IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID GARVEY, M.D., an individual.

Petitioner,

vs.

THE FOURTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA ex rel. THE COUNTY OF ELKO, AND THE HONORABLE KRISTIN N. HILL,

Respondent,

and

DIANE SCHWARTZ, individually and as Special Administrator of the Estate of DOUGLAS R. SCHWARTZ, deceased,

Real Party In Interest.

Supreme Court No.

District Court No. : CV-C-17-439

PETITION FOR WRIT OF MANDAMUS

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ROUTING STATEMENT
CASE TO BE RETAINED BY THE SUPREME COURT

This matter is presumptively retained by the Supreme Court pursuant to NRAP 17(a)(12). This petition raises a question of statewide importance for Nevada professional negligence actions.

DATED this 22nd day of September, 2021

LEWIS BRISBOIS BISGAARD & SMITH LLP

By */s/ Keith A. Weaver*

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RELIEF SOUGHT

Petitioner seeks a writ of mandamus pursuant to NRAP 21 and NRS 34.150 et seq. or an alternative writ directing the District Court to vacate its order denying Dr. Garvey's motion for partial summary judgment, vacate its orders denying his motion to strike the plaintiff's declarations and enter a new order granting the motion for partial summary judgment to statutorily limit the damages pursuant to the trauma cap statute, and granting the motions to strike. This memorandum is supported by the memorandum of points and authorities and declaration set forth below, the concurrently filed Appendix, and the records of the District Court.

NRAP 26.1 DISCLOSURE

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

David Garvey, M.D., is represented in the District Court and in this Court by Keith A. Weaver, Esq. and Alissa N. Bestick, Esq., and the law firm of Lewis Brisbois Bisgaard & Smith, LLP. Dr. Garvey is an individual, and thus there is no such corporation for the purposes of NRAP 26.1.

DATED this 22nd day of September, 2021

LEWIS BRISBOIS BISGAARD & SMITH LLP

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INTRODUCTION

David Garvey, M.D., an emergency medicine physician in the emergency department at Northeastern Nevada Regional Hospital in Elko, seeks relief from the denial of his motion for partial summary judgment to statutorily limit the damages pursuant to NRS 41.503 (Nevada's "trauma cap statute.")

Douglas Schwartz was struck by a vehicle as he walked across the street. Mr. Schwartz was thrown over the vehicle. An ambulance transported him to Northeastern Nevada Regional Hospital in Elko, where Dr. Garvey treated him. Dr. Garvey examined Mr. Schwartz, ordered numerous CT scans and lab tests, and determined that given his precarious multi-trauma condition he should be transported to a trauma center for additional treatment, rather than remain at the rural hospital. Unfortunately, as he was being intubated before being transported to the trauma center by air ambulance, Mr. Schwartz vomited, aspirated his stomach contents, and died.

The undisputed facts here demonstrate that Dr. Garvey is entitled to have the damages limited because there are no questions of material fact that the trauma cap statute is applicable to this case. Contrary to the District Court's finding, the decedent suffered a traumatic injury as defined by the criteria set forth in the statute, or "any acute injury which, according to standardized criteria for triage in field" involves a "significant risk of death or precipitations of complications or

disabilities." Field triage is a multi-step decision scheme for determining the transfer of an emergency room patient to the appropriate hospital.[1] Here, the decedent was admitted into the emergency room as an Emergent 2 or ESI Level 2[2] patient. ESI 2 means the patient is at high risk of deterioration. In addition to signs of blunt chest wall trauma, including flail chest, pulmonary contusions and a traumatic pneumothorax, Mr. Schwartz also had fluid leaks in the head and in the abdomen, potential spine pedicle fractures, and other injuries. This is not surprising given that the decedent was hit by a vehicle as he crossed the street.

The District Court did not follow the criteria plainly enumerated in the statute. The District Court instead relied on anecdotal observations by nonexperts--including allegations that the decedent was talking and laughing and that the ambulance driver did not deploy emergency lights and hurry to the hospital.

Respectfully, these lay observations are not a proper substitute for the standardized field triage expressly referenced in the statutory definition of traumatic injury for the purposes of applying the trauma cap statute, NRS 41.503 (4)(b). The lay observations have nothing to do with the severity of Mr.

[1] See Guidelines for Field Triage of Injured Patients, Recommendation and Reports, January 13, 2012, https://www.cdc.gov/mmwr/preview/mmwrhtml/rr6101a1.htm.

[2] "ESI" is the Emergency Severity Index, a triage tool for emergency department care developed by the Agency for Healthcare Research and Quality, one of twelve agencies within the United States Department of Health and Human Services. *See* https://www.ahrq.gov/patient-safety/settings/emergency-dept/esi.html

Schwartz's traumatic injuries for purposes of application of the trauma cap statute. The applicable criteria was published by the American College of Surgeons Committee on Trauma (ACS-COT) in 1986, and further developed over the course of years since then by the ACS-COT in collaboration with the Centers for Disease Control (CDC). A patient's outward appearance observed by a nonexpert cannot and is not an acceptable substitute for the standardized professional criteria for determining if a patient has a traumatic injury.

The District Court also failed to consider facts demonstrating that Mr. Schwartz was at significant risk of dying, or at least that there was a risk of precipitation of medical complications or disabilities. Had the District Court followed the trauma cap statute, it clearly would have found there was no question of material fact and that the trauma cap statute must apply to limit the damages.

Writ relief is therefore warranted to clarify the application of NRS 41.503, and to provide guidance to District Courts as to when courts, not juries must apply the trauma cap statute and how it should be applied. This Court should issue a writ directing the District Court to vacate its order and grant the partial summary judgment motion. Doing so would support the strong public policy in favor of the trauma statute. This petition presents a situation addressing an important question of law warranting immediate review.

For each of the reasons discussed herein, Dr. Garvey requests that this Court issue a peremptory writ of mandate in the first instance or an alternative writ directing the District Court to vacate its order denying Dr. Garvey's motion for partial summary judgment and to enter a new order granting the motion for partial summary judgment to statutorily limit the damages pursuant to the trauma cap statute.

PETITION

A. The parties.

1. Petitioner David Garvey, M.D., is a defendant in an action now pending before the District Court of the State of Nevada, County of Elko, entitled *Diane Schwartz, individually and as Special Administrator of the Estate of Douglas R. Schwartz, deceased v. David Garvey, M.D., an individual, et al*., County of Elko Case No. CV-C-17-439. [Petitioner's Appendix Volume 1, pages 10-11.] At the time of his care and treatment of Mr. Schwartz, Dr. Garvey was an emergency medicine physician at the Northeastern Nevada Regional Hospital in Elko, Nevada. [Petitioner's Appendix Volume 2, pages 65-66.]

2. Respondent, the District Court of the State of Nevada, County of Elko, is now, and at all times mentioned herein has been, exercising judicial functions in connection with this action. [Petitioner's Appendix Volume 1, page 8.]

3. This action is brought by real party in interest/plaintiff Diane Schwartz, individually and as Special Administrator of the Estate of Douglas R. Schwartz, deceased. [*Id*. at pages 10-11.]

B. A driver collides with Douglas Schwartz as he was crossing the street on foot causing multiple traumatic injuries.

4. It is undisputed that fifty-eight year old Mr. Schwartz was crossing the street on foot after dinner when he was hit by a vehicle. [Petitioner's Appendix Volume 3, page 143.] He was thrown over the vehicle and briefly lost consciousness. Mr. Schwartz was admitted to the emergency department of Northeastern Nevada Regional Hospital. [Petitioner's Appendix, Volume 4, page 158.] Dr. Garvey, the attending emergency medicine physician who treated him, ordered CT scans of the head, spine, chest, and abdomen, and laboratory tests. [*Id*. at page 155.] After performing a physical examination and reviewing CT scans, Dr. Garvey diagnosed Mr. Schwartz with multiple right rib fractures with flail segment, right pulmonary contusions, right pneumothorax (collapsed lung), closed head injury with loss of consciousness, hemoperitoneum (blood in the belly area), possible intracranial hematoma, and possible kidney contusion. [*Id*. at page 159; Petitioner's Appendix Volume 5, pages 193, 196, 200-206.]

5. Northeastern Nevada Regional Hospital is a rural hospital with, in Dr. Garvey's view, no trauma surgeons, pulmonologists, or other physicians with the special training, expertise, and resources to render additional treatment and prevent

the further deterioration of Mr. Schwartz's condition. [Petitioner's Appendix Volume 5, pages 198-199, 219.] Dr. Garvey determined that Mr. Schwartz should be transferred to a trauma center by air ambulance for further treatment of his multi-trauma injuries. [*Id*. at pages 197, 203, 215-216.] Dr. Garvey also determined that Mr. Schwartz needed a chest tube inserted prior to the air ambulance flight, as well as intubated because of his respiratory status, and the greatly increased risk of performing such procedures in midflight. [*Id*. at pages 197, 218.] A paramedic for the air ambulance company who had performed over 1,500 intubation procedures attempted to intubate Mr. Schwartz while Dr. Garvey prepared to insert the chest tube. [*Id*. at pages 265, 220-221, 216.] Mr. Schwartz vomited and aspirated food from his stomach. [*Id*. at pages 221-222, 229-232, 276.] The emergency medicine team made multiple attempts to stabilize Mr. Schwartz's airway, but they were not successful. [*Id*. at pages 221-224, 278-285.] Mr. Schwartz died. [*Id*. at page 292.]

C. Plaintiff files a professional negligence and wrongful death action.

6. Mr. Schwartz's wife, Diane Schwartz, filed an action alleging professional negligence, wrongful death, and lack of informed consent. [Petitioner's Appendix Volume 1, pages 10-24.] She attached an affidavit from a physician specializing in emergency medicine, Dr. Kenneth Scissors, who opined as to the standard of care. [*Id*. at pages 27-31.] Ms. Schwartz filed a first

amended complaint omitting the punitive damage allegations. [Petitioner's Appendix Volume 1, page 46.] Ms. Schwartz filed the operative second amended complaint again alleging negligence, wrongful death and lack of informed consent, and again omitting the punitive damage allegations pleaded in the original complaint.[3] [Petitioner's Appendix Volume 2, pages 62-76.] The second amended complaint did not allege gross negligence, bad faith, or reckless, willful or wanton conduct. [*Ibid*.]

7. Dr. Garvey filed an answer to the second amended complaint. [Petitioner's Appendix Volume 13, pages 1121-1130.]

[3] At the time the motion for partial summary judgment was filed, the second amended complaint was the operative complaint. Since then, Plaintiff has filed a third amended complaint, which is the current operative complaint. [Petitioner's Appendix Volume 13, pages 1146-1230.] The third amended complaint does not include a claim for punitive damages as to Dr. Garvey or Northeastern Nevada Regional Hospital. [*Ibid*.] The third amended complaint does not allege that Dr. Garvey's treatment of Mr. Schwartz was grossly negligent, in bad faith, or done with reckless, willful or wanton conduct. Dr. Garvey has filed an answer and affirmative defenses to the third amended complaint. [*Id*. at 1231.] Throughout this brief, where the "operative complaint" is referenced, Dr. Garvey is referring to the second amended complaint, which was the operative complaint at the time the motion for partial summary judgment was filed. In the third amended complaint, Plaintiff added claims against Reach Air, including a claim for punitive damages, which is not relevant to Dr. Garvey's motion for partial summary judgment.

D. After plaintiff amended her complaint multiple times omitting certain allegations, the District Court denies her motion to amend the complaint for a third time with prejudice.

8. The plaintiff sought leave to file a third amended complaint to reinsert the punitive damage claims not just generally but for each cause of action. [Petitioner's Appendix Volume 13, pages 1141-1146.] The District Court denied her motion to amend the complaint to include a claim for punitive damages with prejudice. [*Ibid*.] The second amended complaint with no allegations of gross negligence, bad faith, or reckless, willful or wanton conduct is therefore the operative complaint.

E. Dr. Garvey moves for partial summary judgment to limit the damages pursuant to Nevada's "trauma cap statute"

9. Dr. Garvey moved for partial summary judgment to limit the damages under NRS 41.503, Nevada's "trauma cap statute." [Petitioner's Appendix Volume 3, pages 109-140.] He argued that early resolution of the damage cap issue makes for sound public policy. [*Id*. at pages 127-128.] Dr. Garvey quoted the key provisions of the trauma cap statute including the statutory definition of "traumatic injury," or any acute injury which according to the standardized criteria for triage in the field involves a significant risk of death or precipitation of complications or disabilities. [*Id*. at page 130.]

10. Dr. Garvey asserted that it is undisputed he rendered care and assistance to Mr. Schwartz after he sustained multiple life threatening injuries

which required care at a trauma hospital. [Petitioner's Appendix Volume 3, pages 133-135.] He rendered care and assistance in good faith and without gross negligence, reckless, willful or wanton conduct. He pointed out that Mr. Schwartz's arrival at the hospital in a non-emergent transport mode with a normal heart rate and no signs of respiratory distress and stable vital signs were irrelevant because his injuries alone put him at an increased risk of respiratory failure and an overall risk of deteriorating condition. [*Id*. at pages 133-134.] A patient with flail chest, pulmonary contusions and a traumatic pneumothorax cannot be safely stabilized until conservative management by a trauma surgeon rules out impending or potential respiratory failure, the need for mechanical respiration and the need for surgical rib fracture fixation. Moreover, clinical indications for intubations including the risk of aspiration, low oxygen level, and anticipation of a deteriorating course leading to respiratory failure were present. [*Id*. at page 135.] His abdominal CT scan revealed bleeding of an unknown origin and the CT scan of his head revealed a possible subdural hemorrhage. [*Id*. at page 134.]

11. Dr. Garvey also emphasized that the gross negligence, bad faith, or reckless, willful or wanton conduct exceptions to the statute could not constitute material factual issues to defeat summary judgment because the plaintiff's operative second amended complaint had failed to allege gross negligence, bad faith, or reckless, willful or wanton conduct, and the court had previously denied

with prejudice plaintiff's motion to file a third amended complaint to add a claim for punitive damages against Dr. Garvey. [Petitioner's Appendix Volume 3, pages 130-133.]

12. Dr. Garvey further argued that he rendered care in good faith believing that intubation was medically necessary due to Mr. Schwartz's respiratory status and his need for transfer. [Petitioner's Appendix Volume 3, pages 138-140.] Failing to intubate Mr. Schwartz in the emergency department would have been ill-advised, including because of how extremely difficult it would be to intubate Mr. Schwartz in flight absent the proper staff and all of the necessary equipment had he lost airway on the airplane. [*Id*. at pages 137-139.] The risk of aspiration and the results of low oxygenation also supported the decision to intubate. The decision to have a veteran flight paramedic perform the intubation was also sound and the informed consent given was reasonable under the circumstances. [*Id*. at pages 139-140.]

13. Dr. Garvey filed the declaration of emergency medicine expert David Barcay, M.D., and numerous exhibits in support of his motion.[4] [Petitioner's

[4] In his initial declaration, Dr. Barcay mistakenly referred to the flail chest injury as a "bilateral" flail chest injury, rather than right-sided. Dr. Barcay did not include this error in his declaration that was attached to the reply brief. An errata correcting the mistake was filed before the Court's order denying the Motion for Partial Summary Judgment. In addition, Dr. Garvey disclosed pulmonologist Andrew Wachtel, M.D. as an expert witness. Dr. Wachtel's report inadvertently included a reference to a "bilateral" flail chest injury. Dr. Wachtel testified in his

Appendix Volume 3, pages 113-117.] Dr. Barcay attested that Dr. Garvey determined Mr. Schwartz had to be transferred to a trauma center based upon the multi-trauma injuries. [*Id*. at pages 115-116.] The medical records reviewed by Dr. Barcay indicated that Mr. Schwartz had a flail chest, pulmonary contusions, traumatic pneumothorax and inadequate oxygenation due to being struck by a vehicle. [*Id*. at pages 114-115.] None of these injuries could be treated on an nonemergency basis until conservative management by a trauma surgeon ruled out impending respiratory failure and other life-threatening injuries or complications. [*Id*. at pages 115-116.] Dr. Barcay also opined that Mr. Schwartz's condition could deteriorate precipitously and therefore transport via air ambulance was superior to ground transportation. Intubation before the flight was clearly indicated because Mr. Schwartz would have had even lower oxygen saturation due to the low atmospheric pressure at high altitude on an airplane. [*Id*. at page 116.] The pneumothorax required a thoracostomy (chest tube) before transport because it may expand during flight, thus running a risk of becoming a tension pneumothorax that can result in cardiac arrest.

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deposition that this was an error that was overlooked. Dr. Wachtel's report was not used or cited in support of (or in opposition to), Dr. Garvey's motion for partial summary judgment.

F. The plaintiff's opposition to the motion for partial summary judgment.

14. The plaintiff opposed the motion for partial summary judgment, arguing, that: 1) although Mr. Schwartz did suffer a traumatic injury after being struck by a vehicle, he did not suffer a traumatic injury for the purposes of applying the trauma cap statute; 2) the actions and omissions alleged in the complaint are not related to the original traumatic injury; 3) he was stabilized and capable to receiving treatment as a nonemergency patient; 4) Dr. Garvey did not act in good faith; and 5) triable factual issues precluded summary judgment. [Petitioner's Appendix Volume 6, pages 432-433, 439-448.] According to the plaintiff, Mr. Schwartz's injuries were not an immediate or imminent threat to life. [*Id*. at pages 433-434, 436-437, 440-441.] Plaintiff emphasized that the ambulance transported him to the hospital without using lights and sirens and did not rush. [*Id*. at page 440.] According to the plaintiff and a friend, Mr. Schwartz was talking and joking. The opposition fails to expressly address whether Mr. Schwartz' condition involved precipitation of complications or disabilities. [*Id*. at pages 429-450.]

15. In support of her opposition, plaintiff filed the declaration of her counsel, Shirley Blazich. [Petitioner's Appendix Volume 6, pages 431-432.] She also filed the declaration of Seth Womack, M.D., a new expert. [*Id*. at pages 460-

484.][5] The declaration of Dr. Kenneth Scissors was attached as an exhibit to the opposition. [*Id*. at pages 454-458.]

G. Dr. Garvey's reply to the opposition to the motion for partial summary judgment and motions to strike the plaintiff's supporting declarations.

16. In his reply to plaintiff's opposition to the motion for partial summary judgment, Dr. Garvey pointed out that the operative complaint contained no allegations of gross negligence, bad faith, or reckless, willful or wanton conduct and District Court had previously denied the plaintiff's motion to amend the complaint a third time with prejudice, contrary to the assertions of the plaintiff's counsel. [Petitioner's Appendix Volume 9, pages 770-772.] He also asserted that there were no disputed facts as to the remaining elements of the trauma cap statute. [*Id*. at pages 772-786.]

17. Dr. Garvey also moved to strike the declarations of plaintiff's counsel, Shirley Blazich, and Dr. Seth Womack. [Petitioner's Appendix Volume 9, pages 725-763.] Ms. Blazich erroneously attested that the plaintiff's motion to file a third amended complaint to add a claim for punitive damages against Dr. Garvey was denied without prejudice, when in fact the denial was with prejudice. [Petitioner's Appendix Volume 9, pages 727, 739.] Dr. Womack's declaration included legal conclusions based upon Ms. Blazich's erroneous conclusion

[5] As indicated below, the District Court in denying the motion for partial summary judgment stated that Ms. Blazich's and Dr. Womack's declarations were moot.

concerning the pleading allegations. [Petitioner's Appendix Volume 9, pages 759-760.] His other conclusions were based upon an inaccurate summary of the medical records and deposition testimony. [*Id*. at pages 760-761.] Plaintiff filed opposition papers and Dr. Garvey filed a response. [Petitioner's Appendix Volumes 10-13, pages 806-1100, 1101-1116.]

H. The District Court denies the motion for partial summary judgment.

18. The District Court issued an order denying Dr. Garvey's motion for partial summary judgment. [Petitioner's Appendix Volume 13, pages 1135-1140.] In its order, the District Court quoted the trauma cap statute including the provision defining traumatic injury, and referred to evidence regarding flail chest, vital signs, airway, heart and breathing rates. The court, however, appears to have primarily relied upon the lay witness accounts supplied by the plaintiff that Mr. Schwartz was joking and laughing, and the ambulance did not have its flashing lights on and did not speed to the hospital, as support for its finding of a question of material fact as to whether Mr. Schwartz had suffered a traumatic injury. "There are even contradictory statements as to whether Schwartz was talking and laughing after being admitted to the hospital: Plaintiff contends that she and some members of the NNRH hospital staff saw and heard him doing so, while Defendant's expert, Dr. David Barcay, opines that Schwartz could not possibly have been doing so while

wearing a full-face mask and struggling to breathe from the flail chest injury." [*Id*. at page 1139.]

19. The District Court also ruled that because it was denying the partial summary judgment motion on grounds unrelated to the declarations filed in support of plaintiff's opposition, Dr. Garvey's motions to strike the declarations of Shirley Blazich and Seth Womack were denied as moot. [*Ibid*.]

I. Why extraordinary relief is necessary.

20. Dr. Garvey submits that the District Court's ruling is wrong as a matter of law because it effectively negates the trauma cap statute. The District Court should have granted his motion for partial summary judgment to statutorily limit the damages. Dr. Garvey has no immediate right of appeal from District Court's order, nor has he any plain, expedient or adequate remedy at law, other than the relief requested in this petition. As a result of District Court's error, Dr. Garvey will be improperly exposed to damages in excess of $50,000.00 in contravention of clear Nevada law precluding the same.

PRAYER

Wherefore, petitioner DAVID GARVEY, M.D., prays this Court:

1. Issue a peremptory writ of mandate in the first instance and/or an alternative writ directing the District Court to vacate its orders of June 3, 2021, denying Garvey's motion for partial summary judgment and denying the petitioner's motions to strike the declarations of Shirley Blazich and Seth Womack, and enter a new order granting said motions;

2. Award petitioner his costs in this proceeding; and

3. Grant such other an further relief as may be just and proper.

DATED this 22nd day of September, 2021

LEWIS BRISBOIS BISGAARD & SMITH LLP

By */s/ Keith A. Weaver*

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DECLARATION OF VERIFICATION IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

Keith A. Weaver, Esq., being first duly sworn, deposes and states the following:

1. I am an attorney duly licensed to practice in all courts of the State of Nevada, and am a partner with Lewis Brisbois Bisgaard & Smith LLP, attorneys of record for petitioner herein. I have read the foregoing petition and know its contents. The facts alleged in the petition are true of my own knowledge and I make this Affidavit pursuant to Nev. R. A pages P. 21(a)(5).

2. All documents contained in Petitioner's Appendix, filed herewith, are true and correct copies of the pleadings and documents they are represented to be in the Petitioner's Index and as cited herein.

3. This Petition complies with Nev. R. A pages P. 21(d) and Nev. R. A pages P. 32(c)(2).

FURTHER YOUR DECLARANT SAYETH NAUGHT.

/s/ Keith A. Weaver
KEITH A. WEAVER, ESQ.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Writ Relief Is a Proper Remedy to Immediately Review This Order.

Nevada appellate courts are empowered to grant writ relief when the petitioner lacks a "plain, speedy, and adequate remedy at law." *See, e.g. Beazer Homes Holding Corp. v. Eighth Jud. Dist. Ct*., 128 Nev. 723, 730, 291 P.3d 128 (2012). Whether an appeal is sufficiently adequate and speedy remedy is determined in each particular case by considering a number of factors, "including 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*.

Writ relief is warranted when a legal error significantly affects the course of the litigation and the aggrieved party should not have to wait until final judgment to correct the error. *See, Lund v. Eighth Jud. Dist. Ct*., 127 Nev. 358, 363, 255 P.3d 280 (2011). This petition merits consideration as it raises an important issue concerning Nevada's Professional Negligence Law. *See e.g. Lowe Enters. Residential Partners, L.P. v. Eighth Judicial Dist. Court,* 118 Nev. 92, 97, 40 P.3d 405 (2002); *see also Brice v. Second Judicial Dist.*, No. 56579, 2011 Nev. Unpub. LEXIS 1196 *3 (Nev. Sept. 20, 2011) (unpublished disposition) (Supreme Court grants writ in trauma cap statute case regarding interpretation of the court's order granting a motion for partial summary judgment when court had never considered

it and thus the application of the statute implicates an important issue of law weighing in favor of judicial intervention.)

Here, judicial intervention is needed to clarify this issue of first impression that is of statewide import--the interpretation and application of the trauma cap statute. This writ petition raises a unique and important issue in the area of Nevada Professional Negligence Law:

> In a professional negligence action against an emergency medicine physician may the doctor's motion for partial summary judgment to limit the damages pursuant to Nevada's "trauma cap" statute, NRS 41.503, be properly denied, where the District Court relied on anecdotal accounts by lay witnesses to support a finding of a genuine issue of material fact as to whether the decedent suffered a traumatic injury after he was struck by a vehicle as he crossed the street, instead of the factors in the statutory definition of what constitutes a traumatic injury for the purposes of applying the trauma cap statute?

The answer is "no." NRS 41.503 places reasonable limits on a damage award. Allowing a plaintiff to skirt the statute by applying irrelevant facts is simply wrong.

The undisputed facts here demonstrate that the statute should be applied to limit the damages, if any, recoverable from emergency medicine physician David Garvey, M.D. The District Court failed to adhere to the statutory requirement that a patient be judged to have incurred a traumatic injury for the purposes of the

statute according to the standardized criteria for field triage and factors such as the risk of death or precipitous complications or disabilities. Had it done so, it would have reached the conclusion that the trauma cap statute applies, as a matter of law.

Dr. Garvey respectfully submits that this Court should exercise its discretion to correct the erroneous orders denying the motion for partial summary judgment to limit the damages pursuant to the trauma cap statute, and denying the motions to strike the declarations in support of plaintiff's opposition.

II. Standard of Review.

A motion for summary judgment is reviewed de novo. *Wood v. Safeway*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).

This court independently determines the proper interpretation of a statute; it is not bound by the trial court's interpretation. *Zohar v. Zbiegien*, 130 Nev. 733, 736, 334 P.3d 402, 405 (2014).

A motion to strike a declaration is reviewed according to the abuse of discretion standard of review. *J.P. Morgan Chase Bank, N.A. v. SFR Invs. Pool, LLC*, 475 P.3d 52, 58, 2020 Nev. LEXIS 65 (2020).

III. The District Court Should Have Granted Partial Summary Judgment Because the Plaintiff's Decedent Incurred a Traumatic Injury According to the Statutory Definition of That Term.

Early resolution of the issue of a damage cap is a matter of sound public policy. The Nevada Supreme Court has observed that district courts "must" consider whether speedy resolution of damage limitation issues promotes economy in litigation or "might lead to meaningful pretrial settlement . . . ." *County of Clark ex rel. University Med. Ctr. v. Upchurch by & Through Upchurch*, 114 Nev. 749, 752, 961 P.2d 754 (1998) ("*Upchurch*").

This question can and should be resolved before trial. Summary judgment is an integral part of Nevada rules designed to secure the just, speedy and inexpensive determination of an action lacking genuine issues of material fact. NRCP 56(c); *Wood v. Safeway*, 121 Nev. 724, 730, 121 P.3d 1026, 1030 (2005) (*Wood*). "The substantive law controls which factual disputes are material and will preclude summary judgment; other factual disputes are irrelevant." *Id.* at 731. Once a moving defendant establishes his or her initial burden of showing there is no dispute as to any issue of material fact, the burden shifts to the plaintiff to establish a dispute of material fact actually exists. *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 602, 172 P.3d 131, 134 (2007). A plaintiff may not rest upon general allegations and conclusions, but must set forth specific facts that transcend the pleadings with admissible evidence. *Wood*, 121 Nev. at 731-32, 121

P.3d at 1031 (the non-moving party may not build a case on "the gossamer threads of whimsy, speculation, and conjecture").

The trauma cap statute, NRS 41.503, provides, in relevant part:

> 1. Except as otherwise provided in subsection 2 and NRS 41.504, 41.505 and 41.506:
>
> a. A hospital which has been designated as a center for the treatment of trauma by the Administrator of the Division of Public and Behavioral Health of the Department of Health and Human Services pursuant to NRS 450B.237 and which is a nonprofit organization;
>
> b. A hospital other than a hospital described in paragraph (a);
> ***
> d. **A physician or dentist under the provisions of chapter 630, 631 or 633 of NRS who renders care or assistance in a hospital described in paragraph (a) or (b),** whether or not the care or assistance was rendered gratuitously or for a fee; [ ]
> ***
>
> **That in good faith renders care or assistance necessitated by a traumatic injury demanding immediate medical attention, for which the patient enters the hospital through its emergency room or trauma center, may not be held liable for more than $50,000 in civil damages**, exclusive of interest computed from the date of judgment, to or for the benefit of any claimant arising out of any act or omission in rendering that care or assistance **if the care or assistance is rendered in good faith and in a manner not amounting to gross negligence or reckless, willful or wanton conduct**.
>
> "Traumatic injury" is defined as follows:
>
> ***(a) "'Traumatic injury' means any acute injury which, according to standardized criteria for triage in the field, involves a significant risk of death or the precipitation of complications or disabilities."***

NRS 41.503 (emphasis added).

Partial summary judgment is entirely appropriate here to resolve the question whether the state's trauma cap statute limits civil damages to $50,000.

Other states have enacted statutes similar or analogous to NRS 41.503. In Georgia, for example, the burden of proof for a plaintiff in a professional negligence case against a provider of emergency care with symptoms of a traumatic condition objectively confirmed to require immediate medical attention must meet a heightened burden of establishing clear and convincing evidence of gross negligence, not merely the preponderance of evidence standard of demonstrating ordinary negligence. *See Nguyen v. Southwestern Emergency Physicians, P.C.*, 298 Ga. 75, 79-80, 779 S.E.2d 334 (2015).

Here, Mr. Schwartz undisputedly suffered traumatic injuries. The record is undisputed that Mr. Schwartz was struck by a vehicle as he crossed the street and was thrown over the vehicle, causing him to lose consciousness. This alone presented sufficient grounds to transfer Mr. Schwartz to a trauma center. ACS-COT, a panel of medical professionals, developed the field triage guidelines after taking into account the mechanics of an injury including the significantly increased likelihood of a serious injury following an auto versus pedestrian accident. Similarly, the Emergency Severity Index (ESI), a five level triage algorithm expressly identifies a pedestrian stuck by a vehicle as a ESI Level 2 situation where the patient is at high risk of injury. See

https://www.ahrq.gov/sites/default/files/wysiwyg/professionals/systems/hospital/esi/esihandbk.pdf. at p. 20. "Traumatic events may involve high-risk injures that may not be immediately obvious. Any mechanism of injury associated with a high risk of injury should be categorized as ESI Level 2." *Id*. at p. 21. Indeed, Mr. Schwartz suffered multiple serious and potentially life-threatening injuries such as a partially collapsed lung (traumatic pneumothorax), pulmonary contusions, blunt chest wall trauma with multiple fractured ribs and flail chest, fluid in the brain that could have been blood, fluid in the abdomen that could also have been blood, and spine pedicle. Each of these injuries alone, much less all of them combined, lead to the inescapable conclusion that Mr. Schwartz suffered serious and potentially life-threatening injuries. Moreover, the existence of such serious injuries in multiple organ systems compounded the potential for precipitation of additional complications and adverse events.

Instead of adhering to the statute, the District Court erroneously accepted the plaintiff's invitation to focus on irrelevant facts concerning the lack of ambulance lights and sirens, speed of the ambulance, and Mr. Schwartz's supposedly joking demeanor. None of these things, however, is relevant to the statutory criteria for the definition of a traumatic injury. Lay accounts about Mr. Schwartz's external demeanor or transport to the rural hospital cannot serve as a proper substitute for the guidelines referenced in the statute. If this was true, then

there arguably would not even be a need to perform any examination much less medical scans or lab work. There would also be no need for standardized guidelines for field triage. As explained above, Mr. Schwartz suffered multiple traumatic injuries to multiple organ systems, which are supported by the medical record. Given Mr. Schwartz's precarious state, where any one of multiple things could lead to a rapid downwardly deadly spiral, Dr. Garvey cannot and should not be denied the application of the trauma cap statute.

The District Court therefore erred by finding there is a question of fact as to whether Mr. Schwartz suffered a traumatic injury sufficient to defeat Dr. Garvey's motion for partial summary judgment. As explained below, the trauma cap statute applies as a matter of law because none of the statutory exceptions apply to this case.

IV. None of the Exceptions to the Trauma Cap Statute Apply to Preclude Partial Summary Judgment.

The statutory cap on damages does not apply once a patient is "stabilized" or if treatment is unrelated to the original traumatic injury:

> 2. The limitation on liability provided pursuant to this section does not apply to any act or omission in rendering care or assistance:
>
> a. Which occurs **after the patient is stabilized and is capable of receiving medical treatment as a nonemergency patient**, unless surgery is required as a result of the emergency within a reasonable time after the patient is stabilized, in which case the limitation on liability provided by subsection 1 applies to any act or omission in rendering care or assistance which occurs

> before the stabilization of the patient following surgery; or
>
> b. Unrelated to the original traumatic injury

The statute defines "reckless, willful or wanton conduct" as follows:

> 4. For the purpose of this section:
>
> (a) "Reckless, willful or wanton conduct," as it applies to a person whom subsection 1 applies, shall be deemed to be that conduct which the person knew or should have known at the time the person rendered the care or assistance would be likely to result in injury so as to affect the life or health of another person, taking into consideration to the extent applicable:
>
> 1. The extent or serious nature of the prevailing circumstances;
> 2. The lack of time or ability to obtain appropriate consultation;
>
> 3. The lack of prior medical relationship with the patient;
>
> 4. The inability to obtain an appropriate medical history of the patient; and
>
> 5. The time constraints imposed by coexisting emergencies.

None of the exceptions to the trauma cap statute applies to this action. First, the need to transfer Mr. Schwartz from a rural hospital to a trauma center with medical specialists on hand to render further treatment is obvious. The plaintiff's assertions that he could somehow remain at the rural hospital and be treated as a non-emergent patient is inaccurate and contrary to the medical record and even to some degree Mr. Schwartz's own experts. The argument that Mr. Schwartz was first traumatically injured by the accident, became stabilized, and then suffered a separate injury from intubation is simply wrong. The need for

intubation was due to his continued respiratory decline from the time Mr. Schwartz was admitted to the emergency department to the time that intubation was performed, as well as the need to intubate Mr. Schwartz before he was transferred. The very need for intubation and the very real risk of precipitous decline and further complications and even death was caused by the traumatic injuries from the accident. *See Campbell v. Pompa*, 585 S.W.3d 56 (Tex. A pages 2019) (Court rejects plaintiff's argument that after being triaged she stabilized at some point before the doctor treated her, stating "[w]e decline to slice the encounter so finely.")

The plaintiff cannot validly maintain that a statutory exception applies because Dr. Garvey's care and treatment of Mr. Schwartz was grossly negligent, in bad faith or done with willful or wanton conduct, where the plaintiff failed to allege gross negligence, bad faith, or reckless, willful or wanton conduct in the operative second amended complaint and the District Court has previously denied her motion to file a third amended complaint with prejudice.

A motion for summary judgment is grounded in an analysis of the pleadings. If a factual issue is not alleged in the pleadings, it cannot become a material fact for purposes of summary judgment simply by raising it in the opposition. Summary judgment cannot be based upon unpled claims that do not give a defendant fair notice of what the plaintiff's claim is and the ground upon

which it rests. *Young v. Mercury Cas. Co.,* No. 2:12-cv-00091-RFB-GWF, 2016 U.S. Dist. LEXIS 100227 *13 (D. Nev. July 29, 2016) (unpublished disposition). Thus, a plaintiff may not raise an unpled issue for the first time in opposition to a summary judgment. *Hasan v. E. Wash. State Univ.*, 485 Fed. Appx. 168, 170-171 (9th Cir. 2012.).

Dr. Garvey's motion sought an order limiting damages to a maximum of $50,000 based on NRS 41.503. An exception to the statute is conduct that is grossly negligent, in bad faith, or reckless, willful and wanton. Those allegations are missing from the second amended complaint, since plaintiff only alleged ordinary negligence. Further, the supporting affidavit of Dr. Scissors only asserts an alleged breach of the standard of care based on ordinary negligence. Plaintiff is bound by her current pleading, alleging ordinary negligence *only* (as to Dr. Garvey).

Marshall v. Eighth Judicial Dist. Court, 108 Nev. 459, 461, 836 P.2d 47, 49 (1992) illustrates how the failure to plead bad faith precludes consideration of the issue on summary judgment. In *Marshall,* the police responded to a potentially life-threatening situation involving a mentally ill person. The trial court found that the police officers and the city were entitled to statutory immunity under NRS 433A.740, which affords immunity "unless it is shown that such officer or employee acted maliciously or in bad faith or that his negligence resulted in bodily

harm to such person." *Id.* at 465, 836 P.2d at 51. Since the complaint did not allege bad faith, malice or negligence causing bodily harm, this Court held that summary judgment in favor of the city and its police officers was proper. *Id.* at 466, 836 P.2d at 52.

The same situation arises here. Under the trauma cap statute, Dr. Garvey is entitled to invoke the legislatively decreed damages cap because plaintiff failed to plead gross negligence, bad faith, or reckless, willful or wanton conduct. Since gross negligence, bad faith, or reckless, willful or wanton conduct are not material issues for purposes of the instant motion, the damage cap should apply as a matter of law under *Marshall*.

Dr. Garvey moved to strike the declarations filed with plaintiff's opposition papers concerning purported gross negligence, bad faith, and reckless, willful and wanton conduct, because they were based on unpleaded allegations. Under NRCP 56(e), the court may consider the fact to be undisputed or it may grant a summary judgment motion if the moving papers including facts considered undisputed show that summary judgment is warranted.

Dr. Womack's declaration in particular, included multiple legal conclusions lacking any foundation because plaintiff's operative second amended complaint contained no such allegations and the District Court has denied plaintiff's motion to file a third amended complaint to add a claim for punitive

damages against Dr. Garvey with prejudice. His other conclusions were based upon an incomplete and inaccurate consideration of the medical records. The District Court denied the motions to strike as moot, because it found there was a question of fact as to whether Mr. Schwartz had suffered a traumatic injury, without relying on the declarations. As explained above, the District Court's conclusion that there was a question of fact was erroneous. The denials of the motions to strike were also erroneous. The motions to strike should have been granted. The District Court exercised no discretion whatsoever as it merely denied the motions to strike as moot.

As explained above, there is no evidence of negligence, much less gross negligence, bad faith, or reckless, willful or wanton conduct. Dr. Garvey properly treated Mr. Schwartz in good faith, based upon the undisputed evidence of traumatic injuries from being struck by a vehicle. Thus, even assuming arguendo, however, that this Court is inclined to consider the declarations, Dr. Garvey's motion for partial summary judgment to statutorily limit the damages must still be granted because the plaintiff's evidence fails to support the inescapable conclusion that Mr. Schwartz suffered a traumatic injury and none of the exceptions to the trauma cap statute apply here.

CONCLUSION.

For all of the foregoing reasons, the Court is urged to grant this petition.

DATED this 22nd day of September, 2021

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or imposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular Nev. R. A pages P. 28(e), which requires every assertion in the brief regarding matters in the record be supported by reference to the page or transcript or appendix where the matter relied upon is found. In addition, I certify that this brief satisfied Nev. R. A pages P. 32 with an approximate word count of 6,611. In addition, I certify that this brief complies with the typeface and type style requirements of Rule 32(a)(4)-(6), using 14 font and Times New Roman style and complies with the page limitations. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirement of the Nevada Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of September, 2021, I served the foregoing **PETITION FOR WRIT OF MANDAMUS** via electronic mail to all parties on the current service list:

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I did cause a true and correct copy of **APPENDIX OF EXHIBITS IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS** to be placed in the United States Mail, with first class postage prepaid thereon, and addressed as follows:

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