COVID-19, and the only way to end the COVID-19 pandemic.

29. That is exactly what happened at Desert Springs while it had Hal in its care. One doctor at the hospital would approve ivermectin, consistent with the professional opinion of Hal's personal physician (and the patient's and family's wishes) while someone else at the hospital would overrule that decision and forbid the treatment without explanation. To Hal's family and his dismay, many of these decisions were made without their input.

30. Throughout this time, the hospital and attending doctors made unauthorized decisions regarding Hal's medical care and treatment, while refusing to communicate with his son Gavin, Hal's surrogate who held a power of attorney over Hal's affairs and medical decisions, and without consulting with Hal's personal physician or heeding his recommendations.

31. The hospital even refused to respond to letters from a lawyer that was representing the de Becker family. In fact, the hospital and attending physicians often made decisions regarding Hal's medical care and treatment without consulting anybody at all. For

example, instead of treating Hal with ivermectin, as he and his family and doctors wished, the attending doctors at Desert Springs prescribed remdesivir, an antiviral drug that the US Food and Drug Administration ("FDA") hastily approved during the first year of the pandemic to deter doctors from treating COVID patients with ivermectin and hydroxychloroquine. If they had known about this, Hal's family would have objected to treating Hal with remdesivir and instructed the hospital not to prescribe it. Hal's personal physician also would have objected to it, as the WHO's Solidarity trial, a large study conducted in 2020, showed that remdesivir did not reduce mortality or the duration of illness in COVID-19 patients. The drug has also been associated with renal and liver toxicity by the NIH and the WHO's Collaborating Center for International Drug Monitoring found at least 7,480 adverse reactions to remdesivir in less than two years, including 945 cardiac disorders and 560 deaths. But Hal's family never got the chance to object to the treatment because they did not know about it.

32. This is a critical distinction. Plaintiffs are not trying to hold the defendants liable for treating Hal with remdesivir. They are trying to hold the defendants liable for failing to communicate with Hal or his family and for failing to get informed consent during Hal's treatment. They are trying to hold the defendants liable for making decisions based on political and media narratives instead of established standards of medical care.

33. These failures occurred in a non-urgent setting between May 6 and May 13, 2021. Between May 9 and May 12, 2021. Dr. Lam was the attending physician who oversaw and was responsible for Hal's treatment on each of those days. Dr. Bhandari served in that role

on May 11, 2021. Dr. Quereshi oversaw Hal's treatment throughout his stay at the hospital. As such, they were responsible for ensuring that Hal or his surrogate received adequate information and an opportunity to consent, or refuse to consent, to Hal's medical treatment. They failed to do that and acted negligently in this regard.

34. Hospitals and physicians must exercise ordinary care when overseeing their patients' care. This standard requires that the hospital and physicians act reasonably and follow basic principles of custodial care. The most important part of that duty is the doctrine of Informed Consent, clearly described in these excerpts from the American Medical Association:

> Patients must have adequate information if they are to play a significant role in making decisions that reflect their own values and preferences, and physicians play a key role as educators in this process... when a patient is subjected to a procedure he or she has not agreed to, the physician performing that procedure is violating the patient's legal rights and may be subject to medical malpractice litigation, removal from preferred-provider lists, or the loss of hospital privileges.

In *Canterbury*, the decision outlined key pieces of information that a physician must disclose: (1) condition being treated; (2) nature and character of the proposed treatment or surgical procedure; (3) anticipated results; (4) *recognized possible alternative forms of treatment*; and (5) *recognized serious possible risks, complications, and anticipated benefits involved in the treatment* or surgical procedure, as well as the *recognized possible alternative forms of treatment*, *including non-treatment.* (emphasis added.)

35. Communicating with patients, their doctors and authorized family members is the way that a hospital and medical professionals can satisfy their professional duties in treating patients. Every patient has a right to receive from his provider of health care the information necessary for the patient to give his informed consent to treatment. Informed Consent in medical care requires hospitals and physicians not bow to external pressure.

36. Desert Springs and the attending doctors violated these duties in overseeing Hal's care. Specifically, Drs. Lam and Bhandari (along with Dr. Quereshi), any attending physicians and/or hospital staff who secretly treated Hal with remdesivir instead of ivermectin, without getting Hal's informed consent, and failed to inform Hal (and his surrogate) of available treatment options, violated their duties of care. Obtaining Informed Consent is a legal and ethical obligation. It requires full disclosure and communication with a patient or his surrogate. It requires tailoring medical care for different patients in different situations. It protects the patient's right to make independent health care decisions, not to have decisions made for him based on political factors.

37. These failures did not always involve professional negligence. For example, on information and belief, no medical professional checked Hal's medical history, consulted with his family and physician, informed Hal (or his surrogate) of all available treatment options, or made a professional judgment about how to treat him. Instead, that decision was dictated by non-medical policymakers at the hospital who were bowing to political pressure and the attending doctors with no regard for the research findings.

38. This should not have been a political issue. The United States military has acknowledged that ivermectin works at all stages in treating COVID-19. Real world evidence supports this finding, including Hal's experience. Hal's surrogate and family offered to sign a waiver disclaiming any liability related to the use of ivermectin. If the hospital and doctors had communicated properly with Hal and his family members and followed the doctrine of Informed Consent (and not administered remdesivir) it would have known that and could have followed the wishes of their patient and his doctor. Instead, the hospital and doctors neglected these basic duties and failed to exercise reasonable care in their handling of Hal's care.

39. Although Hal had shown improvement in response to the ivermectin treatment his personal physician had ordered, his condition deteriorated after the treatment was abruptly interrupted and stopped by the hospital and physicians. He was discharged at the suggestion of the hospital on May 13, 2021. He died within a few hours.

40. If the hospital and/or physicians had exercised ordinary care and communicated with Hal's surrogate and doctor, as it was required to do instead of bowing to political and corporate pressure, that would not have happened.

41. Plaintiffs bring this action to recover damages for the defendants' negligence and for Hal's wrongful death.

FIRST CAUSE OF ACTION

Negligence

(Against Desert Springs, Lam, Bhandari, Qureshi, and DOES 1-20)

42. Plaintiffs incorporate each of the preceding paragraphs by this reference as if fully set forth herein.

43. Defendants owed Hal a duty of ordinary care. That duty included adequately communicating with Hal's representatives, including Plaintiffs, regarding his care, obtaining informed consent, and not making decisions based on external political factors like recommendations from the Centers for Disease Control and Prevention ("CDC"), the White House and public health "experts" on television.

44. Defendants breached this duty of ordinary care by failing to communicate with Hal's representatives when Hal was in their care, failing to obtain informed consent during Hal's treatment, and by making decisions regarding patient treatment based on external political factors instead of based on individual circumstances, as alleged above.

45. As a proximate and actual result of Defendant's negligence, Hal suffered damages, leading up to and including his death. Hal has been harmed and injured to an extent that is currently unknown but is believed to be in excess of $500,000.

46. Plaintiff Brian de Becker brings this action to recover damages for Defendants' negligence in his capacity as the personal representative of Hal's estate. Thus, he has standing to pursue this claim.

SECOND CAUSE OF ACTION

Professional Negligence

(Against Desert Springs, Lam, Bhandari, Qureshi, and DOES 1-20)

47. Plaintiffs incorporate each of the preceding paragraphs by this reference as if fully set forth herein.

48. Defendants also owed Hal a duty of professional care that included conducting an adequate investigation to determine whether it was safe to treat Hal with ivermectin, as he and his family requested and notwithstanding what politicians and the mainstream news media said. In a non-urgent setting, as existed here, this professional duty of care also included informing Hal or his surrogate about how Defendants proposed treating Hal and getting informed consent for that treatment.

49. This second duty is especially important. Ultimately, in a non-urgent setting, it is the patient, not the doctor, who should decide what goes into the patient's body. The medicine being used does not matter. It could have been ivermectin, remdesivir or Tylenol. It was ultimately Hal's decision—or the decision of his surrogate, here his son Gavin—to decide what to take and when to take it, in consultation with the medical professionals.

50. Desert Springs breached its duty of care as a healthcare provider by not requiring and/or not ensuring that hospital staff obtained informed consent from Hal or his surrogate while Hal was being treated in a non-urgent setting. Drs. Lam, Bhandari and Qureshi breached their standard of care as physicians by not communicating with Hal or his surrogate, by not educating Hal or his surrogate about the available treatment options and their risks and benefits, and by failing to get consent from Hal or his surrogate before they treated Hal with certain drugs (including, but not limited to, remdesivir). This failure to use the reasonable care, skill or knowledge ordinarily used under similar circumstances by similarly trained and experienced providers of health care violated NRS § 41A.015.

51. As a proximate and actual result of Defendants' negligence, Hal suffered damages, leading up to and including his death. Hal has been harmed and injured to an extent that is currently unknown but exceeds $500,000.

52. Plaintiff Brian de Becker brings this action to recover damages for Defendant's professional negligence in his capacity as the personal representative of Hal's estate. Thus, he has standing to pursue this claim.

THIRD CAUSE OF ACTION

Wrongful Death

(Against Desert Springs, Lam, Bhandari, Qureshi and DOES 1-20)

53. Plaintiffs incorporate each of the preceding paragraphs by this reference as if fully set forth herein.

54. Defendants owed Hal a duty of ordinary care while Hal was in their care. Their actions and inactions violated their duty of care, as alleged above.

55. As a proximate and actual result of Defendants' negligence, Hal died.

56. Defendants' failure to meet their standard of care resulted in Hal's death.

57. Defendants' actions were "wrongful" or due to "neglect," as defined in NRS 41.085.

58. Plaintiff Gavin de Becker brings this action as Hal's heir to recover the damages actually and proximately caused by Defendants' negligence.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray judgment as follows:

a. For general damages in an amount exceeding $500,000, subject to proof at the time of trial;

b. For special damages in an amount up to and including $350,000, subject to proof at the time of trial;

c. For funeral expenses incurred by the Estate of Hal de Becker, deceased, subject to proof at the time of trial;

d. For prejudgment interest as authorized by law;

e. For punitive damages;

f. For fees and costs of suit incurred; and

g. For such other relief as the Court determines is just and proper.

Dated: July 26, 2022

JW HOWARD/ ATTORNEYS LTD.
By: */s/ Alyssa P. Malchiodi*
ALYSSA P. MALCHIODI
SCOTT J. STREET
Attorneys for Plaintiffs,
Gavin de Becker and Brian de Becker

DEMAND FOR JURY TRIAL

Plaintiffs hereby demand a jury trial.

Dated: July 26, 2022

JW HOWARD/ ATTORNEYS LTD.
By: */s/ Alyssa P. Malchiodi*
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