Case No.

IN THE SUPREME COURT OF THE STATE OF NEVADA

PETER and CHRISTIAN GARDNER, on behalf of minor child, K.G.G.; and GARDNER,
Plaintiffs-Petitioners,

v.

EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; and THE HONORABLE JERRY A. WIESE II, DISTRICT JUDGE

and

BLISS SEQUOIA INSURANCE & RISK ADVISORS, INC.; and HUGGINS INSURANCE SERVICES, INC.
Defendants-Real Parties in Interest,

Extraordinary Writ from the Eighth Judicial District Court of the State of Nevada, in and for County of Clark (District Court Case No. A-15-722259-C)

PETITION FOR WRIT OF MANDAMUS

Donald J. Campbell, Esq.
Philip R. Erwin, Esq.
Samuel R. Mirkovich, Esq.
CAMPBELL & WILLIAMS
700 South Seventh Street
Las Vegas, Nevada 89101
Telephone: (702) 382-5222
Counsel for Plaintiffs-Petitioners

RULE 26.1 DISCLOSURE STATEMENT

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

PETER and CHRISTIAN GARDNER, on behalf of minor child, LELAND GARDNER.

Plaintiffs-Petitioners have not been represented by any other attorneys besides CAMPBELL & WILLIAMS.

ROUTING STATEMENT

The Nevada Supreme Court should retain this writ proceeding because it is a matter raising as a principal issue questions of first impression involving common law as well as questions of statewide importance. NRAP 17(a)(13)-(14).

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PRELIMINARY STATEMENT

Peter and Christian Gardner (the "Gardners") acknowledge this Court generally declines to consider writ petitions challenging district court orders denying motions to dismiss. But if ever there was a case where the Court should exercise discretion to consider such writ relief, this is it as the district court made at least four clear legal errors when it denied the Gardners' motion to dismiss the counterclaims brought by Bliss Sequioa Insurance & Risk Advisors, Inc. and Huggins Insurance Services, Inc. (the "Brokers"). In isolation, any one of these errors would merit this Court's consideration; cumulatively, they overwhelmingly tip the balance in favor of writ review. Moreover, by permitting the Brokers to proceed with their defective counterclaims, the district court immeasurably expanded the scope of this narrow professional negligence action and exponentially increased the length of trial. The Gardners, thus, respectfully submit that judicial economy requires the Court's consideration of their writ petition at this time as waiting to address the district court's errors post-trial will be for naught.

I. INTRODUCTION AND RELIEF SOUGHT

This case arises out of the non-fatal drowning of Leland Gardner ("Leland") in the wave pool at Cowabunga Bay water park ("Cowabunga Bay") in Henderson, Nevada on May 27, 2015. The Gardners filed their initial complaint against Henderson Water Park, LLC d/b/a Cowabunga Bay Water Park ("HWP") on July 28, 2015 in the Eighth Judicial District Court for Clark County, Nevada. Despite operating a 25-acre water

park featuring dozens of water slides and attractions (including the 35,000 square-foot wave pool), HWP carried a commercial liability insurance policy with aggregate limits of only $5 million. Less than 10 months after the initial complaint was filed, HWP offered the full policy limits of $5 million to the Gardners. Because of Leland's devastating injuries and the staggering amount of money it will cost to care for him over the course of his lifetime, the Gardners rejected HWP's $5 million settlement offer out of hand.

Rather than accept HWP's insufficient policy limits, the Gardners sought leave to pursue direct claims for negligence against the individual owners and managers of HWP in addition to alter ego theories against HWP's member-LLCs. The district court denied the Gardners' motion for leave to amend, and the Gardners sought extraordinary writ relief from this Court, which was granted on November 22, 2017. *See Gardner of Behalf of L.G. v. Eighth Judicial Dist. Ct.,* 133 Nev. 730, 405 P.3d 651 (2017). As a result, HWP's owners and managers including Orluff Opheikens, Slade Opheikens, Chet Opheikens and Tom Welch (the "Individual Defendants") were named as defendants in the underlying action.

The Gardners' efforts to find additional resources to supplement HWP's inadequate insurance policy limits did not end there as they later sought leave to pursue a reverse veil-piercing claim under the alter ego doctrine against Orluff Opheikens and his company, R&O Construction Company ("R&O"). Again, the district court refused to allow the Gardners to name additional parties and, again, the Gardners sought

appellate review. Thereafter, the Nevada Supreme Court reversed the district court's order and allowed the Gardners to pursue their reverse veil-piercing theory against Orluff Opheikens and R&O. *See Gardner v. R&O Construction Company*, 443 P.3d 549 (Nev. June 26, 2019).

While the Gardners fought to secure other sources of recovery in addition to HWP's minimal insurance policy, HWP and the Individual Defendants attempted to insulate themselves from potential liability that their own counsel repeatedly acknowledged could exceed $100 million at trial. In November 2018, HWP and the Individual Defendants each filed third-party complaints alleging claims for professional negligence against the Brokers. The malpractice claims centered on the fact that the Brokers responded to an inquiry in July 2014 regarding the adequacy of HWP's insurance coverage with the unequivocal representation based on the Brokers' "professional opinion" that policy limits of $5 million were sufficient.

After the district court denied the defendants' motions for summary judgment on the Gardners' claims, the parties (including the Brokers) participated in a mediation overseen by the Honorable Peggy Leen (Ret.). Over the course of two days, the Gardners settled their claims with every party to the underlying litigation except the Brokers. For its part, HWP agreed to pay its insurance policy limits of $5 million and enter into a stipulated judgment in the amount of $49 million, which is offset by the funds recovered by the Gardners through their settlements with the other parties. HWP, in turn, agreed to assign its causes of action against the Brokers to the Gardners in

exchange for the Gardners' execution of a covenant not to execute and/or record. The district court approved the Gardners' good-faith settlements on November 6, 2019, and the Gardners stepped into HWP's shoes by filing their amended third-party complaint against the Brokers as the assignees of HWP's claims.

The Brokers thereafter went on the offensive by asserting counterclaims for negligent misrepresentation and fraud against HWP which, by then, was no longer a party in the case. In short, the Brokers decided they would rather tell the jury how Leland drowned than defend the malpractice that forced the Gardners to litigate against HWP for nearly five years. Through their so-called counterclaims, the Brokers sought to transform this narrow action arising out of their negligent advisement of insurance limits for Cowabunga Bay into a full-blown rehash of the Gardners' original lawsuit. The upshot of the Brokers' counterclaims is that HWP should be responsible for any damages on the assigned claims because HWP allegedly misrepresented or concealed the lack of safety precautions at Cowabunga Bay.

Notwithstanding that the Brokers' pleading suffered from a litany of obvious defects under NRCP 12(b)(5) and well-settled legal precedent (as detailed below), the district court repeatedly refused to dismiss the Brokers' counterclaims even when the Gardners identified indisputable errors of law in the district court's rulings. Due to the district court's refusal to correctly apply the NRCP 12(b)(5) standard, this litigation has been upended as the Gardners now face the prospect of the Brokers' meritless counterclaims completely subsuming the narrow professional negligence

claims assigned to Plaintiffs in their settlement with HWP. In that regard, the Brokers have named almost every witness identified by the Gardners in the underlying action—from the various managers of HWP—to officials from the Southern Nevada Health District—to the lifeguards who were on duty when Leland drowned. Simply put, while the parties initially anticipated Plaintiffs' professional negligence claims would necessitate a trial lasting 5-7 days, it is apparent that any trial involving the Brokers' counterclaims will now require the 5-7 weeks originally contemplated by the parties in the Gardners' original proceeding.[1]

Though this Court generally declines to consider writ petitions emanating from orders denying motions to dismiss, this is the rare case where judicial economy requires the Court's consideration. Indeed, absent this Court's intervention, the Gardners will be forced to re-litigate the drowning of their son and then appeal the jury's verdict as the flood of otherwise inadmissible evidence flowing from the Brokers' counterclaims will inevitably impact the Gardners' recovery on the assigned claims. This Court has recognized that extraordinary writ relief is appropriate in similar circumstances where the inclusion of improper causes of action brought by a defendant taint the other aspects of the case and impact the plaintiff's potential recovery.

[1] This matter has a preferential trial setting commencing on January 4, 2020 due to the impending expiration of the NRCP 41(e) deadline. In light of the trial date, the Gardners filed a motion to stay proceedings in the district court that is set to be heard on August 18, 2020.

The Gardners' petition also raises multiple important questions of law and issues of first impression concerning (i) whether an inherent duty of disclosure exists in the insurance broker-insured relationship and, if so, whether that duty is reciprocal; (ii) the appropriate standard by which contradictory and inconsistent factual allegations should be evaluated under NRCP 12(b)(5); (iii) the types of statements that may (or may not) form the basis of misrepresentation claims; and (iv) whether a negligent misrepresentation claim must be pleaded with particularity.

In short, the district court clearly abused its discretion by denying the Gardners' motion to dismiss the Brokers' counterclaims in contravention of prevailing legal authority. Because the district court's erroneous ruling has forced the Gardners to defend the Brokers' improper counterclaims and will likely impact their ultimate recovery, the Gardners have no adequate remedy on appeal. Judicial economy warrants the issuance of an extraordinary writ of mandamus.

II. STATEMENT OF ISSUES

Whether the district court abused its discretion by denying the Gardners' motion to dismiss the Brokers' counterclaims, where the court:

1. found as a matter of law that HWP owed an inherent fraud-based duty of disclosure to the Brokers despite the absence of any allegations (let alone facts) supporting the existence of a special relationship;

2. accepted as true the Brokers' contradictory and internally inconsistent factual allegations underpinning their misrepresentation claims based on the NRCP 12(b)(5) standard of review;

3. allowed the Brokers to plead fraudulent and negligent misrepresentation claims based on vague and generalized statements that are incapable of being proven true or false by any objective standard; and

4. permitted the Brokers to plead fraudulent and negligent misrepresentation claims without particularity as required by NRCP 9(b).

III. STATEMENT OF FACTS

A. The Gardners Settle, Accept an Assignment of Claims, and File an Amended Third-Party Complaint.

1. Following entry of the $49 million stipulated judgment and assignment of HWP's claims, the Gardners filed their amended third-party complaint on November 20, 2019 asserting two causes of action against the Brokers for professional negligence and negligent misrepresentation. PA 1-9. The claims assigned to the Gardners are premised on the Brokers' and, more specifically, Lance Barnwell's written "professional opinion" that HWP's "[$5 million] limits of coverage are in line with the scope and size of the park" and that Cowabunga Bay was "adequately insured." *Id.*

B. The Brokers' First Counterclaim.

2. On March 11, 2020, the Brokers moved for leave to assert a single counterclaim for negligent misrepresentation against HWP based on two purported "misrepresentations."[2] PA 10-38. First, the Brokers alleged that:

> In April 2015, HWP represented to Bliss Sequoia that the waterpark 'follows the strictest of safety guidelines set forth by the City, State and Federal agencies' and that its 'entire management team and staff is thoroughly trained in the proper protocol and procedure surrounding issues of guest safety.' PA 31 ¶ 27.

Second, the Brokers alleged that

> Over a period of years, prior to placing coverage for the waterpark, Shane Huish and Scott Huish of HWP on multiple occasions expressed to Lance Barnwell of Bliss Sequoia that safety was a priority in how he [sic] operated his [sic] enterprises. PA 31 ¶ 28.

As to justifiable reliance, the Brokers alleged that Bliss Sequoia "relied on HWP's prior representations that the waterpark was in compliance with applicable safety codes when it advised HWP that its general liability limits were in line with the size and scope of the park" in July 2014. PA 31 ¶ 29.

3. The Gardners opposed the Brokers' motion because, *inter alia*, the proposed amendment was futile under NRCP 12(b)(5). PA 39-52. Specifically, the Gardners asserted that the Brokers could not have justifiably relied on HWP's purported statement in April 2015 when Lance Barnwell provided the "professional opinion"

[2] In the same motion, the Brokers also sought leave to assert cross-claims for contribution against two other insurance brokerages, Moreton & Company ("Moreton") and Haas & Wilkerson ("H&W").

regarding the adequacy of HWP's insurance coverage *nine months earlier* in July 2014. PA 47-48. As to the alleged misrepresentations about safety being a "priority," the Gardners argued that the Brokers had failed to plead their negligent misrepresentation claim with particularity and, moreover, the vague and generalized statements attributed to HWP were not actionable. PA 48-49.

4. The district court granted leave to amend on April 4, 2020, but notably instructed the Brokers to "provide more detailed information as it pertains to [the] claim of misrepresentation against HWP." PA 92. The Brokers failed to do so.

C. The Brokers' Amended Counterclaim.

5. The Brokers filed their amended counterclaims against HWP on April 23, 2020. PA 111-123. The Brokers' amended counterclaim failed to allege any new facts concerning the purported misrepresentations and instead added two new causes of action for (i) fraudulent misrepresentation and (ii) fraudulent concealment. *Id.*

6. Because the Gardners had previously highlighted that the Brokers could not base their claim on a representation that occurred approximately nine months *after* the purported reliance, the Brokers attempted to remedy this defect by slipping in a short, introductory clause at the beginning of the allegation underlying their fraudulent misrepresentation claim. A comparison of the relevant allegations between the original counterclaim and the amended counterclaim is as follows (with the bold, italicized script reflecting the minimally changed language):

Original Allegation	**Amended Allegation**
"In April 2015, HWP represented to Bliss Sequoia that the waterpark 'follows the strictest of safety guidelines set forth by the City, State and Federal agencies' and that its 'entire management team and staff is thoroughly trained in the proper protocol and procedure surrounding issues of guest safety.'" (PA 31 ¶ 27)	"***On*** April ***8,*** 2015, ***in an email from Shane Huish to Lance Barnwell,*** HWP represented to Bliss Sequoia that the waterpark 'follows the strictest of safety guidelines set forth by the City, State and Federal agencies' and that its 'entire management team and staff is thoroughly trained in the proper protocol and procedure surrounding issues of guest safety.'" (PA 114 ¶ 28)
"Over a period of years, prior to placing coverage for the waterpark, Shane Huish and Scott Huish of HWP on multiple occasions expressed to Lance Barnwell of Bliss Sequoia that safety was a priority in how he [sic] operated his [sic] enterprises." (PA 31 ¶ 28)	"Over a period of years, prior to placing coverage for the waterpark, Shane Huish and Scott Huish of HWP on multiple occasions expressed to Lance Barnwell of Bliss Sequoia that safety was a priority in how ***they*** operated ***their*** enterprises." (PA 114 ¶ 29)
"Bliss Sequoia relied on HWP's representations that the waterpark was in compliance with applicable safety codes when it advised HWP that its general liability limits were in line with the scope and size of the park." (PA 31 ¶ 29)	"***During the renewal of HWP's policy***, Bliss Sequoia relied on HWP's representations that the waterpark was in compliance with applicable safety codes when it advised HWP that its general liability limits were in line with the scope and size of the park. (PA 114 ¶ 30)

7. Again, the Gardners' third-party claims are premised on statements made by the Brokers in writing in July 2014. The Brokers' counterclaim against HWP, by contrast, is premised in part on statements made by HWP nearly one year later in April 2015. PA 114 ¶ 30. These are two different events, occurring at two different times. The Brokers' original counterclaim expressly tied their alleged detrimental reliance

on HWP's statements to the first event in hopes of being able to justify the negligent conduct for which the Gardners seek relief. That, of course, was impossible since the Brokers' negligent advisement occurred in July 2014, and the HWP statements upon which the Brokers purportedly relied occurred nearly a year later in April 2015. After recognizing this flaw, the Brokers hastily amended the allegation to claim their detrimental reliance actually occurred at the time of the second event. This "amendment" not only contradicts the Brokers' original allegation, it now creates internal inconsistency because the allegation still tries to provide a justification for the Brokers' negligent policy limits advisement in July 2014 based on conduct occurring nine months later around the time HWP's policy was renewed in April 2015.

8. With respect to the claim that HWP's representatives had informed the Brokers that safety was a "priority" in how they operated their undefined "enterprises," the Brokers did not add any particularity despite the district court's instruction to provide more detailed information.

9. As to their fraudulent concealment claim, the Brokers effectively cut-and-pasted the Gardners' summary judgment briefing from the underlying case and claimed that HWP had concealed information from the Brokers related to the lack of adequate safety measures at Cowabunga Bay. PA 114-117. The Brokers, however, failed to plead any factual allegations that would give rise to a duty of disclosure. Rather, the Brokers conclusorily alleged that "HWP had a duty to disclose to Bliss

Sequoia information regarding its intentional lack of safety measures and its noncompliance with applicable safety codes at the waterpark." PA 120 ¶ 81.

10. On April 27, 2020, the Gardners moved to dismiss the Brokers' amended counterclaims against HWP. PA 124-139. The Gardners argued that the Brokers' misrepresentation claims were premised on contradictory and internally inconsistent allegations that the district court need not accept as true under the NRCP 12(b)(5) standard. PA 129-131. The Gardners further contended that HWP's alleged representation to the Brokers in April 2015 was, in fact, a statement made by an unidentified speaker to an injured guest at Cowabunga Bay. *Id.* As to the statements about safety being a "priority," the Gardners again argued that they were not pleaded with particularity and were otherwise non-actionable as a matter of law. PA 131-133. Regarding the Brokers' fraudulent concealment claim, the Gardners showed that the Brokers had failed to plead the existence of a special relationship and, moreover, no court in the United States has ever recognized an inherent duty to disclose or a special relationship between an insurance broker and insured. PA 133-135.

11. The district court denied the Gardners' motion to dismiss the Brokers' counterclaims against HWP. PA 164-171. The district court acknowledged the Brokers' contradictory allegations of reliance on the statement made in April 2015, but nevertheless allowed the misrepresentation claims to proceed. PA 165-166. Additionally, the district court failed to address the Gardners' arguments that the alleged misrepresentations were not pleaded with particularity or were otherwise non-

actionable as a matter of law. *Id.* With respect to the Brokers' fraudulent concealment claim, the district court relied on this Court's opinion in *Ainsworth v. Combined Ins. Co. of Am.*, 104 Nev. 587, 763 P.2d 673 (1988)—which analyzed the insurer-insured relationship (not the insurance broker-insured relationship)—and determined that the Brokers had satisfied the duty to disclose element as a matter of law despite the lack of any cognizable allegations that would give rise to a special relationship. *Id.*

12. Because the district court conclusively determined the Brokers had met their burden of demonstrating the existence of a duty to disclose, the Gardners moved for partial reconsideration on grounds that *Ainsworth* had no application to this case whatsoever. PA 183-188. Specifically, the Gardners explained that this Court's decision in *Ainsworth* addressed the special relationship between an *insurer* and insured, not an *insurance broker* and insured. *Id.*

13. Although the district court seemingly acknowledged that *Ainsworth* was inapplicable to the instant action, the district court nonetheless determined its prior decision was not clearly erroneous and denied the Gardners' motion for reconsideration on July 31, 2020. PA 195-200.

IV. ARGUMENT

A. Legal Standard.

A primary aspect of the Gardners' petition is the appropriate standard by which motions to dismiss for failure to state a claim should be reviewed under NRCP 12(b)(5). Under existing Nevada precedent, dismissal is appropriate "only if it appears beyond

a doubt that [the plaintiffs] could not prove a set of facts which, if true, would entitle [the plaintiffs] to relief." *Torres v. Nevada Direct Ins. Co.*, 131 Nev. 531, 541, 353 P.3d 1203, 1210 (2015). When assessing a motion to dismiss for failure to state a claim upon which relief may be granted, a court must construe the pleadings liberally and draw every reasonable inference in favor of the non-moving party. *Lubin v. Kunin*, 117 Nev. 107, 110 n. 1, 17 P.3d 422, 425 (2001). All factual allegations of the complaint must be accepted as true. *Vacation Village v. Hitachi Am.*, 110 Nev. 481, 484, 874 P.2d 744, 746 (1994).

As this Court has recognized in certain unpublished decisions predating January 1, 2016 (which are not cited here pursuant to NRAP 36(c)(3)), the mandate that a complainant's allegations be accepted as true is not without limitations. For example, courts are not required to "accept as true [ ] allegations that (1) contradict matters properly subject to judicial notice; (2) are conclusory allegations of law, mere legal conclusions, unwarranted deductions of fact, or unreasonable inferences; (3) are contradicted by documents referred to in the complaint; or (4) are internally inconsistent." *Western Lands Project v. United States Bureau of Land Mgmt.*, 2007 WL 9734511, *3 (D. Nev. Sept. 25, 2007) (interpreting federal counterpart to NRCP 12(b)(5) prior to *Twombly* and *Iqbal*) (listing cases). "Nor need the court accept as true allegations in an amended complaint that, without any explanation, contradict an earlier complaint." *Western Lands Project*, 2007 WL 9734511 at *3; *see also Ellingson v. Burlington N., Inc.*, 653 F.2d 1327, 1329-30 (9th Cir. 1981) (court may strike challenged

allegations as "false or sham" and dismiss the complaint for failure to state a claim). The Gardners ask this Court to confirm the application of these well-settled rules as certain of the Brokers' factual allegations suffer from almost all of the foregoing defects.

B. The District Court's Erroneous Denial Of The Gardners' Motion Warrants Extraordinary Writ Relief.

"A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust or station." NRS 34.160. "Mandamus relief may also be proper to control an arbitrary or capricious exercise of discretion." *Halcrow, Inc. v. Eighth Judicial Dist. Court*, 129 Nev. 394, 398, 302 P.3d 1148, 1151 (2013). "Writ relief will not be available when an adequate and speedy legal remedy exists." *Id.* "Whether a future appeal is sufficiently adequate and speedy necessarily turns on the underlying proceedings' status, the types of issues raised in the writ petition, and whether a future appeal will permit this court to meaningfully review the issues presented." *Id.*

This Court generally "will not exercise [its] discretion to consider writ petitions that challenge orders of the district court denying motions to dismiss or motions for summary judgment." *Smith v. Eighth Judicial Dist. Ct.*, 113 Nev. 1343, 1344, 950 P.2d 280, 281 (1997). The Court, however, has granted exceptions to this policy "where considerations of sound judicial economy and administration militated in favor of granting such petitions." *Id.* Accordingly, "this Court will continue to exercise its discretion with respect to certain petitions where no disputed factual issues exist and, pursuant to clear authority under a statute or rule, the district court is

obligated to dismiss an action." *Id.* at 1345, 950 P.2d at 281; *see also McNamee v. Eighth Judicial Dist. Ct.*, 135 Nev. 392, 395, 450 P.3d 906, 908 (2019) ("[W]rit relief may be warranted if the record reflects clear legal error or manifest abuse of discretion by the district court[.]"). "Additionally, [the Court] may exercise [its] discretion where [ ] an important issue of law requires clarification." *Smith*, 113 Nev. at 1345, 950 P.2d at 281.

Here, there is no doubt the district court committed several clear errors in the face of overwhelming legal authority requiring dismissal of the brokers' counterclaims against HWP. Beginning with the Brokers' claim for fraudulent concealment, the district court determined as a matter of law that an insured client owes an inherent fraud-based duty of disclosure to its insurance broker despite the absence of any supporting legal authority or factual allegations supporting the existence of a special relationship between the Brokers and HWP. Moreover, because the district court held that the Brokers had satisfied the duty element as a matter of law, the Gardners are precluded from later challenging that a special relationship existed between the Brokers and HWP after the close of discovery.

As to the Brokers' misrepresentation claims, the district court manifestly abused its discretion in numerous respects. As to the April 2015 statements attributed to HWP, the district court permitted to the Brokers to proceed with their negligent and fraudulent misrepresentation claims based on an internally inconsistent and sham allegation of reliance that contradicted their prior allegations. With respect to the

statements about safety being a "priority," the Brokers indisputably did not plead their claims for negligent and fraudulent misrepresentation with particularity under NRCP 9(b) and failed to cure the deficiency after the district court instructed them to "provide more information." The district court, however, overlooked this continuing defect in the Brokers' amended pleading. The district court likewise departed from well-settled legal precedent that misrepresentation claims cannot be based on vague and generalized statements which are incapable of being proven true or false. The district court, accordingly, manifestly abused its discretion and committed multiple errors on important issues of law when it allowed the Brokers' counterclaims to survive the Gardners' motion to dismiss under NRCP 12(b)(5).

The ramifications of the district court's refusal to dismiss the Brokers' counterclaims are manifest. As stated previously, the Brokers' counterclaims greatly expand the scope of this narrow professional negligence action, and will essentially require the parties to re-litigate Leland's drowning even though the Gardners settled with HWP and its co-defendants nearly a year ago. Similarly, if successful, the Brokers' counterclaims will serve as a setoff to the professional negligence claims assigned by HWP, thereby reducing the Gardners' eventual recovery at trial.[3]

[3] *See Express Recovery Servs. Inc v. Olson*, 397 P.3d 792, 795-96 and n. 1 (Utah Ct. App. 2017) (citing numerous cases for the principle that a "defendant cannot assert its claim against the assignor offensively to recover damages from the assignee, but only defensively, as a setoff, to reduce the amount of the assignee's recovery").

The impact on the Gardners' claims is compounded by the fact that the Brokers separately served HWP with their counterclaims, meaning HWP will be required to appear as a fourth-party defendant and respond to the same allegations that were previously raised (and settled) by the Gardners related to Leland's drowning. Simply put, the district court's erroneous decision has transformed a straightforward professional negligence action focused on a written opinion given to HWP by the Brokers into a full rehash of the Gardners' original lawsuit.

Notably, this Court has entertained writ petitions emanating from orders denying motions to dismiss in similar circumstances. In *Smith*, the district court denied a motion to dismiss an improper cross-claim filed by one defendant against his co-defendants. *See Smith*, 113 Nev. at 1345-46, 950 P.2d at 281-82. This Court determined that, as here, the district court "did not evaluate petitioners' motion to dismiss under the proper standard of law" when it declined to strike the improper cross-claim. *Id.* at 1348, 950 P.2d at 283. The Court further found that "an appeal following final judgment would be an inadequate remedy, because not only will petitioners have to defend [the defendant's] personal injury cross-claim, [the defendant's] claim will likely impact the resolution of [another defendant's] claim against petitioners. *Id.*

The same rationale applies here. The Gardners respectfully submit the district court incorrectly evaluated the Brokers' counterclaims against HWP under NRCP 12(b)(5) and should have summarily dismissed the counterclaims. By permitting the

Brokers to proceed with their counterclaims against HWP, the Gardners are now forced to defend against the counterclaims at trial to prevent a setoff against their own recovery from the Brokers. HWP has also been dragged back into this litigation as a party and will be required to defend itself for a second time even though the Gardners settled their claims with HWP last year.[4] This harm is compounded by the fact that the scope of the Brokers' counterclaims dwarfs the exceedingly narrow claims assigned to the Gardners by HWP, and will relegate the Gardners' professional negligence claims to a secondary sideshow compared to the story of how Leland drowned at Cowabunga Bay in 2015. As such, the Gardners lack an adequate remedy at law, and will suffer irreparable harm if they are forced to raise these issues on appeal after a final judgment. For those reasons, the Gardners ask the Court to exercise its discretion and consider the instant writ petition.

C. The Brokers Did Not Allege A Viable Claim For Fraudulent Concealment Because HWP Did Not Owe A Duty To Disclose.

"Under Nevada law, the general rule is that an action in deceit will not lie for nondisclosure." *Nevada Power Co. v. Monsanto Co.*, 891 F.Supp. 1406, 1416 (D. Nev. 1995). Nevertheless, Nevada has recognized a cause of action for fraudulent concealment where the defendant had a duty to disclose. *Id.* at 1415-16. "A duty to disclose arises where there is a fiduciary relationship or where there is a 'special

[4] HWP had not been formally served with the counterclaims when the Gardners moved to dismiss and, thus, did not participate in the proceedings below.

relationship,' such that the complaining party imparts special confidence in the defendant and the defendant reasonably knows of that confidence." *Peri & Sons Farms, Inc. v. Jain Irrigation, Inc.*, 933 F.Supp.2d 1279, 1292 (D. Nev. 2013).

"The existence of duty presents a question of law" for the Court. *O.P.H. of Las Vegas, Inc. v. Oregon Mut. Ins. Co.*, 133 Nev. 430, 436-37, 401 P.3d 218, 223-24 (2017) (finding insurance broker did not owe de facto fiduciary duty or special duty to monitor its insured client's premium payments and alert client to potential cancellation). Here, the district court relied on *Ainsworth v. Combined Ins. Co. of Am.*, 104 Nev. 587, 763 P.2d 673 (1988) in determining that a special relationship existed between the Brokers and HWP as a matter of law.

But the Nevada Supreme Court's decision in *Ainsworth* addressed the special relationship between an *insurer* and insured, not an *insurance broker* and insured. It is undisputed that the Brokers did not insure HWP. Rather, the Brokers assisted HWP in procuring commercial general liability insurance and, on one occasion in July 2014, provided a recommendation to HWP regarding the appropriate amount of insurance coverage for Cowabunga Bay. Thus, the Court's decision in *Ainsworth* is inapposite and does not support the district court's finding that HWP owed the Brokers a duty to disclose.[5]

[5] In addition to finding that *Ainsworth* governed the insurance broker-insured relationship, the district court stretched its holding even further by finding that the duties owed to the insured by the insurer are reciprocal, *i.e.*, that "both parties have equal and corresponding duties to act truthfully and honestly with one another." This,

Turning to the insurance broker-insured relationship, this Court flatly rejected the suggestion that an insurance broker owes a "de facto fiduciary duty" to its insured client. *O.P.H.*, 133 Nev. at 436-47, 401 P.3d at 223-24. Rather, the Court advised that "[t]he duty of a broker, by and large, is to use reasonable care, diligence, and judgment in procuring the insurance requested by its client[,]" and "the usual relationship between an insurance broker and its client is not the kind which would logically give rise to" heightened duties on the part of the insurance broker—in that case, the duty to monitor and notify the insured of cancellation. *Id.* While "an insurance broker may assume additional duties to its insured client in special circumstances," *O.P.H.*, 133 Nev. at 436, 401 P.3d at 223-24, no court in any jurisdiction has ever found that an insured owed a fraud-based duty of disclosure to an insurance broker. Against this legal backdrop, it was wholly improper for the district court to manufacture an inherent fraud-based duty to disclose flowing from the insured to the insurance broker, particularly when the *O.P.H.* court had the opportunity to recognize the existence of a fiduciary duty or "special relationship" between an insurance broker and insured client and declined to do so.

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too, is incorrect. The *Ainsworth* court imposed heightened duties on insurers for the protection of insureds. 104 Nev. at 592, 763 P.2d at 676. Given that the *Ainsworth* court intended to protect the insureds of this State, the district court's assumption that the "naïve consumer" owes the same heightened obligations to the "wealthy, sophisticated commercial venturer" makes no sense. *Id.*

Nor could the district court find the Brokers adequately alleged facts supporting the existence of a special relationship as they only proffered the conclusory allegation that "HWP had a duty to disclose to Bliss Sequoia information regarding its intentional lack of adequate safety measures and its noncompliance with applicable safety codes." Put another way, the Brokers did not allege any facts that would take their relationship with HWP beyond an "association characterized by 'routine arms-length dealings' [which] will not suffice to establish a special relationship." *Silver State Broad., LLC v. Crown Castle MU, LLC*, 2018 WL 6606064, *3 (D. Nev. Dec. 17, 2018) (citing *Weingartner v. Chase Home Fin.*, 702 F.Supp.2d 1276, 1288 (D. Nev. 2010)); *see also Nevada Power*, 891 F.Supp. at 1416 (surveying Nevada law and finding no special relationship exists in a "straightforward commercial transaction").

Because there is no legal authority in any jurisdiction to support the existence of an inherent fraud-based duty to disclose between an insurance broker and insured, and the Brokers failed to plead a single factual allegation that would otherwise give rise to a special relationship, the district court manifestly abused its discretion by finding that the Brokers satisfied the duty element as a matter of law.

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D. The Brokers' Claims For Negligent Misrepresentation And Fraudulent Misrepresentation Fail To Allege An Actionable Misrepresentation of Fact.[6]

In order to plead a viable claim for negligent misrepresentation, the Brokers must allege that (i) HWP, in the course of an action in which it had a pecuniary interest, failed to exercise reasonable care or competence in obtaining or communicating information to the Brokers to guide them in their business transactions; (ii) the Brokers' justifiably relied on this information; and (iii) the Brokers suffered damages as a result. *See Barmettler v. Reno Air, Inc.* 114 Nev. 441, 449, 956 P.2d 1382, 1387 (1998). Similarly, to bring a claim for fraudulent misrepresentation, the Brokers must allege that (i) HWP made a false representation; (ii) HWP either knew or believed that its representation was false or that HWP had an insufficient basis of information for making the representation; (iii) HWP intended to induce the Brokers to act or refrain from acting upon the misrepresentation; and (iv) damage to the Brokers as a result of relying on the misrepresentation. *Id.* at 446-47, 956 P.2d at 1386. "In Nevada, negligent misrepresentation and fraudulent misrepresentation both require that the defendant supply 'false information' or make a 'false misrepresentation.'" *Guilfoyle v. Olde Monmouth Stock Transfer Co.*, 130 Nev. 801, 810, 335 P.3d 190, 197 (2014).

Fraudulent misrepresentation must be pleaded with particularity under NRCP 9(b). *Roundy v. Bank of Am., N.A.*, 2013 WL 559486, at *5 (D. Nev. Feb. 12, 2013) ("A

[6] Because the Brokers' causes of action are based on the same purported misrepresentations and suffer from the same defects, the Gardners will address these claims together.

plaintiff asserting fraud against a corporate entity must state the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written."). Additionally, because negligent misrepresentation is a fraud-based claim, the Brokers are required to plead their cause of action against HWP with particularity under NRCP 9(b). *Weingartner*, 702 F.Supp.2d at 1291 (dismissing negligent misrepresentation claim for failure to plead with particularity where "Plaintiffs [made] no claims as to which Defendants made which particular fraudulent or negligent statements at what times or what was fraudulent or negligent about them.").

The Gardners will address each "misrepresentation" identified by the Brokers below.

1. HWP's alleged statements in April 2015 concerning legal compliance and safety guidelines at Cowabunga Bay.

The Brokers originally alleged that "Bliss Sequoia relied on HWP's representations that the waterpark was in compliance with applicable safety codes when it advised HWP that its general liability limits were in line with the size and scope of the park" in July 2014. After the Gardners opposed the Brokers' motion for leave to amend by pointing out that the Brokers could not base their claim on a representation that occurred approximately nine months after the purported reliance, the Brokers changed their allegation to state that "***[d]uring the renewal of HWP's policy***, Bliss Sequoia relied on HWP's representations that the waterpark was in compliance with applicable safety codes when it advised HWP that its general liability limits were in line with the size and

scope of the park." In a sloppy attempt to make the timeline work, the Brokers conveniently altered the allegation to insert the phrase "during the renewal of HWP's policy" (*i.e.*, in Spring 2015) as that event occurred at or about the time of HWP's April 2015 e-mail, but yet they continue to maintain that Mr. Barnwell's purported reliance on the April 2015 e-mail somehow justifies or excuses his negligent advisement of insurance coverage for HWP nearly one year earlier.

The Brokers' ever-evolving misrepresentation claims premised on the April 2015 e-mail clearly fail to state a claim. The allegation in the Brokers' amended counterclaim is contradictory and internally inconsistent because Mr. Barnwell indisputably did ***not*** advise HWP that Cowabunga Bay was "adequately insured" when HWP renewed its insurance policy in 2015. Rather, it is undisputed that Mr. Barnwell gave the negligent advisement of policy limits for HWP in July 2014. The district court was not required to accept as true the Brokers' sham allegation of reliance on the April 2015 e-mail when the averment is demonstrably false, contradictory, and plainly designed to evade dismissal.

Regardless, the addition of the prefatory language "during the renewal of HWP's policy" did not change the Brokers' claim of reliance in any material way. The Brokers' central allegation on the element of reliance continues to be that Mr. Barnwell supposedly relied on these statements when he provided his "professional opinion" on the adequacy of Cowabunga Bay's insurance coverage limits. Because Mr. Barnwell made the recommendation of $5 million in insurance coverage limits for Cowabunga

Bay in July 2014, the Brokers cannot maintain claims for negligent misrepresentation and fraudulent misrepresentation based on statements made nine months later in April 2015. *See Lubbe v. Barba*, 91 Nev. 596, 599, 540 P.2d 115, 117 (1975) (the element of justifiable reliance requires a "causal connection" in that the misrepresentation must play "a material and substantial part in leading the plaintiff to adopt his particular course of conduct.").[7]

2. Statements that safety is a "priority" are not actionable as a matter of law.

In opposing the Brokers' request for leave to amend, the Gardners contended that the Brokers failed to plead their claim with particularity as it related to the alleged statements about safety made by Scott Huish and Shane Huish. Specifically, the Brokers failed to allege when, where and how Scott Huish and Shane Huish made these alleged statements; nor did the Brokers allege that these representations about safety being a "priority" were made in connection with insurance coverage at Cowabunga Bay. Rather, the Brokers seemed to allege that the statements attributed to Scott Huish and Shane Huish concerned "enterprises" associated with their other businesses.

[7] In addition, the representations attributed to HWP in April 2015 were not even directed to Mr. Barnwell. PA 138. Rather, Shane Huish merely forwarded an e-mail in which "someone from corporate" responded to an injured guest named Joanne Soof and made the statement on which the Brokers' misrepresentation claim is based. *Id.* Suffice it to say, the Brokers cannot credibly allege that HWP intended to induce Mr. Barnwell to rely on these statements and Nevada law is clear that "misrepresentations must be made to the plaintiff, not a third-party, to be actionable." *Reed v. Allstate Ins. Co.*, 2016 WL 1558364, *4 n. 1 (D. Nev. Apr. 14, 2016) (citing *Epperson v. Roloff*, 102 Nev. 206, 210-11, 719 P.2d 799, 802 (1986)).

In their amended counterclaim, the Brokers left this allegation materially unchanged despite the Court's instruction to provide more detail. There are simply no particularized allegations concerning the alleged misrepresentations by Shane Huish and Scott Huish about safety being a "priority." The Brokers' repeated failure to plead with particularity and identify the "who, what, when, where and how" related to these alleged misrepresentations is grounds for dismissal with prejudice. *See, e.g.*, *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985) (affirming dismissal of fraud claim where plaintiffs failed to plead with particularity despite having multiple opportunities); *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1108 (9th Cir. 2003) (same).

Irrespective of their failure to plead with particularity, the Brokers cannot allege a viable misrepresentation claim based on alleged statements by Shane Huish and Scott Huish that safety is a "priority." This Court and other courts around the country have held that vague and indefinite statements of opinion will not support a cause of action for negligent or fraudulent misrepresentation. *See, e.g.*, *Clark Sanitation, Inc. v. Sun Valley Disposal Co.*, 87 Nev. 338, 342, 487 P.2d 337, 339 (1971) ("Nevada has recognized that expressions of opinion as distinguished from representations of fact, may not be the predicate for a charge of fraud."); *Spartan Leasing Inc. v. Pollard*, 400 S.E.2d 476, 478-79 (N.C. Ct. App. 1991) ("[T]he fraudulent misrepresentation must be of a subsisting or ascertainable fact [and] must be definite and specific."); *Cadle Co. v. Davis*, 2010 WL 5545389, at *8 (Tex. Ct. App. Dec. 29, 2010) ("Vague representations cannot constitute a material representation actionable under our laws.") (listing cases); *see also*

37 Am. Jur. 2d *Fraud and Deceit* § 245 ("A statement that is vague and indefinite in its nature and terms, or is merely a loose conjectural or exaggerated statement, is not sufficient to support either a fraud or negligent misrepresentation action.").

Here, the alleged statements by Scott and Shane Huish that safety was a "priority" in how they operated their businesses cannot be evaluated by any objective measure. It is a vague, generalized and entirely subjective opinion that will have a different meaning to any listener. For that reason, courts have frequently dismissed fraudulent and negligent misrepresentation claims based on statements concerning safety and whether something is a "priority." *Glen Holly Entm't, Inc. v. Tektronix Inc.*, 343 F.3d 1000, 1015 (9th Cir. 2003) (dismissing negligent misrepresentation claim based on general statements describing the "high priority" placed on product development by the defendant); *see also Cooke v. Allstate Mgmt. Corp.*, 741 F.Supp. 1205, 1215-16 (D. S.C. 1990) (dismissing fraud claim based on representations concerning the "safety" of apartment complex because such statements are "opinion rather than fact" and "[s]afety is a vague term that would not be susceptible of exact knowledge"). Thus, the district court erred by declining to dismiss the Brokers' claims for negligent misrepresentation and fraudulent misrepresentation in their entirety.

V. CONCLUSION

Based on the foregoing, the Gardners respectfully request that this Court grant their Petition for Writ of Mandamus forthwith.

DATED this 11th day of August, 2020

CAMPBELL & WILLIAMS

By: /s/ ***Donald J. Campbell***
DONALD J. CAMPBELL, ESQ. (#1216)
PHILIP R. ERWIN, ESQ., (#11563)
SAMUEL R. MIRKOVICH, ESQ. (#11662)
700 South Seventh Street
Las Vegas, NV 89101

Attorneys for Plaintiffs-Petitioners

VERIFICATION

I, Donald J. Campbell, declare as follows:

1. I am one of the attorneys for Peter and Christian Gardner, on behalf of minor child, Leland Gardner.

2. I verify that I have read and compared the foregoing PETITION FOR WRIT OF MANDAMUS and that the same is true to my own knowledge, except for those matters stated on information and belief, and as to those matters, I believe them to be true.

3. I, as legal counsel, am verifying the Petition because the questions presented are legal issues, which are matters for legal counsel.

4. I declare under the penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

DATED this 11th day of August, 2020

/s/ ***Donald J. Campbell***
Donald J. Campbell, Esq. (#1216)

CERTIFICATE OF COMPLIANCE

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

I further certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the typestyle requirements of NRAP 32(a)(6) as this brief was prepared in a proportionally spaced typeface using Times New Roman 14 pt font. I also certify that this brief complies with the page or type volume limitations of NRAP 21(d) as it contains 7,182 words or 649 lines of text in a monospaced typeface.

Finally, I certify that the Appendix accompanying this brief complies with NRAP 21(4) and NRAP 30 in that the Appendix includes a copy of the District Court's order that is challenged, the pertinent parts of the record before the respondent judge, and the other original documents, which are essential to

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understand the matter set forth in this Petition.

DATED this 11th day of August, 2020

CAMPBELL & WILLIAMS

By: /s/ ***Donald J. Campbell***
DONALD J. CAMPBELL, ESQ. (#1216)
PHILIP R. ERWIN, ESQ., (#11563)
SAMUEL R. MIRKOVICH, ESQ. (#11662)
700 South Seventh Street
Las Vegas, NV 89101

Attorneys for Plaintiffs-Petitioners

CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I hereby certify that, in accordance therewith and on this 11th day of August 2020, I caused true and correct copies of the foregoing Petition for Writ of Mandamus to be delivered to the following counsel and parties:

VIA ELECTRONIC MAIL:

Judge Jerry A. Wiese II
Eighth Judicial District Court of Clark County, Nevada
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89155

VIA ELECTRONIC MAIL:

Mark A. Hutchison, Esq.
Patricia Lee, Esq.
Hutchison & Steffen, PLLC
10080 West Alta Drive, Suite 200
Las Vegas, Nevada 89145

Attorneys for Bliss Sequoia Insurance & Risk Advisors and Huggins Insurance Services, Inc.

Janice Michaels, Esq.
Marian L. Massey, Esq.
Wood Smith Henning & Berman, LLP
2881 Business Part Ct., Suite 200
Las Vegas, Nevada 89128

Attorneys for Fred A. Moreton and Company

Steven Guinn, Esq.
Ryan W. Leary, Esq.
9790 Gateway Dr., Suite 200
Reno, Nevada 89521

Attorneys for Haas & Wilkerson, Inc.

/s/ ***John Y. Chong***
An employee of Campbell & Williams