**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



# APPENDIX OF EXHIBITS TO PETITION FOR WRIT OF MANDAMUS – VOLUME 5 OF 13

**[VOLUME 1 (PAGES 1-54)]; [VOLUME 2 (PAGES 55-101)]; [VOLUME 3 (PAGES 102-143)]; [VOLUME 4 (PAGES 144-174)]; [VOLUME 5 (PAGES 175-412)]; [VOLUME 6 (PAGES 413-508)]; [VOLUME 7 (PAGES 509-568)]; [VOLUME 8 (PAGES 569-717)]; [VOLUME 9 (PAGES 718-798)]; [VOLUME 10 (PAGES 799-866)]; [VOLUME 11 (PAGES 867-959)]; [VOLUME 12 (PAGES 960-1093)]; [VOLUME 13 (PAGES 1094-1246)]**

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## CHRONOLOGICAL INDEX

| Number | Document | Filing Date | Volume | Page |
|---|---|---|---|---|
| 1 | Summons | 06/22/2017 | 1 | 8 |
| 2 | Plaintiff's Complaint | 06/22/2017 | 1 | 10 |
| 3 | Acceptance of Summons and Complaint | 07/13/2017 | 1 | 32 |
| 4 | Plaintiff's Amended Complaint | 10/20/2017 | 1 | 33 |
| 5 | Plaintiff's Second Amended Complaint (Medical Malpractice and Wrongful Death) | 02/12/2018 | 2 | 62 |
| 6 | Errata to Plaintiffs Complaint Amended Complaint and Second Amended Complaint | 09/10/2018 | 2 | 84 |
| 7 | Notice of Entry of Order Denying Plaintiff's Motion for Leave to Amend Complaint (erroneously titled order denying plaintiff's motion to dismiss) | 10/28/2019 | 2 | 91 |
| 8 | Defendant David Garvey, M.D.'s Motion for Partial Summary Judgment to Statutorily Limit Damages | 07/27/2020 | 3<br>4<br>5 | 109<br>151<br>182 |
| 9 | Defendant David Garvey MD;s Errata to Motion for Partial Summary Judgment | 08/06/2020 | 6 | 420 |
| 10 | Plaintiffs' Opposition to Defendant David Garvey M.D.'s Motion for Partial Summary Judgment to Statutorily Limit Damages, and All Joinders Thereto | 08/18/2020 | 6<br>7<br>8 | 430<br>516<br>679 |
| 11 | Defendant David Garvey, M.D.'s Motion to Strike the Declaration of Shirley Blazich, Esq. | 09/08/2020 | 9 | 725 |

| Number | Document | Filing Date | Volume | Page |
|---|---|---|---|---|
| 12 | Defendant David Garvey, M.D.'s Motion to Strike the Declaration of Seth Womack, M.D. | 09/08/2020 | 9 | 757 |
| 13 | Defendant David Garvey, M.D.'s Reply in Support of Motion For Partial Summary Judgment to Statutorily Limit Damages | 09/08/2020 | 9 | 765 |
| 14 | Plaintiffs' Opposition to:<br><br>(1) Defendant David Garvey M.D.'s Motion To Strike The Declaration Of Shirley Blazich, Esq., And (2) Defendant David Garvey M.D.'s;<br><br>(2) Motion To Strike The Declaration Of Seth Womack, M.D., and Any Joinders Thereto And Plaintiff's Countermotion<br><br>(3) For Leave to Amend the Complaint | 09/11/2020 | 10<br>11<br>12 | 806<br>874<br>1055 |
| 15 | Defendant David Garvey, M.D.'s Response to Plaintiff's Improper Surreply To Partial Summary Judgment Motion and Request that the Court Disregard Plaintiff's Mislabeled and Untimely Motion For Reconsideration of this Court's October 16, 2019 Order Denying Leave to Amend With Prejudice | 09/21/2020 | 13 | 1101 |
| 16 | Defendant David Garvey, M.D.'s Errata to Motion for Partial Summary Judgment | 04/19/2021 | 13 | 1117 |
| 17 | Defendant David Garvey, M.D.'s Answer to Plaintiff's Second Amended Complaint | 04/23/2021 | 13 | 1121 |
| 18 | Order Granting Plaintiff's Motion for Leave to Amend Complaint | 05/06/2021 | 13 | 1131 |

| Number | Document | Filing Date | Volume | Page |
|---|---|---|---|---|
| 19 | Order Denying:<br><br>1. Defendant Phc-Elko, Inc. dba Northeastern Nevada Regional Hospital's Motion that All of Plaintiff's Claims Against Northeastern Nevada Regional Hospital Are Subject to the Requirements And Limitations of NRS 41.503 (The "Trauma" Statute)<br>(Filed July 6,2020);<br><br>2. Defendant David Garvey, M.D.'s Motion for Partial Summary Judgment to Statutorily Limit Damages (Filed July 27,2021);<br><br>3. Defendant David Garvey, M.D.'s Motion to Strike the Declaration of Seth Womack, M.D.; and<br><br>4. Defendant David Garvey, M.D.'s Motion to Strike the Declaration of Shirley Blazich,Esq. | 06/03/2021 | 13 | 1135 |
| 20 | Order Denying Plaintiff's Countermotion for Leave to Amend Complaint | 06/03/2021 | 13 | 1141 |
| 21 | Third Amended Complaint (Medical Malpractice and Wrongful Death) | 06/28/2021 | 13 | 1147 |
| 22 | Defendant David Garvey, M.D.'s Answer To Third Amended Complaint | 07/16/2021 | 13 | 1231 |

## ALPHABETICAL INDEX

| Number | Document | Filing Date | Volume | Page |
|---|---|---|---|---|
| 17 | Defendant David Garvey, M.D.'s Answer to Plaintiff's Second Amended Complaint | 04/23/2021 | 13 | 1121 |
| 6 | Errata to Plaintiffs Complaint Amended Complaint and Second Amended Complaint | 09/10/2018 | 2 | 84 |
| 7 | Notice of Entry of Order Denying Plaintiff's Motion for Leave to Amend Complaint (erroneously titled order denying plaintiff's motion to dismiss) | 10/28/2019 | 2 | 91 |
| 20 | Order Denying Plaintiff's Countermotion for Leave to Amend Complaint | 06/03/2021 | 13 | 1141 |
| 19 | Order Denying:<br><br>1. Defendant Phc-Elko, Inc. dba Northeastern Nevada Regional Hospital's Motion that All of Plaintiff's Claims Against Northeastern Nevada Regional Hospital Are Subject to the Requirements And Limitations of NRS 41.503 (The "Trauma" Statute)<br>(Filed July 6,2020);<br><br>2. Defendant David Garvey, M.D.'s Motion for Partial Summary Judgment to Statutorily Limit Damages (Filed July 27,2021);<br><br>3. Defendant David Garvey, M.D.'s Motion to Strike the Declaration of Seth Womack, M.D.; and<br><br>4. Defendant David Garvey, M.D.'s Motion to Strike the Declaration of Shirley Blazich,Esq. | 06/03/2021 | 13 | 1135 |
| 18 | Order Granting Plaintiff's Motion for Leave to Amend Complaint | 05/06/2021 | 13 | 1131 |

| Number | Document | Filing Date | Volume | Page |
|---|---|---|---|---|
| 4 | Plaintiff's Amended Complaint | 10/20/2017 | 1 | 33 |
| 2 | Plaintiff's Complaint | 06/22/2017 | 1 | 10 |
| 5 | Plaintiff's Second Amended Complaint (Medical Malpractice and Wrongful Death) | 02/12/2018 | 2 | 62 |
| 14 | Plaintiffs' Opposition to:<br><br>(4) Defendant David Garvey M.D.'s Motion To Strike The Declaration Of Shirley Blazich, Esq., And (2) Defendant David Garvey M.D.'s;<br><br>(5) Motion To Strike The Declaration Of Seth Womack, M.D., and Any Joinders Thereto And Plaintiff's Countermotion<br><br>(6) For Leave to Amend the Complaint | 09/11/2020 | 10<br>11<br>12 | 806<br>874<br>1055 |
| 10 | Plaintiffs' Opposition to Defendant David Garvey M.D.'s Motion for Partial Summary Judgment to Statutorily Limit Damages, and All Joinders Thereto | 08/18/2020 | 6<br>7<br>8 | 430<br>516<br>679 |
| 1 | Summons | 06/22/2017 | 1 | 8 |
| 21 | Third Amended Complaint (Medical Malpractice and Wrongful Death) | 06/28/2021 | 13 | 1147 |

# EXHIBIT C

IN THE FOURTH JUDICIAL DISTRICT COURT OF THE

STATE OF NEVADA, IN AND FOR THE COUNTY OF ELKO

| | |
|---|---|
| DIANE SCHWARTZ, individual and as Special Administrator of the Estate of DOUGLAS R. SCHWARTZ, deceased,<br><br>Plaintiff,<br><br>vs.<br><br>DAVID GARVEY, M.D., an individual; BARRY BARTLETT, an individual (Formerly Identified as BARRY RN); CRUM, STEFANKO & JONES LTD., dba Ruby Crest Emergency Medicine; PHC-ELKO INC. dba NORTHEASTERN NEVADA REGIONAL HOSPITAL, a domestic corporation duly authorized to conduct business in the State of Nevada; REACH AIR MEDICAL SERVICES, L.L.C.; DOES I through X; ROE BUSINESS ENTITIES XI through XX, inclusive,<br><br>Defendants. | Case No. CV-C-17-439<br>Dept. No. 1 |

DEPOSITION OF DAVID JAMES GARVEY, M.D.

Taken on Tuesday, June 25, 2019

At 10:17 a.m.

At 6385 South Rainbow Boulevard, Suite 600

Las Vegas, Nevada

Reported By:
Vicki Chelst Turner, CCR 375, RMR, CRR, CRC

and rules and regulations of the hospital and everything when I started my employment there and credentials.

Q (BY MS. MORALES) Well, that's a little different.

Did -- did you -- what I'm asking is a little more specific as far as clinical pathways or policies and procedures regarding medical care and treatment that you would be rendering to patients in the emergency room at Northeastern Hospital.

A There are certain clinical pathways that are posted for various illnesses and that -- that occasionally get updated and -- and distributed.

Q Did you receive those at the time that you began working at Northeastern Nevada Regional Hospital?

A I'm not sure when I received them, but I know that there are certain clinical pathways that are posted every once in a while.

Q And when you say "posted," where are they posted?

A Either in the physician room or in the hallway with the nurses where -- or where the physicians were stationed so they can be seen.

Q Are they posted just like as a piece of

paper or --

A Usually, yes.

Q Have you -- besides those pieces of paper that are posted, do you -- have you been asked to review any kind of binders that are policies and procedures that the hospital wants the physicians holding privileges to follow?

MS. RIES-BUNTAIN: Objection. Form.

THE WITNESS: Again, when I first started, I'm sure that I read through the policies and procedures of the hospital.

Q (BY MS. MORALES) Well, and -- and I think we're talking about two different things. So there's the bylaws; right? And the rules and regulations for working as a physician. But I'm talking about actual policies and procedures pertaining to medical care of patients.

A I don't recall if there's anything specific called policies and procedures other than what -- like rules and regulations and guidelines.

Q And when you say "guidelines," what guidelines were you provided?

A Again, I don't know anything specific that I -- that I can think of, but -- other than, again, what's posted, care plans and sepsis protocols and

things like that.

Q Since you've worked at the hospital for the last eight years, have you been asked to attend any type of educational meetings pertaining to clinical pathways, policies and procedures pertaining to medical care?

A By the hospital?

Q By the hospital.

A By the hospital, no.

Q Have you ever had your privileges -- have you ever had your privileges suspended?

A No.

Q Or terminated at any facility?

A No.

Q What about your medical license? Have you ever had any reprimands?

A No.

Q When you work in the emergency room at Northeastern Nevada Regional Hospital, do you wear a white coat?

A No.

Q What do you wear?

A Scrubs.

Q And does the scrubs have any identifying information on it?

Q Okay. And then it says "Exam." So that's ROS and then "Exam." And I don't want to have to go through each line again, but we can go through -- that's at 21:20. So that's only a couple minutes later.

And if you go to page 4 --

A Those times are when it was put in the computer, not the times that it was done.

MR. WEAVER: Let her ask you the question.

THE WITNESS: Okay.

Q (BY MS. MORALES) Okay. So this is -- this 21:20 was the time that it was entered?

A Yes.

Q Okay. How do we know the exact time that the -- like the examination, for instance, took place of Mr. Schwartz?

A You have to peruse the rest of the record. But the initial evaluation occurred on his arrival of just after 20:51. I think I was there at the time, and that's when all that initially occurred.

Q Okay. So at the beginning of your deposition when I asked you if there were any changes or any inaccuracies in the records, you had indicated the timing on some of these.

A Oh, that's -- that --

Q Is that what you're talking about?
A Those are some of the things I'm talking about. The times were the times they were inputted in the computer, not the times they were done.
Q Okay. So to the best of your recollection, you would believe that the exam would have been done at or around 20:51?
A It was done at or about 20:51.
Q Okay. When you go into the computer system -- you said you have a scribe.
So does the scribe actually enter it for you? Like, you write it on -- on something, and then it's entered by someone else?
A No. The scribe watches the interaction, listens to the answers to the questions, and -- or puts down what I tell them I found on the exam.
Q Okay. So they're actually sitting with you.
A They are there the whole time.
Q So at -- at least what's documented as 21:20, the respiratory -- well, it says cardiovascular rate normal, rhythm regular. Respiratory, the patient does not display signs of respiratory distress. Respirations are normal. Breathing sounds are normal and clear throughout.
Is that correct?

A Pretty much a full trauma workup based on the seriousness of his -- the potential injuries. He had CTs of almost his entire body.

Q Okay. Did you get any details besides -- I think it talked about the rate of speed pertaining to Mr. Schwartz's accident?

A I just remember the paramedics saying that he was -- he went over the car and landed on the pavement, and it was about ten feet from the actual place where the accident occurred.

Q Okay. So at the time -- after this initial evaluation, had you made a determination at that point whether or not you were going to transfer Mr. Schwartz to another facility?

A No, not at that time.

Q Okay. And so you just indicated that you pretty much ordered every CT available; correct?

A Pretty much.

Q And any other tests that you ordered?

A Lab. Routine trauma lab tests. Blood tests and urine.

Q Let me ask you this. At the time that Mr. Schwartz presented to the emergency room, was he already on oxygen?

A Yes.

Q And the EMTs, the -- the paramedics had indicated that was for precautionary measure; correct?

MR. WEAVER: Object as to form.

THE WITNESS: No. I don't remember them indicating anything precautionary. They typically would put -- put a patient on oxygen en route, especially with chest trauma.

Q (BY MS. MORALES) And so at the time that he presented to the hospital, he still had on a nasal cannula; is that correct?

A He still had the nasal cannula from EMS, yes.

Q Do you recall at what point you met Ms. Schwartz? Was it upon the -- before or after your initial evaluation of Mr. Schwartz?

A It was probably -- again, it was -- she probably was not there when he first arrived. That was EMS, and we usually let family come in after the initial assessment. So it was probably after the initial assessment.

Q Okay. And do you have an independent recollection of Ms. Schwartz?

A Yes. I mean not specifics, but yes.

Q Had you ever met her prior to that day?

A No.

A It usually lasts two to four hours.
Q And Mr. Schwartz was also given Dilaudid en route; is that correct?
A I think Fentanyl. Maybe Dilaudid, but I thought it was Fentanyl. I'd have to look at the EMS record.
I thought the record said Fentanyl and Zofran, but maybe it was Dilaudid and Zofran. They're fairly equivalent.
Q So do you have any independent recollections of your initial discussions with Ms. Schwartz?
A Initial discussions, no.
Q Okay. So -- and I kind of want to break it into time frames to make it a little easier.
So before Mr. Schwartz went in for the radiology testing, do you remember any specific discussions that you had with Ms. Schwartz during that period of time?
A Before he went in, no.
Q Okay. Do you have any independent recollection of there being other friends in the room with Mr. Schwartz prior to him going in for CT scan?
A Prior to him going in to CT scan, I -- prior. So that was about a half hour worth of time. I don't -- I don't recall who all was in the room

prior to him going. There was probably about a half hour there, and I -- I'm not sure who was there before he left for the CT scanner.

Q Okay. So he goes for the CT, for the radiology studies.

Had you -- before he went for that testing, had -- had you made any determinations of whether or not he was going to get transferred?

A No. I already said no.

Q Okay. So after Mr. Schwartz gets back from the radiology testing, did you already have the lab work done back by then?

A Yes.

Q Okay. And what were the results of the lab work?

A Most of the labs were pretty normal, except there was some blood in his urine, which could indicate a kidney injury. But most of his hemoglobin and everything, other -- other things that we'd look at were pretty normal. I don't know what page that's on.

Q Page 13 I think.

A Where's the pages?

MR. WEAVER: Right there.

MS. MORALES: Thirteen and 14.

THE WITNESS: There on the bottom. I got it.
MR. WEAVER: It's confusing.
I'm sorry, Jenn, what was the question?
MS. MORALES: Oh, so I was letting him look at it.
Q So everything was pretty normal?
A Pretty normal. We looked at mainly the hemoglobin, the hematocrit. We looked at amylase to make sure there's no pancreatic injuries, and then usually the urine. But he did have blood in his urine. He's got three plus hemoglobin and 20 to 30 microscopic hematuria in the blood.
Q All right. And you said that could be indication of a kidney --
A Kidney or bladder injury, yes.
Q Is it consistent with anything else besides those two things? What's in your differential diagnosis when you see that?
A Well, unless he has some kind of kidney condition, which he's not supposed to have with his past medical history, it would probably more than likely be a result of the trauma. So probably a kidney contusion would be the most likely since most of his injury was the right flank.
Q Okay. So besides that, besides the

kidney -- potential kidney or bladder issue, there was nothing else --

A Nothing else remarkable, no.

Q So after you got the lab work back, did you make any additional orders?

A Probably not, no.

Q Okay. And after you saw the lab work, did you make a determination whether or not you were going to transfer the patient --

A No.

Q -- to --

MR. WEAVER: Wait till she's finished the question before you answer.

Q (BY MS. MORALES) -- if you're going to transfer the patient out?

A No, I did not.

Q Okay. The radiology studies, in between getting the lab work and the radiology studies, did Mr. Schwartz physically remain stable for evaluation? Did you check on him in between that period of time?

A Between what time?

Q The time you got the lab results back and the time before you got the radiology results.

A Yes. Usually there's communication between the lab -- the radiology tech, the nurse, and myself.

A It's a radiologist.
Q Oh, it is a radiologist. Okay.
A It's a service provided.
Q So they're not on site. They're sending the films out to be read.
A Sending them out electronically to be read. They're usually done in bulk after they're all done.
Q And when you have a -- a trauma patient, is that something that comes back on a more expedited basis?
A We try to get everything back, especially for trauma, STAT, at which --
Q Is that how these were ordered, STAT?
A Always, yes.
Q And do you have an independent recollection if you had to go down to the radiology department or if the technician from Night Hawk called you?
A Oh, the technician from Night Hawk called me. But I also viewed the -- the -- the -- I -- I look at all the radiographs myself.
Q Okay. And do you look at them while you're talking to the radiologist, or do you get the radiologist's opinion and then look at them? What's your custom and practice?
A I will usually look at them immediately

after they are done and then make my opinion. If I see something that I can interpret, sometimes I will make a decision based on that. Otherwise, I will usually wait for the official radiology report to decide how I'm going to proceed.

Q Okay. And in this specific case, did you review all the films?

A Yes. I always review all the films.

Q And did you have any specific concerns with the films that you reviewed?

MR. WEAVER: Just let me object as to the phrase "specific concerns."

But go ahead.

You mean the quality or what's on them?

Q (BY MS. MORALES) Yeah, what you -- the findings.

A The main thing that I did see when I reviewed the films was a pneumothorax and injury to the right lung. And at that point in time, just based on that finding, I knew the patient was going to need transfer.

Q So was that -- the pneumothorax after you reviewed the film, did you discuss that in any more detail with the radiologist to determine the size of the pneumothorax?

A No. The radiologist after -- when they read it would have called me and told me their opinion on any -- any of the readings of the film.

When I looked at it, I can determine the size. And -- and being a traumatic pneumothorax, that's -- that's significant, and I know -- knew the patient was going to be needing to be transferred to a trauma center.

Q Okay. And can you explain for the jury what a pneumothorax is.

A A collapsed lung.

Q And it means when there's -- does it mean when there's like a pocket of air around the lung?

A A traumatic pneumothorax usually means that something penetrated the lung and caused it to collapse.

Q And is there a difference as far as the sizes -- the size of the pneumothorax as -- as far as urgency is concerned?

A Not necessarily.

Q Can a pneumothorax of ten percent or less resolve on its own?

A Usually not a traumatic pneumothorax. A spontaneous, yes, but not a traumatic. Almost always requires a chest tube.

be able to determine it with the computer-generated images that they get. They might be able to be closer than my guesstimate, but that's probably about right.

Q So if I understand you correctly, the fact that he had a traumatically-induced pneumothorax, regardless if it was five, six, seven, even 15 percent, you would have transferred him to a different facility?

A Yes.

Q And is that for observation purposes?

A No. It would be for continued treatment. He's going to have a chest tube in, and it will probably be three to five days before he gets that pulled out. So he will be under the care of a trauma surgeon and the trauma team until that -- if that is his only injury.

Q And are there any trauma surgeons available at -- in Elko, at the Elko hospital?

A No, there are not.

Q Can a regular -- like a pulmonologist or a regular general surgeon take care of pneumothoraxes?

A They can take care of pneumothoraxes --

Q Pneumothoraxes. Sorry.

A Pneumothoraxes. But I would not give them traumatic pneumothoraxes to take care of. That's why

we have trauma centers.

Q And do you have general surgeons and pulmonologists that contract out of Elko hospital?

A We have no pulmonologists, and we don't have any trauma surgeons that contract out of Elko.

Q In reviewing the film, I assume that you were looking at the CT of the chest; is that correct?

A Yes.

Q What other findings did you see on the CT of the chest?

A I'm not sure if I saw the rib fractures or not, but I think I sort of -- once I saw the pneumothorax, I started arranging for transfer.

MR. WEAVER: It's page 57.

Q (BY MS. MORALES) Okay. So as you sit here today, you don't recall whether or not you specifically were able to see the same fractures as identified by the radiologist?

A I don't remember whether I did or not.

Q And whether or not you saw the fractures yourself or read this report, did you have any concerns regarding the rib fractures?

A I'm -- I'm not quite sure of what your question is.

Q Did you have any additional concerns with

the fractures of the ribs?

A After the radiologist told me about the fractures?

Q Yes.

A Yes. He went -- the patient went from serious to critical once I got the radiology report.

Q And why did he go from serious to critical?

A Because a flail chest is an immediate life threat. One of the deadly dozen.

Q And can you explain for the jury what a flail chest is.

A Multiple rib fractures, adjacent ribs fractured in multiple places. So you've got a segment that is independent of the rest of the chest.

Q And is it two ribs that are broken in two places or is it three ribs? How many ribs have to be broken to --

A Two or more.

MR. WEAVER: Just let her get her whole question out before you answer.

Q (BY MS. MORALES) So is it -- is it two ribs broken in the same area?

A Two or more ribs broken -- broke -- two or more adjacent ribs broken in multiple places, yes.

Q And what are the symptoms that are

associated with flail chest?

A Well, the main problem with the failed -- a flail chest usually is the underlying pulmonary contusion where the lung itself is bruised and filling with blood.

But you also have an area of the chest that when the patient breathes, there's paradoxical movements. So when you do an inspiration, the rest of the chest goes out and the flail segment goes in, so ventilation isn't adequate.

Q And was Mr. Schwartz -- did Mr. Schwartz have any of those symptoms?

A Yes, he did.

Q And did you document that somewhere?

A It's documented in the -- the reports, especially the radiology findings. His oxygen saturations are documented, and they started diminishing. He required to be placed on a Venti mask as opposed to a four-liter nasal cannula.

Q And when you're talking about the -- the breathing pattern, did you document that anywhere in the medical record?

A No. Well, it's not obvious.

Q And when you -- you mentioned or made reference to pulmonary contusion.

When you reviewed the radiology film, did you actually see a pulmonary contusion?

A I saw injury to the right lung. I didn't necessarily know what it was. You usually do not see pulmonary contusions immediately after the injury. When you do, it pretty much means that the injury was pretty significant.

Q Okay. And it's fair to say that the radiologist didn't definitively identify or diagnose a pulmonary contusion; correct?

A Correct. However, the injury on the radiograph was in the same spot as the area of the questionable contusion versus aspiration. And either one of them would have been significant, whether the patient had already aspirated or has a lung filling with fluid. Neither one are trivial.

Q And I just want to make sure we're clear.

But when you looked at the film, you weren't able to distinguish one way or the other what the injury was to the lung; correct?

A No.

Q Now, after -- well, let's go through it.

The other CT scans that you reviewed, was there anything else that -- that was concerning to you?

A No. Most of the other findings were subtle, and I did not get -- I mean, I was not alarmed until I got the CT report back.

Q And just to be clear, there were several CT reports, so CT of the chest.

A Several. CT of the chest.

MR. WEAVER: She's -- she's asking about the other films as well, whether there was anything concerning on the other CTs of the spine and --

THE WITNESS: Yes.

MR. WEAVER: -- head.

Would that -- that was your question?

MS. MORALES: Uh-huh.

THE WITNESS: Yeah. There -- there were findings concerning on every one of the CTs that were performed.

Q (BY MS. MORALES) Okay. Anything that made it emergent?

A Yes. All of them.

Q Okay. All of them on every finding made it emergent.

A Every CT scan that was done had an emergent finding that the patient would have been transferred to a trauma center.

Q Okay. And so let's go over what those

emergent findings are.

A All right.

Q So CT of the C-spine, that --

A Except the C-spine.

Q Okay. So the C --

A Okay.

Q The CT of the C -- the C-spine, nothing on that; right?

A Nothing major on that. It was pretty unremarkable. But that is only -- that doesn't necessarily mean that there's no spinal injury. There could be a ligamentous injury. So we still keep the patient in -- in a collar even though that the CT was negative.

Q Okay. So Mr. Schwartz was in a -- had a C collar on at the time?

A Yes. The entire time.

Q Okay. The CT of the head without contrast, that's on NEN 62.

Anything emergent on that?

A Yes. He had what clinically -- 62? I'll get there.

Clinically it would be a possibility of a small subdural hematoma.

Q And did you look at that film yourself? Do

you recall?

A I looked at it after the reading. I could see what the radiologist was looking at. And based on the clinical situation with the head trauma and the amnesia and possible loss of consciousness, I made the determination that the subdural was much more likely than patient being dehydrated because clinically he was not dehydrated.

Q Okay. And the radiologist came up with the opposite impression; correct?

A Yes. But he wasn't in the room and didn't know the entire story of the patient.

Q The thoracic spine, was there something emergent on that?

A Yes. Two pedicle fractures.

Q And on what levels?

A It was 10 and 11 or 11 and 12.

Let me see. What page are we on?

MR. WEAVER: 66.

THE WITNESS: Ten and 11.

Q (BY MS. MORALES) 66 and 67. Sorry.

A Uh-huh.

Q So fractures to those areas?

A That's what I have to take from that CT scan. Correlate for tenderness to palpation at this

level, that's exactly where he was struck by the car. The pedicles are what surround the spinal cord, so that to me is a significant injury.

Q Okay. Anything in the -- oh, that was the thoracic. Sorry. We talked about the chest.

A The abdomen.

Q Okay. Anything in the abdomen or pelvis?

A Yes. He had blood behind the liver and then abdominal gutters.

Q And what is that? What's in your differential diagnoses when you see that?

A Well, he could have been bleeding from anything inside the abdomen. He could have diaphragmatic rupture. I didn't see a liver laceration, but he still could have. It could be coming from any kind of visceral injury in the abdomen. But it's coming from something, so he does have bleeding in his abdomen which needs to be evaluated further.

Q And did you -- did you see that on the film yourself, or were you relying on the radiologist?

A I did not see that on the film.

Q Okay. Pelvis?

A That's all one film.

Q Oh.

A Abdomen and pelvis all done together.
Q And we talked about the chest.
Okay. So were -- after reviewing those films and talking with the radiologist, did -- was there any other treatment that you had to provide or that you ordered after reviewing the films?
A I knew the patient needed to be transferred. He came back from CT scan after -- and I looked at the original scan, and I knew he had to be transferred with me looking at the chest film. And I called -- I asked for an air ambulance. I probably talked to the wife. I think she said that she had contracts or insurance through REACH. So I don't know if I or the nurse or the clerk asked REACH to be called. And I told them to call. We haven't arranged transfer yet, but I wanted them to come early to assist if -- if they were able to get there.
Usually we wait until we have an accepting physician, but I asked them not to wait, to go ahead and respond.
Q So if I understand this correctly, when Mr. Schwartz had got back from the CT, you at that point had called REACH or did you --
A At that point -- at that point I called REACH when he returned from CT and I looked at the CT

film. Sometimes it takes a few minutes for the films to be processed enough that I can look at them. But I looked at them probably shortly after he arrived back to the emergency department.

Q Now, is there a note that you wrote within your medical records that would identify your review and diagnoses after you reviewed the films?

A I don't think there's a note. The only thing is that at that point in time, between the time that the patient returned from CT scan and the time the radiologist called the report, I called REACH. So I knew that the -- I knew that the patient needed to be transferred.

MR. WEAVER: The question was, was there a note.

THE WITNESS: No. I said no. Not that I recollect.

Q (BY MS. MORALES) Okay. And so what I'm showing is that, from the REACH Air documentation, they were contacted at 11:36 p.m.

A The patient returned from the CT scan --

MR. WEAVER: Dr. Garvey, let her ask you a question, and then answer the question she asks you.

THE WITNESS: All right.

Q (BY MS. MORALES) And -- and so that, you're saying, would have been at or around the time that

A Dr. Ray, an emergency physician.
Q And have you worked with Dr. Ray before?
A No, I have not.
Q Okay. And so you never transferred a patient that you can recall to this specific physician?
A Not that I can recall. I possibly have.
Q And what information did you convey to him when you talked to him?
A I pretty much listed all the injuries that we know -- knew of at the time. Pneumothorax, flail chest, pulmonary contusion, hemoperitoneum.
Q So just so we're clear, you told him the flail chest, the --
A Pulmonary contusion.
Q -- pulmonary contusion, although you didn't know whether or not there actually was a contusion; correct?
A Clinically there was and radiographically concurred, so yes.
Q Okay. What else did you tell him?
A Hemoperitoneum. Blood in the belly.
Q Okay.
A That's probably -- I mean, I may have listed everything else, but those are indicators of major

trauma, so he needed to go to a trauma center.

Q And what information did Dr. Ray convey back to you?

A If I recall in my notes, he recommended a chest tube and possible intubation. But that was already planned. That's why I asked REACH to come early.

Q Okay. So he said chest tube, possible intubation.

A Yes.

Q He didn't tell you to conclusively intubate the patient.

A No.

Q He left that up to you; correct?

A That's my decision. I'm the transferring physician.

Q Prior to talking to the receiving facility, do you send over any paperwork or do you call first?

A We -- after acceptance, we send the paperwork. So once he accepted the transfer, we will -- we would forward all our paperwork over to them. Whatever is complete at the time.

Q Okay. Did -- did that receiving doctor request that -- that you do any additional interventions before you send them over?

MR. WEAVER: Other than what they talked about?
Q (BY MS. MORALES) Other than the chest tube.
A No.
Q Is there a -- a categorization for patients that you send by flight transfer? Like, for example, emergent? Immediate? I mean, are there -- is there a category -- strike that.
You're -- you're also a medical director of REACH Air, so is there a category that shows the urgency of the transfer?
A Almost all our transfers are emergent. I mean, we're transferring to a higher level of care, a tertiary care center. In this case, a trauma center.
Q And that's not categorized in any way by you as a ER doctor or by the flight team that's transferring.
A I'm not sure how to answer that. At this -- at this point in time, he's a Level I trauma. He has multiple life-threatening injuries, so you can't get much more urgent than that unless you're in full arrest.
Q And do you recall -- well, strike that.
Tell me what you recall after you talked to the receiving doctor at the University of Utah.
Did you instruct someone to send over

Q (BY MS. MORALES) Okay. And why not?
A Because this is an emergency situation, and there really are no options. I need to explain the procedure to the patient, which I did, and tell him the indications and why it was being done, and I did all that.
Q Okay. So you don't believe that you're required to do anything other than just explain the procedure that is going to take place; is that correct? To Mr. Schwartz.
A Not necessarily with those words. I need to make sure that the patient -- Mr. Schwartz and Mrs. Schwartz clearly understood the severity of the injuries and the necessity for doing the procedures that I was going to do, and they were both quite -- they -- they understood quite clearly exactly what I was going to do and why I was going to do it. And they had no -- they -- no indication that they disagreed with my decisions.
Q Okay. So do you -- do you have a recollection of exactly what you told Mr. Schwartz and Mrs. Schwartz?
A I told them exactly what I would tell any other patient. I explained the injuries to them, the collapsed lung, the need for the chest tube, the risks

of transporting a patient without being intubated, with -- risk of the -- the necessity during intubation, understanding the -- explaining the changes in the physiology with altitude and the -- what would -- what could occur to the collapsed lung in the -- in air medical transport and what could -- could happen to his oxygenation levels in transport and why. And also receiving pain medications for his chest tube and broken ribs in flight also impairing his ability to oxygenate. So all that -- all those reasons were clearly explained to them.

Q Okay. And I'll represent to you Ms. Schwartz has testified that you said that you might intubate him and there was nothing further discussed.

And so that's contrary to what you're testifying today; correct?

MR. BURTON: I'm just going to object it mischaracterizes the record.

Go ahead.

MR. WEAVER: Join.

THE WITNESS: Yeah, I -- I would not be surprised that she did not hear or understand everything that I said, but I know for a fact that I -- I do it for every patient. I know for a fact that I explained the

entire situation. I don't just do a procedure without telling all those involved about the indications, the risks, and the benefits of the procedure.

Q (BY MS. MORALES) Okay. So what risks did you explain to Mr. and Mrs. Schwartz that could occur by intubating him for the flight?

A Probably not much. We all -- we always assume that the patient has a full stomach, and there's also always the risk of aspiration with an intubation. But the main thing that was -- that was explained to them were the risks of not intubating, and the risks of not intubating were much higher than the risks of intubating.

Q Okay. So I just want to be clear.

You did not explain the risks of intubating the patient; correct?

A No. I probably --

MR. BURTON: I'm going to object to the extent it mischaracterizes the testimony and it's argumentative.

MR. WEAVER: Join.

THE WITNESS: I mainly explained the risks of not intubating, which are higher than the risks of intubating.

Q (BY MS. MORALES) Okay. So you explained the risks of not intubating, but you did not explain

the intubation.

Q (BY MS. MORALES) And you agree that aspiration is -- is a known complication of intubation; correct?

A Oh, yes.

Q And it's a complication that's more prevalent to occur when a patient hasn't been MPO or -- or if they've recently eaten; correct?

A Which is almost all our patients in the emergency department. Yes, correct.

Q Was it an option to provide a CPAP for Mr. Schwartz during flight?

A Absolutely not.

Q Why not?

A Because all that would do was increase the pressure in his stomach. With a full stomach, it increases risks of aspiration.

Q Was it an option to attempt ground transportation to get Mr. Schwartz to the University of Utah?

A Absolutely not.

Q Why not?

A Because it's a -- almost a three-and-a-half to four-hour transport. He's already got life-threatening injuries. We're -- at that point, as

soon as we got the results, that's when the old golden hour of trauma kicked in, and we needed to get him to a trauma center as soon as possible.

Q So it's fair to say that you never tried to get ground transport; correct?

A I have never tried in ten years in Elko --

MR. WEAVER: Dr. Garvey, just answer the question she's asking.

THE WITNESS: No, I did not try to get ground transport.

Q (BY MS. MORALES) Did you ever try -- well, strike that.

Did you ever tell Mr. or Mrs. Schwartz that you were going to delegate the intubation to a -- an EMT?

MR. BURTON: Objection. Sorry. Objection. Form and foundation.

MR. WEAVER: Join.

THE WITNESS: I'm not sure "delegate" is the word I would use. I called REACH up there to assist me because I knew that we had to intubate the patient, and we had to put a chest tube in the patient, and we had to do it as expeditiously as possible.

Q (BY MS. MORALES) Do we know -- or do you know if Barry Bartlett is an EMT or an RN?

anesthetist?

A No, I did not.

Q Are there nurse anesthetists available at Northeastern Regional?

A There probably was one on call, yes.

Q And you would agree that nurse anesthetists are more experienced to deal with high-risk intubations; correct?

A Absolutely not.

Q Why? Why do you say that?

A I have no idea what the qualifications and the capabilities of the nurse anesthetists are. I know that they intubate in a controlled environment with fasted patients, but this is a completely different situation. This is a rapid-sequence intubation and not an operation-room intubation.

Q Would you agree that a nurse anesthetist would have more experience than an EMT?

MR. WEAVER: Object as to form.

THE WITNESS: No, I do not. I --

Q (BY MS. MORALES) And why is that?

A I know that -- I know that all of the REACH flight -- flight crew were very competent and qualified in airway management. That's the primary focus of their training. I do not know anything of

the competency or the qualifications of the nurse anesthetists, and I don't know if they've ever -- a nurse anesthetist have -- has ever done a rapid-sequence intubation on a patient with a full stomach. But the paramedic does it quite frequently.

Q Was it an option to attempt to transfer Mr. Schwartz without intubation?

A No, it wasn't an option.

Q Why not?

MR. BURTON: I'm just going to object. It's been asked and answered several times.

MR. WEAVER: Join.

THE WITNESS: Because of the risk of aspiration en route, I would never be able to defend a bad outcome in a patient requiring intubation inflight or aspirating inflight and me having not intubated him. I can defend attempting to intubate, but I cannot defend not intubating.

Q (BY MS. MORALES) And it's the same risk that he had with trying to intubate on a full stomach at the hospital; correct?

A No. Completely different situation. You're in a cramped aircraft without the resources of the hospital. We had three suction units going, we had multiple hands involved, and we had plenty of room.

from the EMS to ours. So that would be his baseline, which is pretty darn low.

Q And at 23:51, you take the Venti mask off, and you're preoxygenating for the intubation?

A I've changed pages, but yeah, that's about right.

MR. WEAVER: Ten.

THE WITNESS: I was looking at that.

I don't know if this is right or this is right.

Q (BY MS. MORALES) Have you ever called in an anesthesiologist, the anesthesiologist or a nurse anesthetist to perform a high-risk intubation in the ER?

A Never.

Q But it's your understanding that they're available if you need them; correct?

MR. WEAVER: Well, who? Who's available?

Q (BY MS. MORALES) The nurse there on call.

MR. WEAVER: Who?

Q (BY MS. MORALES) The nurse anesthetist and/or anesthesiologist.

A There are no anesthesiologists in Elko, Nevada.

Q Okay. So there's nurse anesthetists that

MR. BURTON: Join.

THE WITNESS: I don't know if it's the most common risk, but it is -- it is always a risk, yes.

Q (BY MS. MORALES) And that's more likely to occur between the loss of consciousness and the inflation of the cup; is that correct? The endotracheal tube?

A Yes.

Q Why in this case did you delegate or order that Mr. Bartlett perform the intubation?

A Because what my -- the plan was to -- instead of -- to do both the chest tube and the intubation during one administration of the medications, the sedative and the paralytic, so that the patient did not have to receive multiple doses of -- of either.

And I'm -- I'm credentialed to do the chest tube, and Mr. Bartlett is certified, competent to do the intubation. And they -- and so I figured the -- the -- I made the decision that the best way forward is to have them both done at the same time. While I put the chest tube in, he could do the intubation, and we could get the patient on the plane a little quicker than to try to do the procedures simultaneous -- or sequentially.

Q At this point, why didn't you take over the intubation?

A Because there was no reason. He just wasn't able to visualize the cords, which happens sometimes.

Q Okay. And not being able to visualize the cords and knowing that Mr. Schwartz had a full stomach and had been nauseous during his time in the ER, you didn't feel that the more experience that you would have would be necessary to resume the intubation or take over the intubation?

A I'm not sure how you quantify more experience. But he was competent. I'm competent. And someone competent needed to do the intubation, and I felt he was competent to do the intubation. So no, I did not see a need to intervene at that time.

Q Okay. But you definitely could have; correct?

A I could have.

Q What happened -- what happened next?

A Okay. If I'm -- reading from the record, my -- my didactic description, we bagged the patient. He tried a second attempt. And during that second attempt, the patient began to regurgitate.

At that point, I aborted putting the chest tube in and went to the head of the bed. We tried to

going?

A We had both of our wall suction machines and we had one of EMS's portable suction machines all going. Just with our suction machine, we got over a liter of emesis, and not telling how much the other ones got.

Q And so there were three people suctioning?

A Possibly three people. We had three suction units. I don't know if one had two in their hands or whatever, but we had three units going at once.

Q And did the King airway help?

A Yes, it did. I was pretty amazed. CPR was started. I think we gave a milligram of epinephrine. We were doing chest compressions. They placed the King airway, started bagging with the King airway. The oxygen saturations improved, and the patient regained a pulse.

Q And can you look at this timeline on page 4 and tell me when the King airway -- are you able to tell on here?

A Not on page 4. Page 4 is just sort of a computer-generated timeline, so I don't know what I'm looking at there.

But I would say the King airway was placed around 0335 -- 0035. That's when the patient

arrested. King airway was placed, the oxygen saturations started improving with the King airway, and the pulse came back.

Q And then what happened?

A Then the patient started sort of deteriorating again. His pulse -- his oxygen saturation started dropping. And -- let's see. 035, King.

What I did -- since they started dropping, I thought maybe we could leave the King airway in place and deflate the balloons, suction the oral cavity, and see if I could pass the bougie into the cords while we still had the King airway in place occluding the esophagus.

I had digitally placed the bougie. I thought I felt the cords. I felt the bougie -- felt the bougie go through the cords. I put an ET tube in, blew up the balloon, pulled the King airway, and the ET tube filled up with emesis again.

Again, I, you know, in retrospect, feel that the tube -- both those tubes that I placed were in the proper positions, but the patient with his initial aspiration filled his trachea and had a massive aspiration from the -- from the initial attempts.

Q So he would have been -- strike that.

So at what point -- I'm looking at 42.

So when you did -- did you actually wind up doing the cric procedure?

A Yes. We did the cric procedure after I pulled the King, after we pulled the tube that I thought I had in. I don't know if -- I can't remember if he arrested right prior to the cric procedure, but right around that time he went into arrest again. Did the cric. Put the cric tube in, and the cric tube filled with emesis.

Q Was Barry Bartlett still helping with this intubation after his initial failed attempts?

A It depends on what we were doing at the time. There -- both of us were -- after people thought they -- they suctioned enough, both of us attempted to visualize the cord and attempted intubations. But none were -- well, again, some were probably successful, but none were -- none secured the airway. Everything filled with -- with emesis.

Q And was a code called in this case?

A After the cric tube was switched out to another tube that was a little longer that I could float down an ET tube further down into the trachea, it also plugged up and -- which confirmed that it was a pretty massive aspiration. We pulled that tube.

# EXHIBIT D

FOURTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF ELKO

-oOo-

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

Plaintiff,

vs.

DAVID GARVEY, M.D., an individual; BARRY BARTLETT, an individual (Formerly Identified as BARRY R.N.); CRUM, STEFANKO & JONES LTD, dba Ruby Crest Emergency Medicine; PHC-ELKO INC. dba NORTHEASTERN NEVADA REGIONAL HOSPITAL, a domestic corporation duly authorized to conduct business in the State of Nevada; REACH AIR MEDICAL SERVICES, L.L.C.; DOES I through X; ROE BUSINESS ENTITIES XI through XX, inclusive,

Defendants.

Case No. CV-C-17-439

Dept. No. 1

VIDEOTAPED DEPOSITION OF DONNA KEVITT, R.N.

Monday, March 4, 2019

Elko, Nevada

Job No. 527823B

Reported By: PEGGY B. HOOGS, CCR #160, RDR, CRR

**records about initially receiving the patient?**

A That he was brought into the ER via EMS and he was on oxygen, he was awake. Nothing -- I don't really know what else more specifically.

**Q Do you know -- did you know at the time what had happened to him without looking at the medical records? Did you have an independent recollection of the circumstances that got him to the hospital?**

A Just what the EMS told -- said when they arrived.

**Q Okay. And do you recall that or were you relying on your memory, I mean relying on the records?**

A Relying on the records, yeah.

**Q Once you received the patient into your care, as a nurse, do you have any independent recollection of talking with Diane Schwartz when she first arrived to the hospital?**

A No, not -- no, I don't really recall.

**Q And we'll go through the records in a minute. I just want to try to get an understanding of what you independently recall from your treatment as a nurse of this patient versus just what you documented on the day of.**

**Do you have any independent recollection of the complaints that Mr. Schwartz had prior to reviewing the**

**records again?**

A No. No.

**Q Do you have an independent recollection of what testing was done on Mr. Schwartz --**

A No.

**Q -- that day.**

A No.

**Q Do you have an independent recollection of the results of any of the tests that came back that Mr. Schwartz underwent?**

A No, not without reviewing records.

**Q Do you have any independent recollection of the decision to transfer -- the doctor's decision to transfer the patient to Salt Lake?**

A I'm not really understanding what you're asking. Like I reviewed records, and so I -- from reviewing these, then, yes, I remember that, but not just off the top of my head do I --

**Q I want to know what you recall without -- and we're going to go through all of your records and your notes, but I want to have an understanding of what you actually recall of this patient first.**

A Nothing specific until I review the -- until I reviewed the records.

**Q Okay.**

**Q And so is it fair to say, because your name is listed as a team member on this sheet, that you participated somehow in the code of this patient?**

A Yes.

**Q And as you sit here today, do you have an independent recollection of how you assisted in the code of the patient?**

A Well, in multiple ways I assisted.

**Q Okay. What do you recall?**

A I recall assisting respiratory -- I believe it was Tom in respiratory -- holding the face mask and bagging while they're doing -- I don't know what they -- they were doing their job. Again, I'm paying attention to what I'm doing and just kind of an overview of the room.

During a code you usually switch out team members doing different -- different things at different times.

**Q So just to break it down a little bit, you recall bagging, helping bag the patient with the RT who is identified as Tom, I think, on this record?**

A Yes. I remember attempting to clear copious amounts of food chunks, large particles of food that he had vomited.

**Q And how were you attempting to clear the airway**

**of the food?**

A Well, we had attempted with suction to clear the airway. He also had large particles just coming out his mouth, so just wiping it away.

I remember getting a washcloth, trying to -- you know, just trying to clear the field because it was -- he was covered in vomit, and it was just -- it was spraying out from his mouth. Sorry.

**Q That's okay.**

A Yeah.

**Q I visualize, try not to.**

A So we're trying to, the best we can -- he had just a copious amount of vomit, and it was very large particles of food, like chunks of steak or potato or -- definitely steak.

**Q Okay. At any point did the suction machine just stop working?**

A The suction, the part that you suction with has a little tiny hole like this and the food particles are like this (indicating), so you would think of like a vacuum or -- say you have a vacuum cleaner at home and you're trying to suck up a ball that's this big (indicating). It's not going to go through the suction, so we suctioned what we could suction from him.

We tried multiple suction machines. The trauma

room is split by a curtain, so both suctions were being used to try to suction up what we could.

**Q Is it the same machine, but you were just trying to duplicate efforts, or was it like a bigger tube than the other machine, a bigger suction?**

A There's not a bigger -- no. There's not like a bigger suction to use. You can't change like -- it's the attachment that goes on.

**Q So there's just one -- I guess that's what I'm trying to figure out.**

A We used two separate machines to make sure, okay, the -- it's got a canister inside -- it's got a canister that's attached to the wall, and inside that canister is a disposable canister.

And so our suction was on, and it, like, suctioned the canister, so you knew the suction was working because it collapsed the canister inside, but, again, the food particles were too big to fit in the suction, so we suctioned what we could suction, the fluids that we could get out we did suction, so --

**Q When you say "we," so you were suctioning one side. Who do you recall was suctioning the other?**

A There was -- respiratory was involved. I don't remember specifically who was doing what. Multiple team members attempted to clear an airway, so it was not just

one person doing that. It was multiple people trying to get these large food particles out.

**Q At any point during this procedure, besides the second suction machine, did anyone leave to get any other equipment that was necessary to try to clear the airway?**

A Across the -- well, those were airway -- let me start over. Sorry.

Are you talking about suctioning or --

**Q Any other equipment that anyone on the team went to get to try to help.**

A Maybe, like, 10 feet across the hall, a bougie. That's just a different type of an airway.

**Q Who went to get that; do you remember?**

A I do not. Sorry.

**Q And what's -- do you have an understanding of what a bougie is for?**

A It's a different type of airway.

So Dr. Garvey also requested a King airway, which EMS had on their ambulance, so they went out to get a King airway because that was -- during the code he was making several attempts to establish an airway.

**Q And so with the King, what's your understanding of what the King does?**

A I don't have any training on airways, so I just know that it's different, like a different type of

**correct?**

A I guess so. All I remember is that it was asked for and someone walked across the hall, got it and brought it back. I don't remember the exact steps as to opening the package and it being used.

**Q And do you recall how long it took the paramedic to go get the King air -- the King airway or the King --**

A No, I do not.

**Q During your time in the emergency room at this hospital, have you ever witnessed the Reach Air team intubate a patient in the emergency room?**

A Each case is different. So I have seen flight teams intubate, yes.

**Q Okay. In the ER?**

A Yes.

**Q Approximately how many times have you seen that?**

A I can't answer that. I don't know.

**Q Could you make an estimate?**

A Oh, I don't know. Maybe -- I don't know. Five, maybe. I can't tell you specific cases or when or which flight team. It's not uncommon for a flight team to intubate. It's not out of the ordinary.

**Q What other flight transport is contracted with**

**Q And what about Dr. Garvey?**

A No. I have always felt very comfortable working with Dr. Garvey. If I was ever in need of medical care, I would feel very comfortable with him providing care to me. So I think my personal -- my personal opinion probably doesn't count, but I feel like everybody in that room did the very best they could for the situation.

**Q Did you express any concern whether or not they should have intubated the patient to begin with?**

A Again, I don't recall specifics, and I'm not trained in intubation, you know, so I can't answer that.

**Q As a Registered Nurse, do you have an understanding that patients who have recently had a meal are at increased risk of aspiration during intubation?**

MR. WEAVER: Objection as to form. Lacks foundation. Calls for expert opinion. She already said she doesn't have any experience.

BY MS. MORALES:

**Q As a Registered Nurse, do you have that knowledge?**

MS. RIES-BUNTAIN: I join in the objections.

THE WITNESS: I have not had any specific training in intubation. Again, it is up to a physician to make that call. He had -- looking at his records, if

your oxygen level is decreasing, like even on 4 liters, he's 91 percent prior to -- that was at 2345. On 4 liters of oxygen, he's already needing oxygenation. On arrival he's on 4 liters of oxygen and he's only 94 percent. He's already having an oxygenation issue on arrival or he would have been on room air on arrival.

So to me --

BY MS. MORALES:

**Q Again, you didn't have the medical records -- right? -- from Reach Air? I'm sorry. From the paramedics?**

A No. I can only go by my notations, and what I'm seeing here is his chart from the hospital chart.

**Q Right. And we've gone over that oxygenation chart where you're not sure if the mask was placed to preoxygenate the patient; correct?**

A No, I don't believe -- I was not -- I came in after the procedures had already started, so I can't answer that question.

**Q After this event occurred, did you -- were you called in to any meetings at the hospital regarding this event?**

MS. RIES-BUNTAIN: I'm going to object relative to the extent that this is potentially requesting privileged information. That being said, the witness can

know. I'm not privy to that knowledge.

**Q Have you ever seen any written consents from the hospital for intubation procedures?**

A Specifically for an intubation -- like a form that says we are going to intubate you? No. There's, like, just a general -- there's a general form.

**Q Okay.**

A So as far as like -- are you talking about, like, pros and cons of intubation?

**Q I'm just asking if you've seen anything more specific provided by the hospital regarding intubation other than just a consent to treat a patient?**

A No. No. You just -- you know, normally the -- it's a verbal explanation. We don't give them a paper and show them and go into detail about how it's done.

**Q Okay. What about chest tube placement? Have you ever seen a written consent for that?**

A No. There's no specific form that says this is for chest tube placement.

**Q Okay. Did you have any discussions with any of the nurses that were caring or technicians that were in that room with Mr. Schwartz after this event occurred?**

A Honestly, I don't remember any specifics. If I did, I don't remember any specific conversations with any techs or anybody else because afterwards I was with his

MR. PLUMADORE: No, I don't have any questions.

MS. RIES-BUNTAIN: I have just a couple follow-up questions for you.

EXAMINATION

BY MS. RIES-BUNTAIN:

**Q In terms of this patient's oxygenation needs upon arrival, you offered some testimony about that earlier.**

**Was his oxygen saturation as low as 83 percent upon arrival or shortly thereafter?**

A Possible. A lot of times on arrival, you're trying to get a patient situated in the bed. There's a lot of movement, you're moving them over, and you're trying -- they're either going to have the oxygenation on their finger or a good place to do oxygenation is on their ear. And I can't recall if his oxygenation or if the sat monitor was on his ear or his finger. That I don't remember.

**Q So there may have been some adjustments to capture the best reading?**

A Yes.

**Q And in terms of what oxygenation was able to be accomplished, even on 4 liters of supplemental oxygen, you still were not able to get him up to the high 90s; is**

**that true.**

A Yes.

**Q And the high 90s is what your goal is for oxygenation for a patient?**

A Yeah.

I'm sorry. I forgot your name. I apologize.

**Q It's Jennifer. Same as me.**

A Oh, okay.

She made a comment that the EMS record, which I have not read them so I don't know, but he was put on oxygen for -- as a routine.

Is that what you had said, I think?

Anyway, usually if -- a routine oxygen level is -- it's 2 liters, so he was placed on 4 on arrival. So -- and he -- on my exam he had decreased breath sounds.

**Q And that's on page 8.**

**Could you please explain for the record what you meant by that entry "breath sounds are diminished in right posterior middle lobe and right posterior lower lobe"?**

A So when you do an auscultation of lung sounds, you want to listen to each section of their lungs, and you have two lobes on one lung and three lobes on the other. So you listen -- I listen on the front, and then

you listen on the back in each position of the lobe.

So when somebody's breath sounds are diminished, that would be like if you asked them, "Take a deep breath in," you're not going to hear the full lung sounds in that. It's just going to sound either quieter or -- they're just diminished, they're not full lung sounds.

I don't know if that helped at all, but that's how I do a -- auscultate for breath sounds.

**Q And is that also an indication to you that his respiratory status was compromised upon arrival?**

MS. MORALES: Objection. Form. Calls for an expert opinion.

THE WITNESS: To me, like when I examine a patient, whether it be they come in for wheezing, whatever, the breath sounds are -- is part of their exam, and when you don't hear a good, full breath sound, then they're compromised in some position, whether it be age, accident, asthma, so...

BY MS. RIES-BUNTAIN:

**Q You were asked some questions about the oral report you gave to the University of Utah.**

**Do you ever record the content of an oral report to a transferring facility? Do you ever write "I told this person this vital sign, this" --**

it calls for that, yeah.

MS. RIES-BUNTAIN: Okay. I have no further questions.

MS. MORALES: I just have a couple follow-ups.

FURTHER EXAMINATION

BY MS. MORALES:

**Q To your recollection did Dr. Garvey stay in the room from the time that you presented to the code up until the time the patient passed?**

A Was he in the room?

**Q The entire time.**

A Yeah. I don't remember any -- I don't remember anything different other than that. I don't recall that.

**Q A minute ago counsel was asking you about diminished breath sounds.**

**Can that occur also if someone has pain associated with broken ribs and they're not breathing deeply in and out?**

A I don't want to answer that in the fact that I'm not a physician so -- I can just go by how I was taught to assess breath sound. It's not my job to make a diagnosis as to why it's happening. I can just -- how do I say that? Like I can just tell you about what I hear, what I experience.

**Q Okay. And not the reason why; correct?**

A Well, it's out of our scope of practice to make a diagnosis. So the reason why, I can't -- I don't know. Was it due to the fact that he had broken ribs? If, you know, he had a flail chest, he had -- I can't answer why it was like that.

**Q Do you have an ICU at that hospital?**

A We do have an ICU unit, yeah.

**Q In your experience as an emergency room nurse, have you ever seen the emergency room doctors calling a nurse anesthetist to assist in intubating a patient?**

A No, not in the ER.

**Q The house supervisor indicated that there's on-call nurse anesthetists in the -- available in the ER.**

**Do you know the name of the group?**

MR. WEAVER: Just let me object. It misstates her testimony. She says there was an on-call group. She didn't say they were on call for the ER.

THE WITNESS: I don't know their specific name.

BY MS. MORALES:

**Q Do you know that there's an on-call group available?**

A Yes.

**Q And since you've worked there, you've never seen a doctor call them in in the emergency room?**

A Not in the ER. They've come in to assist with, like, an OB for a surgery, and they are there to -- if there's a surgery in the hospital, they can be called in for that.

MS. MORALES: Okay. All right. We're going to take a quick break and I'm almost done.

THE VIDEOGRAPHER: We're going off the record. The time is 4:01.

(A recess was taken.)

THE VIDEOGRAPHER: This is the continuing deposition. This is media number 4 of Donna Kevitt. Back on the video at 4:07 p.m.

BY MS. MORALES:

**Q Looking back at this medical record, the code sheet -- I should know it by heart by now -- 0033, I think it is, do you have -- in looking at the code sheet, does it refresh your recollection at all as far as when Dr. Garvey jumped in to assist with intubation?**

MS. RIES-BUNTAIN: Object to the form.

MR. WEAVER: Join.

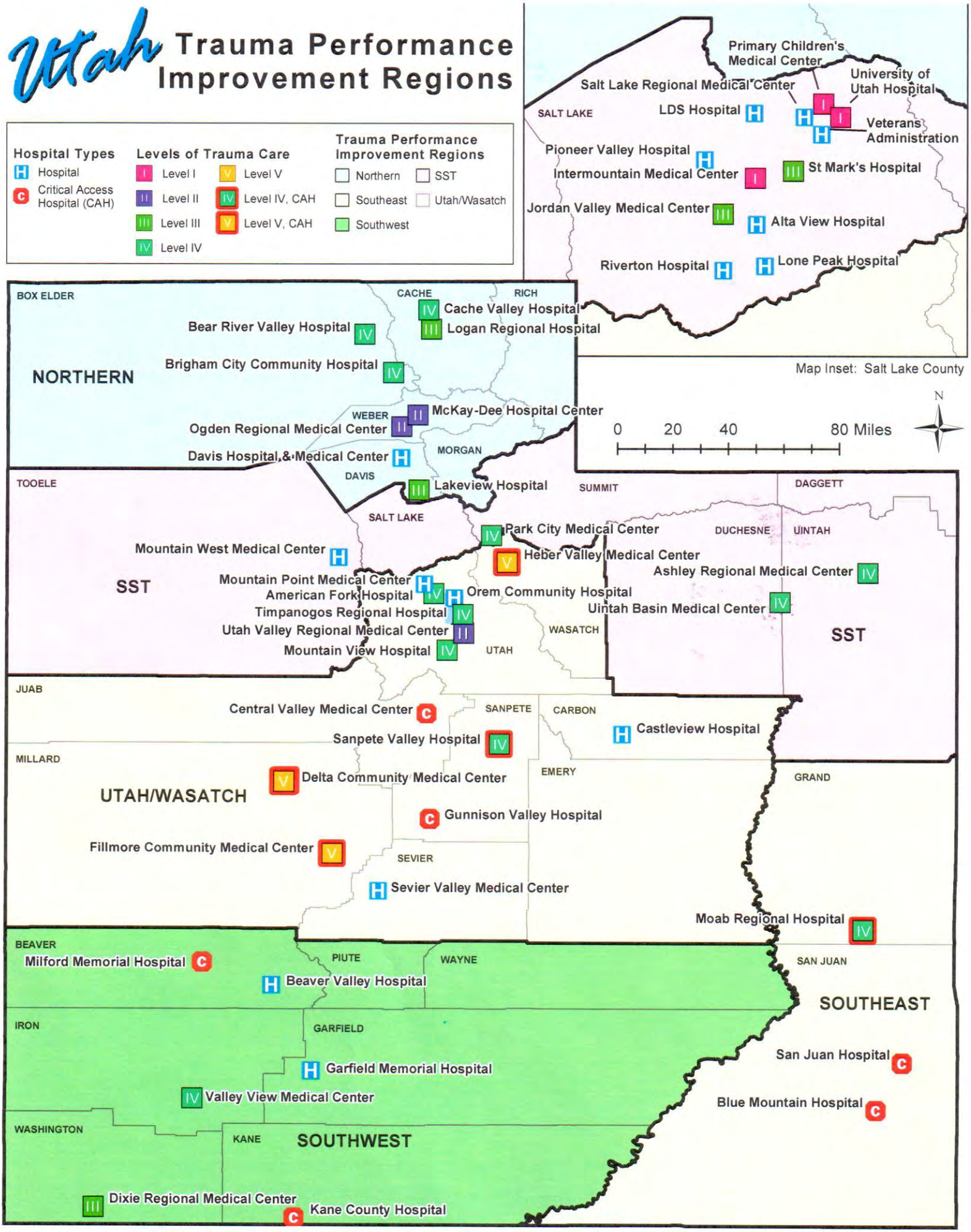
THE WITNESS: I can only go by what is charted here.

BY MS. MORALES:

**Q And I believe your testimony was earlier that Dr. Garvey was the one who tried to place the King; is**

# EXHIBIT E

# Utah Trauma Performance Improvement Regions



# EXHIBIT F

FOURTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF ELKO

-oOo-

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

Plaintiff,

vs.

DAVID GARVEY, M.D., an individual; BARRY BARTLETT, an individual (Formerly Identified as BARRY R.N.); CRUM, STEFANKO & JONES LTD, dba Ruby Crest Emergency Medicine; PHC-ELKO INC. dba NORTHEASTERN NEVADA REGIONAL HOSPITAL, a domestic corporation duly authorized to conduct business in the State of Nevada; REACH AIR MEDICAL SERVICES, L.L.C.; DOES I through X; ROE BUSINESS ENTITIES XI through XX, inclusive,

Defendants.

Case No. CV-C-17-439

Dept. No. 1

VIDEOTAPED DEPOSITION OF SUSAN OLSON, R.N.

Monday, March 4, 2019

Elko, Nevada

Job No. 527823A

Reported By: PEGGY B. HOOGS, CCR #160, RDR, CRR

**worked in June of 2016?**

A I can't say because he left before Greg did.

**Q And what's your understanding of when a nurse anesthetist would be called in to the hospital?**

A When one would be called in?

**Q Correct.**

A When there's an emergency C-section, emergency surgery.

**Q And were they available all hours of the night for those calls?**

A Yes.

**Q Would they also be called in for emergency intubation procedures?**

A That would be up to the doctor's discretion.

**Q Have you -- in your time at the hospital, have you seen them called in by any of the physicians to do an intubation procedure?**

A No.

**Q And that includes your time in working in the emergency room?**

A Yes.

**Q Have you ever heard of them being called in or read about them being called in to do an intubation procedure at the hospital?**

MS. RIES-BUNTAIN: Objection. Form.

BY MS. MORALES:

**Q Let me restate that. Strike that question.**

**Have you read about a nurse anesthetist doing an intubation procedure in the emergency room?**

MS. RIES-BUNTAIN: Same objection.

BY MS. MORALES:

**Q Again, unless she instructs you not to answer, she's just preserving the record.**

A Okay. When I'm working I don't have no recollection of that. As far as reading about it, I don't read in other people's charts. It's a HIPAA violation. So when I leave on my days off, I don't go looking back in charts from the days I'm off.

**Q Are you involved in, like, root cause analysis meetings?**

A No.

**Q Are you involved with risk management at all?**

A No.

**Q Have you ever heard of a nurse anesthetist providing anesthesia and doing an intubation in the emergency department?**

A No.

**Q Besides these nurse anesthetists, who would have information on how many times a nurse anesthetist has performed an intubation procedure in the emergency**

objection.

BY MS. MORALES:

**Q Is this the first time that Dr. Garvey -- again, they're just preserving the record.**

**Is this the first time that Dr. Garvey was involved in this intubation procedure, at 0044?**

A By my charting here, he was in the room, but as far as the intubation, that's what I wrote.

**Q You believe -- do you know one way or the other if Dr. Garvey was in the room the entire time during the intubation?**

MR. WEAVER: Object as to form.

THE WITNESS: By the code sheet starting with the patient name and by me adding on right there, I come walking in on it because someone else had the code sheet started, but the time that I was here, any code -- I've seen the doctor in the room with codes. The doctor is in the room.

BY MS. MORALES:

**Q You were actually -- it appears from these notations, you were actually in the room at the time that initial intubation started -- correct? -- when he was given medication?**

A Yes.

**Q And so you were there at the very beginning of**

**the procedure; true?**

A I documented that. I was there, then, yes.

**Q And as you sit here today, can you say one way or the other whether or not Dr. Garvey was in the room prior to 0044?**

A Yes.

**Q And what are you relying on?**

A At 0018, ketamine and rocuronium, and he's present.

**Q Okay. And where does it say he's present?**

A Number one team member.

**Q Okay. And so because he's number 1 team member, that means he was present in the room prior to 0044?**

A Yes.

**Q And you didn't make that entry, though, at number 1 -- correct? -- "David Garvey"?**

A No, I didn't write his name.

**Q Do you recognize the writing of who had put that there, who wrote number 1?**

A No.

**Q Okay. The next entry is "0047." Does that -- those little marks mean that Dr. Garvey attempted the ET tube again?**

A Yes.

A That would be up to the doctor.

**Q Okay. And I understand that as far as informing the patient, but my question is a little different.**

**Have you ever seen, since you've been working at the hospital as a house supervisor, a written consent for a patient to undergo an intubation procedure?**

A Not the individual form, no.

**Q Okay.**

A Just for that procedure.

**Q And I have the same question as far as placement of a chest tube.**

**Have you ever seen any written consent from the hospital to a patient and/or family to consent to undergo placement of a chest tube?**

A Under emergency situations, a chest tube is placed after results from CAT scan or X-ray, but no. Just on -- when -- when they're checked in or their family checks them in if they're unresponsive, to sign for consent to treat.

THE VIDEOGRAPHER: We're going off the record with no objection. The time is 11:23 a.m.

(A recess was taken.)

THE VIDEOGRAPHER: We're going back on the record. The time is 11:33 a.m.

**the tubes are 6 and 7-1/2.**

**Who makes the decision as far as what size of tubes to use?**

A The doctor.

**Q Do you have an understanding or knowledge as to when a 9 tube would be used?**

MS. RIES-BUNTAIN: Objection. Incomplete hypothetical.

THE WITNESS: No. Like I said, the size would be up to the doctor.

MS. MORALES: I'll pass the witness.

MR. WEAVER: No questions. Thank you.

MR. BURTON: No questions.

MS. RIES-BUNTAIN: I have just a couple follow-up questions for you.

EXAMINATION

BY MS. RIES-BUNTAIN:

**Q You were asked some questions about anesthesia services that are available, and I just wanted to clarify.**

**At the time of this occurrence, was there an anesthesiologist physician in town at all?**

A If you say CRNA, yes. We have them on call.

**Q But was there an MD physician who was trained**

**in anesthesia services that was available at that time, or was it just CRNAs?**

A CRNAs, I believe.

**Q Regarding the crash cart, which my understanding is contained an intubation tray -- Am I understanding that correctly?**

A Yes.

**Q Was it part of your job to check the crash cart on some routine basis to ensure that it was fully stocked?**

A We have charge nurses in each department, and they're checked daily, except for ER is checked twice a day, once in the morning and once at night.

**Q And you as house supervisor, did you have to sign off on those checks as well?**

A Yes.

MS. RIES-BUNTAIN: I have no further questions for you.

MS. MORALES: I have a follow-up question, but I'm not sure if there's someone on the phone.

MS. RIES-BUNTAIN: I apologize. I forgot. Sorry. We all forgot. Sorry about that.

MR. PLUMADORE: Can you all hear me, or no?

THE REPORTER: Yes, we can hear you.

MR. PLUMADORE: Okay. Is it my turn? I can't

# EXHIBIT G

Welcome

Fields marked with asterisk (*) are required.

# Licensee Detail

## Entity Information

**Name**

NORTHEASTERN NEVADA REGIONAL HOSPITAL

**Physical Address**

2001 ERRECART BLVD

ELKO, NV 89801

STEVE.SIMPSON@LPNT.NET

## Credential Information

| Credential Type | Credential Number | Endorsement | Status | Expiration Date |
|---|---|---|---|---|
| RURAL HOSPITAL | 642-RUH-36 | N/A | Active | 12/31/2020 |

1-1 of 1 records

## Statement of Deficiency and Plan of Correction

| Inspection Date-Time | Inspection Number | Event ID | Grade | SOD/POC | Document(s) |
|---|---|---|---|---|---|
| 01/23/2020 0:00 AM | 32252 | JQR211 | | SOD/POC | Documents (0) |
| 09/24/2019 0:00 AM | 29047 | RLEL11 | | SOD/POC | Documents (0) |
| 04/03/2019 0:00 AM | 24030 | CZLB11 | | SOD/POC | Documents (0) |
| 03/12/2018 0:00 AM | 15434 | 9DYZ11 | | SOD/POC | Documents (0) |
| 12/29/2017 0:00 AM | 12810 | F58Y11 | | SOD/POC | Documents (0) |

1-5 of 5 records

## Additional Statement of Deficiency and Plan of Correction

| Document Name | Comments |
|---|---|
| T2BH11_sod.pdf | Survey Date: 05/06/2020 |
| D82E11_poc.pdf | Survey Date: 08/17/2016 |
| Z25O11_poc.pdf | Survey Date: 04/14/2016 |
| 11I011_sod.pdf | Survey Date: 01/22/2015 |
| 9K3F11_poc.pdf | Survey Date: 11/20/2014 |
| 0NDT11_sod.pdf | Survey Date: 03/13/2014 |
| 0NDT21_sod.pdf | Survey Date: 03/13/2014 |
| 1GU711_sod.pdf | Survey Date: 03/13/2014 |
| 3QHR11_sod.pdf | Survey Date: 09/12/2013 |
| 1S4Y11_SoD.pdf | Event ID: 1S4Y11, Survey Date: 05/23/2013 0:00 AM |

1 2

1-10 of 17 records

Close

# EXHIBIT H

IN THE FOURTH JUDICIAL DISTRICT COURT

OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF ELKO

---o0o---

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

Plaintiff,

vs. Case No. CV-C-17-439

DAVID GARVEY, M.D., an individual; BARRY BARTLETT, et al., Dept. No. 1

Defendants.
_____/

VIDEOTAPED DEPOSITION OF BARRY AMOS RAY BARTLETT

DECEMBER 20, 2019

RENO, NEVADA

Reported by: JULIE ANN KERNAN, CCR #427, RPR

Job No. 581741

A That would be the California EMS agency in Sacramento.

**Q Have you ever had your license revoked or suspended?**

A I have not.

**Q Have you ever had any lapses in your license?**

A I have not.

**Q Have you ever been contacted by the board for any letters of concern regarding your care?**

A I have not.

**Q What certifications do you hold?**

A Paramedic certification.

**Q Do you have a BLS -- do you have a BLS certification?**

A Yes, I do.

**Q And do you know when you first got the BLS?**

A When I was in the Navy in 1982.

**Q And have you maintained that certification since 1982?**

A Yes, I have.

**Q Any lapses?**

A No.

**Q What about ACLS?**

A Yes, ACLS.

**Q And when did you get your ACLS certification?**

A In 1983.
**Q Any lapses in that certification?**
A Never.
**Q Are there different rankings for paramedics?**
A There are not.
**Q Can you tell me five years prior to 2016 where you worked as a paramedic?**
A American Medical Response.
**Q Anywhere else?**
A No.
**Q So you went from AMR to Reach Air? Or were you working for both?**
A I was working for both.
**Q How long did you work for both companies?**
A For AMR, close to 19 years. And for Reach, close to six months.
**Q When did you begin working for Reach Air?**
A In March or April, 2016.
**Q And how did you come to find Reach Air or did they find you?**
A I forged around and Reach, since they were a new program in California, I worked with a lot of their crew members because many of them worked on our team.
**Q And back in June of 2016, what -- can you tell me what your schedule looked like between the two**

**Q The Reach Air.**

A As soon as I finished the academy. So I'm estimating May.

**Q And as an intern was there any kind of documentation that you would have to submit to your supervising preceptor, Mr. Lyons?**

A We had daily evaluations.

**Q And can you explain to us what was included in those daily evaluations?**

A Basic overall performance.

**Q And would -- on those evaluations is that something that you would see? Would he share with you how he was evaluating you?**

A Yes. We went through the entire evaluation together.

**Q Can you explain to us how that would work? Was it, like, at the end of each shift or the beginning of the next shift that, you know, he would -- what would he go over with you?**

A No, it was at the end of every shift.

**Q Okay. And do you recall what subjects were on that daily evaluation?**

A I don't recall exact subjects.

**Q Is it something that you had to sign off on?**

A Yes.

**Q Did you keep a copy of those evaluations?**

A I did not.

**Q Where -- what would happen after you would sign off on those evaluations?**

MR. BURTON: Objection as to form.

MS. MORALES: Yeah.

THE WITNESS: Could you --

MS. MORALES: Yeah. To your --

THE WITNESS: -- rephrase that?

BY MS. MORALES:

**Q Yeah. To your knowledge, did you have to submit those evaluations that you signed off onto Reach Air? What would you do once you signed off on them?**

A They were kept in a binder at the base. And then at the end of the internship it would be submitted to -- to Santa Rosa.

**Q Do you recall ever having any criticisms by Mr. Lyons of your -- during your internship?**

A I do not.

**Q Why did you -- why did you leave Reach Air before -- I mean right after you -- well, strike that.**

**Did you complete your internship?**

A I did not.

**Q And why didn't you complete it?**

A Because I resigned my position.

**Q And why did you resign?**

A I resigned because I had decided to leave Reach within about four months of employment because of the insurance. Medical insurance was not what I thought it was.

**Q Any other reasons?**

A That's the only reason.

MS. MORALES: I heard that. It's being videoed.

BY MS. MORALES:

**Q So after you decided to leave Reach Air where did you start working?**

A I went back full time to AMR in Stockton.

**Q Now, when you're licensed in California as a --as a paramedic is there, like, reciprocity so you can work in other states, is that how it works?**

A There is not.

**Q And so do you have to be licensed in the state of Nevada?**

A You do.

**Q And were you licensed in the state of Nevada at the time that you provided care to -- in 2000 -- June of 2016?**

A Yes, I was.

**Q And how long had you had your license in the state of Nevada?**

A Approximately three months.

**Q Three months from when? What -- what was the date that you got your license?**

A I -- I can't remember that.

**Q Did you have it before you started at Reach Air?**

A I did not.

**Q Did you have it in June of 2016?**

A I did.

**Q Did you have it at the time that you attended the training courses in Santa Rosa?**

A I did not.

**Q Did you do any intern, part of your internship with Reach Air prior to -- with the crew prior to getting your Nevada license?**

A I did.

**Q For approximately how long?**

A Approximately four weeks.

**Q And what was your scope of practice during that four weeks of time that you were on the crew with Reach Air without a license in Nevada?**

A I was actually at the time operating at the Stockton base in California, so I was operating under the California State Paramedic scope of practice.

**Q Did you go with any of the flight crews in Nevada during that period of time?**

A I did not.

**Q And when you say you were operating out of Santa Rosa can you explain that for us?**

A Actually, it was out of Stockton.

**Q I'm sorry, Stockton.**

A Yeah, it was the Stockton base that they sent me to because I was -- I did not have my license in Nevada yet.

**Q And how long did you stay there?**

A Approximately four weeks.

**Q And do you recall what month that was?**

A The month of May.

**Q So then you obtained your Nevada license sometime in June of 2016?**

A It was in May.

**Q Do you still hold a Nevada license?**

A I do not.

**Q Is there a reason for that?**

A I don't work in the state.

**Q Did you ever have that license revoked or suspended?**

A I did not.

**Q Do you still talk with Mr. Lyons?**

A I do not.

**Q Did you get along with him when you worked with**

(Short break.)

VIDEOGRAPHER: We are going back on the video record. The time is approximately 10:18 a.m.

BY MS. MORALES:

**Q How many intubations have you performed in your career as a paramedic?**

A Approximately 1,500.

**Q And that's a specific number. How'd you come up with that?**

A I used to keep a record.

**Q I'm sorry?**

A Used to keep a record.

**Q Do you still have that record?**

A I do not.

**Q And what was the purpose of keeping the record?**

A Just have a record how many intubations I've done.

**Q And when did you stop keeping record?**

A Fifteen years ago.

**Q Have you ever performed a cric procedure before?**

A I have.

**Q How many?**

A Five.

**Q How many had you performed before Mr. Schwartz?**

A Four.

**Q And as a -- does your license as an EMT allow you to do cric procedures?**

A In the state of Nevada.

**Q What about in California?**

A No.

**Q When prior to -- strike that. Did you perform the cric procedures while a crew member for Reach Air, prior to Mr. Schwartz's other four?**

A No.

**Q Where did you perform those?**

A In California.

**Q And how did you perform those if your licensure didn't allow you to do it?**

A It was actually assisting of the surgical cric with the flight nurse.

**Q So you didn't actually do one yourself.**

A No.

**Q So prior to Mr. Schwartz you'd never yourself performed a cric procedure. Correct?**

A Not on a human being.

**Q What's your understanding as an EMT as to when a cric procedure should be performed?**

A When you're in a crash airway situation you can not orally intubate the patient.

**Q And can you explain to us a little bit more what**

A Yes, it was.

**Q Would you estimate that you've intubated a patient in an emergency room setting more or less than 50 times?**

A I would say more.

**Q Is there a reason the last time that you had done it in California was approximately six years before Mr. Schwartz's intubation, attempted intubation?**

A In 2009, 2010, yes.

**Q Is there a reason that you hadn't done it for that six-year period of time?**

A Are you talking about in-house intubation or intubation?

**Q In-house. I'm talking about in an emergency room setting.**

A Yeah, it was approximately -- was there a reason for it?

**Q Yeah.**

A Yes, because most of the intubations we do are in the field.

**Q Can you estimate for me appro -- by percentages, like 95 intubations that you do in the field, more or less? Is it more or less than 95 percent?**

MR. BURTON: Object to form.

THE WITNESS: I'd say more.

**what it means to preoxygenate a patient?**

A It's to supersaturate a patient before rapid sequence induction intubation.

**Q And to your knowledge, and education and experience as an EMT, what's the purpose of preoxygenation of a patient prior to rapid induction?**

A There's gonna be a time when the patient is not breathing, and the cells need to be supersaturated.

**Q And what's your understanding of how long the patient should be preoxygenated before performing an intubation?**

MR. BURTON: Object to form.

THE WITNESS: Approximately five, eight minutes.

BY MS. MORALES:

**Q Now, is there a setting that -- of the amount of oxygen that should be given?**

A Yes.

**Q And what is that?**

A On a nonrebreather, anything above eight liters, permanent.

**Q And so here in this record that I'm going back to this 1888, at the time that you arrived to the hospital it's fair to say that Mr. Schwartz was tolerating the pneumothorax and flail segment. Correct?**

MR. WEAVER: Object as to form.

MR. BURTON: Join.

THE WITNESS: Tolerating. Why don't you rephrase that. What do you mean by tolerating?

BY MS. MORALES:

**Q I'm getting it straight from the record from Reach Air. So he was stable at the time that he got to the hospital. Correct?**

MR. WEAVER: Object as to form.

MR. BURTON: Join.

MS. RIES-BUNTAIN: Join.

THE WITNESS: I wouldn't say he was stable.

BY MS. MORALES.

**Q Okay. And why wouldn't you say he was stable?**

A Because he is at 97 percent oxygen saturation and he's on a 15-liter nonrebreather.

**Q Okay.**

A And your average person would be at 99 percent at room air.

**Q And do you know what it meant when it said that he was tolerating these conditions well?**

A No.

**Q And his vital signs were normal. Correct?**

A His blood pressure and his pulse.

**Q And can you look at the record and tell me what his respirations were?**

**Q Okay. So now you're looking at what we marked as the next exhibit, which is -- are we going numbers or Letters here? Letters?**

REPORTER: Numbers. Number 3.

MS. MORALES: Okay. That's fine. Number 3.

BY MS. MORALES:

**Q Number 3. Have you had an opportunity to review this record?**

A Just right now.

**Q Yeah.**

A Yes.

**Q Okay. And so this isn't one of the records that you reviewed in preparation for your deposition?**

A No, it was not.

**Q Okay. And according to this record, what time did you attempt to intubate the patient?**

MR. BURTON: Object to form.

THE WITNESS: Zero --

MR. BURTON: Go ahead.

THE WITNESS: 0020.

BY MS. MORALES:

**Q Okay. And then going back to the 00034, Mr. Schwartz' respiratory rate, that's the first time that it increased was actually at the time that you tried to intubate the patient. Correct?**

A A complete airway bag with an assortment of endotracheal tubes, a C-MAC intubation system.

**Q Okay. And can you explain to the jury what a C-MAC is?**

A It is a computerized fiberoptic computer laryngoscope blade, with a screen.

**Q And does that -- does that machine allow for recordings?**

A It does.

**Q What about photographs?**

A I don't know about photographs. Still shots recordings, it does.

**Q And had you used a C-MAC machine prior to Mr. Schwartz' intubation?**

A I had.

**Q Okay. And is it your custom and practice to video, to press a video recording button while you're doing this, intubating?**

A It is -- I'm sorry, say that one more time?

**Q I'm sorry. Is it your custom and practice to video record while you're attempting to intubate?**

A It is policy.

**Q Okay. And when you say it's policy, is that policy of Reach Air or are you saying that's standard of care? I'm confused.**

**Q Anything else?**

A That is it.

**Q Okay. Can you tell me from your recollection what you recall happening when you -- at 20 minutes after when you attempted to intubate Mr. Schwartz?**

A I'm sorry, could you kind of rephrase that?

**Q Yeah, let me strike that. Let me back up a little bit anyway.**

**How did it come -- what discussions took place between you and Dr. Garvey pertaining to who was gonna intubate Mr. Schwartz?**

A There were no discussions.

**Q Okay. How were you assigned that duty?**

A The paramedics usually do the intubations, and flight crews. So it was a given that I was gonna do the intubation.

**Q Okay. Earlier you testified that that normally doesn't occur in an ER setting. So in this situation how did it come about that you were gonna be the one to intubate Mr. Schwartz?**

A It does in an ER setting when there's a flight crew involved, not with the ground paramedic.

**Q And so was there any discussion between you and Mr. Schwartz -- I mean you and Dr. Garvey regarding who was gonna do the intubation?**

A No.

**Q Was there any discussion between you and your supervising preceptor, Mr. Lyons, as far as who was gonna do the intubation?**

A No.

**Q And so you don't recall any discussions. Do nurses do intubations?**

A They do.

**Q Flight crew nurses?**

A They do.

**Q And so I guess I'm trying to see how this all kind of went down. If you're in the room, there's no communications as far as who's gonna intubate?**

MR. BURTON: Object to form.

THE WITNESS: It's -- it's a given that the paramedics are going to do the intubation.

BY MS. MORALES:

**Q How is it a given within your own team who's gonna do it?**

A Because most flight nurses are not comfortable with intubations.

**Q Okay. And did you have -- you didn't have any discussions even prior to arrival for this patient who was gonna intubate?**

A I don't recall that.

**Q Can you tell me what occurred or what you recall happening at this 20-minute-after mark when you attempted to intubate?**

A What happened at the 20 minutes during the intubation?

**Q Right.**

A He was paralyzed. And I attempted the intubation with a C-MAC, and it was a difficult visualization. It was very anterior.

**Q And when you say it was very anterior, to a lay person what does mean?**

A That means his airway list was farther up than the normal airway in more of an anterior upward position made it difficult to actually visualize the cords.

**Q And did you communicate his anatomy to Dr. Garvey?**

A I communicated I was having a difficult time visualizing the glottic opening.

**Q Okay. And did you -- who did you say that to? Was it just --**

A I just --

**Q -- out loud?**

A I spoke it out loud.

**Q Okay. And did you -- what exactly do you recall saying?**

A I don't recall exactly what I said.

**Q Do you recall -- generally what would you say in a situation like that? What would be your custom and practice if you've seen that?**

A He's interior.

**Q Okay.**

A He's interior.

**Q And had you intubated a patient who are interior before?**

A Many.

**Q And have you had difficulty doing so?**

A There is difficulty in some.

**Q And it's fair to say that that makes it a higher risk intubation, correct?**

MR. BURTON: Object to form.

THE WITNESS: It makes it more difficult.

BY MS. MORALES:

**Q And at that point did you ask Dr. Garvey to assist you?**

MR. WEAVER: Object as to form.

MR. BURTON: Join.

THE WITNESS: I did not.

BY MS. MORALES:

**Q Okay. And then what do you recall happening next?**

**handwritten on a plain piece of paper.**

A ET tube placement was attempted again at 0023.

**Q Okay. And what happened during that attempt? So that was, like, three minutes after the first attempt and after you pushed the jaw up. Right?**

A That is correct.

**Q Okay. So three minutes later what happened? What do you recall of that attempt?**

A I got visualization and considered about a 25 percent glottic opening visualization, and emises started to pool into the hypopharnyx.

**Q Okay. And what do you recall happening after that?**

A Um, I attempted to pass a tube, in the glottic opening.

**Q And what tube were you attempted to pass, what size?**

A The 7.5, if I recall.

**Q Okay. And what happened next?**

A I was not able to get it into the -- into the glottic opening. It slipped into the esophagus.

**Q Okay.**

A And we pulled the tube out and had to start doing very aggressive suctioning of the airway.

**Q And was he -- was there emesis already coming up**

**Q Okay. What time did you do that?**

A Well, the record says 0033, but it was -- it was very soon after the -- the first attempt.

**Q Okay. And what happened during that attempt?**

A Same, had about a 25 percent glottic opening plus the airway, and again, another wave of emesis.

**Q Okay. Then what happened?**

A I attempted to intubate the trachea.

**Q What -- to a lay person what does that mean?**

A We tried to get the tube into the glottic opening to secure the airway.

**Q And what happened when you tried to do that?**

A The tube went into the esophagus.

**Q Did it fill up again?**

A It did.

**Q Okay. And what happened next?**

A We pulled the tube and started aggressive suctioning, and I told Dr. Garvey that we were having a major problem here he needs to get involved in this airway now.

**Q And what was -- where was Dr. Garvey when you were trying these attempts?**

A He was on the right side of the patient prepping for a chest tube insertion.

**Q And to your knowledge had he actually inserted**

**the chest tube while you were trying to intubate?**

A He did not.

**Q So after the 033 attempt, on this sheet it says "0035 CPR in progress". Is that what you recall happening next?**

A No.

**Q Okay. And what do you recall happening?**

A Dr. Garvey came over and prepped for intubation.

**Q Okay. And then what happened after that? When did he attempt to intubate?**

A I don't know the exact time.

**Q What do you recall happening when he came over?**

MR. BURTON: Form. Go ahead.

THE WITNESS: Oh. He got his equipment together and got the patient in position. This is after we had logrolled him over to attempt to clear the airway.

BY MS. MORALES:

**Q What does logroll mean?**

A It means to completely turn the patient face down to allow for passive relief of emesis out of the airway.

**Q And when do you believe that you logrolled him? Was of it right before -- right around that 35 time period?**

A It was right before Dr. Garvey attempted his intubation.

**during his assist? Or his attempt?**

A Just his attempts to do the intubation and just the multiple times that we had to continuously suction the airway.

**Q Okay. So let's start with the first time that he attempted. What do you recall of his first attempt? Where were you?**

A I was on the right side of him up at the -- up at the head of the patient.

**Q And what were you doing during his first attempt?**

A I was suctioning.

**Q Was there anyone else suctioning or was it just you?**

A There were more than just one -- more than me suctioning.

**Q Was there one -- more than one machine being used to suction?**

A There was.

**Q How many machines were being used to suction?**

A I remember at one time three.

**Q Did you start off using one machine or did you start off using two machines?**

A I remember starting off with one.

**Q Okay. And at what point looking at this time**

correct.

**Q So is it more likely than not that that logroll if it actually occurred during your attempt to intubate happened after your second attempt?**

A I believe it was after my second attempt.

**Q And explain to me how the logroll works.**

A The logroll is a procedure you do when you actually roll the patient over as one unit, and it requires a lot of people to do it, especially a man of his size. And you do it in unison. Everybody gets a point, one on the hips, one on the legs, and one at the shoulder, one at the head, and you do it on the count of three, one, two, three, and up and over.

**Q And do you -- is it, like, on their side that you're laying them, or is it on their belly?**

A You know, on him it's traditionally on the side, but with him the amount of body we brought him over to the posterior position --

**Q I'm sorry, I was coughing. Sorry.**

A We did it in the posterior position, face down.

**Q And how long do you leave him like that?**

A Until the airway is cleared.

**Q And in this case can you estimate when that first logroll was done how long it took for his airway to clear, how long you had to keep him on his belly?**

**Q And why do you have that opinion?**

A Because they fill up with vomit quickly.

**Q And so do you recall where -- strike that.**

**Do you recall Dr. Garvey asking for a King airway?**

A I do not.

**Q Okay. Do you know where -- where they got the King airway?**

A I do.

**Q Where?**

A From Paul, the transporting paramedic.

**Q And what do you remember -- what do you remember about that?**

A He offered to put in the King airway.

**Q Okay. So it was Paul who actually inserted the King airway, not Dr. Garvey, or are you saying he just went and got the equipment?**

A He inserted the airway.

**Q So then he was attempting to actually intubate the patient?**

A That's not intubation.

**Q What is this King airway help do?**

A It's sorry, say again.

**Q What does it help? How did it help in the intubation process?**

A It just helps to ventilate the patient when you can't ventilate by other means. It occludes -- in theory it occludes the esophagus, but it does not occlude the esophagus.

**Q And did he have to go get this out of his truck or van or did he have it with him?**

A I don't recall.

**Q Okay. And so he tries to -- Paul tries to insert the King airway. What happens when he does that?**

A He does successfully insert the King airway.

**Q And did that help in the intubation process at all?**

A Not in the intubation process.

**Q Did it help in any regard?**

A It did.

**Q How?**

A We restored pulses.

**Q How long did Mr. Schwartz lose a pulse before the King airway was placed?**

A I -- I can't recall.

**Q Okay. And what do you recall happening next?**

A Within a very short period of time the King airway became inoperable.

**Q Is that because the emesis blocked it?**

A That's correct.

**that procedure?**

A I did.

**Q And how did you assist?**

A I assisted with the set up of the equipment, and also I did a final landmarks for the cut that's needed for the eventual tube insertion.

**Q Did you -- I'm sorry, did you actually do the incision? I mean the cut?**

A I did not.

**Q Okay. And what do you recall occurring when you tried the cric?**

A It was somewhat precarious with the fact that it requires such highway -- high airways pressures from the BVM assist the trachea was actually -- was actually moving, so we had to stop BVM assist to stabilize the trachea before the BVM. Before the cut.

**Q And how long did you have to stop the BVM?**

A I can't recall.

**Q Can you estimate? Was it a matter of seconds, minutes?**

MR. BURTON: Object to form.

THE WITNESS: Possibly 30 seconds.

BY MS. MORALES:

**Q And what happened actual -- after you made that incision?**

A He inserted the -- the -- we have an instrument that opens up the trachea, tracheal reigns, and you can open it up and continue to place the tube in.

**Q Okay. And was that successful?**

A Tube went into the trachea.

**Q Do you use that C-MAC machine when you're doing that type of procedure?**

A No.

**Q And what happened after the tube went into the trachea?**

A It became compacted with vomit.

**Q And then following that you -- the CPR was continued. Correct?**

A That's correct.

**Q In looking at the last page, page 70, was there any other attempts after the attempt of the cric?**

A Attempts at what?

**Q Was there any other attempt to do anything as far as intubating or clear out the airway?**

A He inserted a second tube, the tracheostomy.

**Q And same thing happened?**

A That is correct.

**Q So there was two attempts at putting in a tube in the cric. Correct?**

A That's correct.

**Q And both of which were unsuccessful. Right?**

A The tube was successfully inserted in the trachea, but it was full of vomit.

**Q Okay. Anything after going through each line of the medical record that you recall occurring that isn't documented there?**

MR. BURTON: Object to the form of the question.

THE WITNESS: No. Not that I can recall.

BY MS. MORALES:

**Q Okay. After Mr. Schwartz passed, did you have any discussions with the fam -- any of his family or friends?**

A I did not.

**Q Did you have any discussions with any of the nurses at the hospital?**

A I did not.

**Q Did you talk to Dr. Garvey about what happened?**

A I did.

**Q And when did you talk to Dr. Garvey?**

A About 6:00 that morning, I called him.

**Q And where were you at when you called him?**

A I was at the Reach base, in Elko.

**Q And what did you say to him?**

A I told him I thought he did an outstanding job, and the entire team did.

# EXHIBIT I

Case No.: CV-C-17-439
Dept. No: 1

**AFFIRMATION**
Pursuant to NRS 239B.030
This document does not contain
any Social Security Numbers



IN THE FOURTH JUDICIAL DISTRICT COURT OF THE

STATE OF NEVADA, IN AND FOR THE COUNTY OF ELKO

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

Plaintiff,

vs.

DAVID GARVEY, M.D., an individual; BARRY BARTLETT, an individual (Formerly Identified as BARRY RN); CRUM, STEFANKO, & **JONES LTD**, dba Ruby Crest Emergency Medicine; PHC-ELKO INC. dba NORTHEASTERN NEVADA REGIONAL HOSPITAL, a domestic corporation duly authorized to conduct business in the State of Nevada; REACH AIR MEDICAL SERVICES, L.L.C.; DOES I through X; ROE BUSINESS ENTITIES XI through XX, inclusive,

Defendants.

**SECOND AMENDED COMPLAINT**
**(Medical Malpractice)**
**and Wrongful Death)**

COMES NOW, Plaintiff, DIANE SCHWARTZ, individual and as the administrator of the Estate of DOUGLAS SCHWARTZ, by and through her attorneys of record, CLAGGETT & SYKES LAW FIRM, for their causes of action against Defendants, DAVID GARVEY, M.D., individually; BARRY BARTLETT, individually; CRUM, STEFANKO, & **JONES LTD**, dba RUBY CREST EMERGENCY MEDICINE; PHC-ELKO, INC., dba NORTHEASTERN NEVADA REGIONAL

HOSPITAL, REACH AIR MEDICAL SERVICES, L.L.C; DOES 1 through X; ROE BUSINESS ENTITIES X1 through XX; and each of them and alleges as follows:

1. At all times relevant herein, Plaintiff, DIANE SCHWARTZ, individually and as the Special Administrator on behalf of the Estate of DOUGLAS R. SCHWARTZ (hereinafter the "Plaintiff" or "Diane"), was and is a resident of Elko County, Nevada.

2. At all times relevant herein, Plaintiff DOUGLAS SCHWARTZ (hereinafter the "Plaintiff" or "Mr. Schwartz"), was a resident of Elko County, Nevada.

3. Upon information and belief, at all times relevant herein, Defendant, David Garvey, M.D. (hereinafter "Dr. Garvey" or "Defendant"), was and is a medical doctor licensed in the State of Nevada, and a resident of Elko County, Nevada.

4. Plaintiff is informed and believes and thereon alleges that at all times relevant herein, Defendant, BARRY BARTLETT, (hereinafter "Bartlett" or "Defendant") was and is a resident of Elko, Nevada.

5. Upon information and belief, at all times relevant herein, Defendant, CRUM, STEFANKO, & **JONES LTD**, dba RUBY CREST EMERGENCY MEDICINE (hereinafter "Ruby Crest" or "Defendant"), was and is a domestic corporation existing pursuant to the laws of Delaware, authorized to do business in Nevada, and doing business in the State of Nevada.

6. Upon information and belief, at all times relevant herein, Defendant, PHC-ELKO, INC. dba NORTHEASTERN NEVADA REGIONAL HOSPITAL (hereinafter "NNRH" or "Defendant"), was and is a domestic corporation existing pursuant to the laws of Nevada, authorized to do business in the State of Nevada, and doing business in the State of Nevada.

7. Defendant NNRH was and is at all times relevant operating as a medical care facility in Elko County, Nevada and was and is owned, operated, managed, and controlled as a medical care facility within the County of Elko, State of Nevada, and was held out to the public at large, including the Plaintiff herein, as a properly equipped, fully accredited, completely staffed by qualified and prudent personnel, and operating in compliance with standards of due care maintained by other properly equipped, efficiently operated and administered, accredited medical care facilities in said community, offering full, competent, qualified, and efficient health care services to the general public

and to the Plaintiff herein; that Plaintiff herein is informed and believes and thereon alleges, that Defendant, NNRH, administered, governed, controlled, managed, and directed all the necessary functions, activities, and operations of said medical care facility, including its physician care, nursing care, interns, residents and health staff, and other personnel.

8. Upon information and belief, Defendant REACH AIR MEDICAL SERVICES, LLC, (hereinafter "Reach Air" or "Defendant") is a foreign limited liability company existing pursuant to the laws of California, authorized to do business in the State of Nevada, and doing business in the State of Nevada

9. That the true names or capacities, whether corporate, associate, individual or otherwise, of DOES I through X, inclusive, were and now are physicians, surgeons, registered nurses, licensed vocational nurses, practical nurses, registered technicians, aides, attendants, physician's assistants, CRNAs, or paramedical personnel holding themselves out as duly licensed to practice their professions under and by virtue of the laws of the State of Nevada, and were and are now engaged in the practice of their professions in the State of Nevada, and are unknown to Plaintiff who, therefore, sues said Defendants by such fictitious names. Plaintiff is informed and believes, and thereon alleges, that each of the Defendants designated herein as a DOE Barry R.N. and DOE is legally responsible in some manner for the events and happenings herein referred to and proximately caused injury and damages thereby to Plaintiff as hereinafter alleged. Plaintiff will seek leave of the Court to amend this Complaint to insert the true names and capacities of DOE BARRY R.N. or DOES I through X when the same have been ascertained and to join such Defendants in this action.

10. That the true names or capacities of Defendants, ROE BUSINESS ENTITIES XI through XX, inclusive, are unknown to Plaintiff who, therefore, sues said Defendants by such fictitious names. Defendants designated herein as ROE BUSINESS ENTITIES XI through XX, and each of them, are corporations, firms, partnerships, associations, other medical entities, including but not limited to nursing staffing companies and/or registry nursing companies, emergency physician services group, predecessors-in-interest, successors-in-interest, and/or agencies otherwise in a joint venture with, and/or serving as an alter ego of, any and/or all Defendants named herein; and/or are entities responsible for the treatment, diagnosis, surgery, and/or other provision of medical care to

Plaintiff herein, and/or otherwise responsible for the supervision of the individually named Defendants at the time of the events and circumstances alleged herein; and/or are entities employed by and/or otherwise directing the individual Defendants in the scope and course of their responsibilities at the time of the events and circumstances alleged herein; and/or are entities otherwise contributing in any way to the acts complained of and the damages alleged to have been suffered by the Plaintiff herein. Plaintiff is informed and, on that basis believes and thereon alleges, that each of the Defendants designated as a ROE BUSINESS ENTITY is in some manner negligently, vicariously, and/or statutorily responsible for the events and happenings referred to and caused damages to Plaintiff as herein alleged. Plaintiff will seek leave of the Court to amend this Complaint to insert the true names of such Defendants when the same have been ascertained.

11. Defendants are agents, servants, employees, employers, trade venturers, and/or partners of each other. At the time of the incident described in this Complaint, Defendants were acting within the color, purpose and scope of their relationships, and by reason of their relationships, Defendants may be jointly and severally and/or vicariously responsible and liable for the acts and omissions of their Co-Defendants.

## GENERAL ALLEGATIONS

1. The Plaintiff repeats and realleges the allegations as contained in the preceding paragraphs herein, and incorporates the same herein by reference.

2. On June 22, 2016, Mr. Schwartz was struck as a pedestrian by a moving vehicle as he was exiting a local restaurant in the 400 block of Commercial Street in Elko, Nevada.

3. Paramedics were called to the scene at 8:17 p.m. and arrived at the scene within a few minutes.

4. Mr. Schwartz was placed in full C-spine precautions. During transport to the hospital, his vitals were within normal limits, 4L of oxygen was started routinely, a heart monitor was placed showing normal sinus rhythm.

5. Mr. Schwartz was transported by Elko County Ambulance to Northeastern Nevada Regional Hospital on a "non-emergent" transport mode arriving at approximately 8:48 p.m.

6. Dr. Garvey performed a physical examination of Mr. Schwartz upon arrival to the emergency department.

7. His assessment revealed that Mr. Schwartz had mild abrasions to the forehead, injury to the right lateral posterior chest with moderate pain, and abrasions to the right bicep, elbow and knee.

8. Mr. Schwartz had a normal heart rate and rhythm.

9. Mr. Schwartz did not display signs of respiratory distress; his respirations were normal with clear breath sounds throughout.

10. Mr. Schwartz's neurological status was normal.

11. Mr. Schwartz's abdominal evaluation was within normal limits.

12. At approximately 9:02 p.m. several diagnostic studies were ordered to further evaluate Mr. Schwartz's injuries including scans of the head, cervical and thoracic spine, chest, abdomen and pelvis.

13. Dr. Garvey contacted Dr. Ray at the University of Utah who accepted the patient for transfer.

14. The air ambulance crew from Reach Air arrived at NNRH to transport Mr. Schwartz to the airport for an air ambulance transport to the University of Utah Hospital.

15. Mr. Schwartz was not informed of the risks of undergoing an intubation. He was not informed of the alternatives to undergoing an intubation procedure.

16. Dr. Garvey elected to have the flight nurse, Barry Bartlett, from Reach Air, perform the intubation after Rocuronium and Ketamine were administered at 12:18 a.m.

17. Mr. Schwartz's vital signs were stable up until this point.

18. Barry Bartlett, first attempted intubation at 12:20 a.m., unsuccessfully, followed quickly by a deterioration of oxygenation and vital signs.

19. Intubation by Barry Bartlett, was again unsuccessful at 12:33 a.m. and a large aspiration of gastric contents was noted.

20. After the aspiration, the vital signs and oxygenation indicated cardiopulmonary arrest and CPR was administered.

21. CPR continued and several subsequent intubation attempts were unsuccessful.

22. At 1:20 a.m. Mr. Schwartz had asystole (complete lack of heart beat) and he was pronounced dead at 1:33 a.m.

**FIRST CLAIM FOR RELIEF**

**(PROFESSIONAL NEGLIGENCE/WRONGFUL DEATH)**

**DR. DAVID GARVEY, BARRY BARTLETT,**

**RUBY CREST, REACH AIR, AND NNRH**

23. The Plaintiff repeat and reallege the allegations as contained in the preceding paragraphs herein, and incorporates the same herein by reference.

24. Defendant Dr. GARVEY owed a duty of care to Mr. Schwartz to render medical care and treatment in a professional manner consistent with the standard of care prescribed in his medical field.

25. Defendant Dr. GARVEY fell below the standard of care by deciding to intubate Mr. Schwartz without clinical indications for intubation.[1]

26. Defendant Dr. GARVEY fell below the standard of care by failing to request an anesthesiologist to perform the intubation due to the high risk of aspiration.[2]

27. Defendant Dr. GARVEY fell below the standard of care by assigning an RN to perform a high risk, semi-elective intubation in a patient who he knew just ate a large meal.[3]

28. Defendant Dr. GARVEY fell below the standard of care by failing to obtain informed consent for Mr. Schwartz when he failed to advise him of the pros and cons of the procedure as well as other acceptable options (including not doing the procedure at all or having it done by an expert physician).[4]

29. Defendant Dr. GARVEY fell below the standard of care by electing to continue with the same plan of having an RN attempt intubation even after the initial intubation procedure was

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[1] See Affidavit of Kenneth N. Scissors, M.D., attached hereto as **"Exhibit 1"**.

[2] Id.

[3] Id.

[4] Id.

unsuccessful rather than trying it himself or supporting the patient with a bag-mask technique and/or by calling in an anesthesiologist as the standard of care would require.[5]

30. Defendant Dr. GARVEY thereby caused Mr. Schwartz to suffer severe complications including a large aspiration of gastric contents and a fatal cardiopulmonary arrest.[6]

31. Defendant BARRY BARTLETT, owed a duty of care to Mr. Schwartz to render medical care and treatment in a professional manner consistent with the standard of care prescribed in his medical field. [6]

32. Defendant BARRY BARTLETT, fell below the standard of care by agreeing to attempt an intubation of Mr. Schwartz when he did not have clear indications for intubation and had a high risk of aspiration of gastric contents.[7]

33. Defendant BARRY BARTLETT, fell below the standard of care by not deferring to a qualified anesthesiologist.[8]

34. Defendant BARRY BARTLETT, fell below the standard of care by attempting a second intubation after the failed first attempt. At that point Mr. Schwartz was struggling, but supportable with a bag-mask technique. Nurse Barry should have deferred to a qualified physician. [9]

35. Defendant BARRY BARTLETT, thereby caused Mr. Schwartz to suffer severe complications including a large aspiration of gastric contents and a fatal cardiopulmonary arrest.[10]

36. Defendant NNRH employees, agents, and/or servants, including BARRY BARTLETT, was acting in the scope of his employment, under Defendant's control, and in the furtherance of Defendant's interest at the time his actions caused injuries to Mr. Schwartz.

37. Defendant NNRH in the capacity of a medical hospital, providing medical care to the public owed Mr. Schwartz a non-delegable duty to employ medical staff including Dr. GARVEY to have adequate training in the care and treatment of patients consistent with the degree of skill and

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[5] Id.
[6] Id.
[7] Id.
[8] Id.
[9] Id.
[10] Id.

learning possessed by competent medical personnel practicing in the United States of America under the same or similar circumstances.

38. At all relevant times mentioned herein, Defendants knew or in the exercise of reasonable care should have known, that the provisions of medical care and treatment was of such a nature that, if it was not properly given, was likely to injure or cause death to the person to whom it was given.

39. Defendants, and each of them, fell below the standard of care for a health care provider who possesses the degree of professional learning, skill, and ability of other similar health care providers in failing to timely and properly treat Mr. Schwartz resulting in significant injuries and death. The allegations against Defendants are supported by the Report of Dr. Kenneth N. Scissors.[11]

40. Mr. Schwartz thereby experienced great pain, suffering, and anxiety to his body and mind, with said injuries ultimatley leading to death and damages in the sum in excess of Ten Thousand Dollars ($10,000.00).

41. As a further direct and proximate result of the aforesaid negligence and carelessness of Defendants, Plaintiff have incurred damages, both general and special, including medical expenses as a result of the treatment of Mr. Schwartz's injuries and funeral expenses.

42. As a further proximate result of the aforementioned negligence and carelessness of Defendants, the Plaintiff was required to, and did, employ physicians, surgeons, and other health care providers to examine, treat, and care for her and did incur medical and incidental expenses thereby. The exact amount of such expenses is unknown at this present time, but Plaintiff alleges that she has suffered special damages in excess of Ten Thousand Dollars ($10,000.00).

43. As a further direct and proximate result of the negligence and carelessness of Defendants, Plaintiff has suffered, and will continue to suffer, pain, suffering, and loss of enjoyment of life in an amount to be proven at trial.

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[11] Id.

44. As a direct and proximate result of the negligence and carelessness of Defendants, Plaintiff suffered and will continue to suffer lost wages and/or loss of earning capacity, in an amount to be proven at trial.

45. The actions of the Defendant have forced Plaintiff to retain counsel to represent her in the prosecution of this action, and she is therefore entitled to an award of a reasonable amount as attorney fees and costs of suit.

**SECOND CLAIM FOR RELIEF**

**(Vicarious Liability, Corporate Negligence and Ostensible Agency)**

**Against Defendant NNRH, RUBY CREST, AND REACH AIR**

46. The Plaintiff repeats and realleges the allegations as contained in the preceding paragraphs herein, and incorporates the same herein by reference.

47. Employers, masters and principals are vicariously liable for the torts committed by their employees, servants and agents if the tort occurs while the employee, servant, or agent was acting in the course and scope of employment.

48. The Defendants were the employers, masters, principals, and/or ostensible agents of each other, the remaining Defendant, and other employees, agents, independent contractors and/or representatives who negligently failed through their credentialing and re-credentialing process to employ and or grant privileges to an emergency room physician with adequate training in the care and treatment of patients consistent with the degree of skill and learning possessed by competent medical personnel practicing in the United States of America under the same or similar circumstances.[12]

49. Defendants' breach of the applicable standard of care directly resulted in Plaintiff sustaining significant injuries that ultimately led to his death.

50. Mr. Schwartz thereby experienced great pain, suffering, and anxiety to his body and mind, sustaining injuries, damages and death in the sum in excess of Ten Thousand Dollars ($10,000.00).

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[12] Id.

51. As a further direct and proximate result of the aforesaid negligence and carelessness of Defendants, Plaintiff has incurred damages, both general and special, including medical expenses as a result of the necessary treatment of her injuries, and will continue to incur damages for future medical treatment necessitated by incident-related injuries she has suffered.

52. As a further proximate result of the aforementioned negligence and carelessness of Defendants, the Plaintiff was required to, and did, employ physicians, surgeons, and other health care providers to examine, treat, and care forherand did incur medical and incidental expenses thereby. The exact amount of such expenses is unknown at this present time, but Plaintiff alleges that she has suffered special damages in excess of Ten Thousand Dollars ($10,000.00).

53. As a further direct and proximate result of the negligence and carelessness of Defendants, Plaintiff has suffered, and will continue to suffer, pain, suffering, and loss of enjoyment of life in an amount to be proven at trial.

54. As a direct and proximate result of the negligence and carelessness of Defendants, Plaintiff suffered and will continue to suffer lost wages and a loss of earning capacity, in an amount to be proven at trial.

55. Defendants' failure to properly credential and/or re-credential Dr. Garvey or to otherwise assure that an emergency room physician had adequate training in the care and treatment of patients consistent with the degree of skill and learning possessed by competent medical personnel practicing in the United States of America under the same or similar circumstances caused Plaintiff to suffer and ultimately die as a result of his care.

56. The actions of the Defendants have forced Plaintiff to retain counsel to represent her in the prosecution of this action, and she is therefore entitled to an award of a reasonable amount as attorney fees and costs of suit.

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**THIRD CLAIM FOR RELIEF**

**(Negligent Hiring, Training, and Supervision)**

**Against Defendant NNRH, RUBY CREST, AND REACH AIR**

57. The Plaintiff repeat and reallege the allegations as contained in the preceding paragraphs herein, and incorporates the same herein by reference.

58. The Defendants, and each of them, hired, trained, supervised and/or retained employees to provide treatment to patients, to include Plaintiff, within the appropriate standard of care, which required Defendants to properly assess and recognize when intubation is needed.

59. The Defendants had a duty to hire, properly train, properly supervise, and properly retain competent employees, agents, independent contractors and representatives.

60. Upon information and belief, the Defendants, breached their duty by improperly hiring, improperly training, improperly supervising and improperly retaining incompetent employees regarding the examination , diagnosis, and treatment of patients.

61. Defendants' breach of the applicable standard of care directly resulted in Plaintiff sustaining significant injuries that ultimatley lead to his untimely death.[13]

62. Plaintiff thereby experienced great pain, suffering, and anxiety to his body and mind, sustaining injuries and damages in the sum in excess of Ten Thousand Dollars ($10,000.00).

63. As a further direct and proximate result of the aforesaid negligence and carelessness of Defendants, Plaintiff has incurred damages, both general and special, including medical expenses as a result of the necessary treatment of her injuries, and will continue to incur damages for future medical treatment necessitated by incident-related injuries she has suffered.

64. As a further proximate result of the aforementioned negligence and carelessness of Defendants, the Plaintiff wasrequired to, and did, employ physicians, surgeons, and other health care providers to examine, treat, and care for Mr. Schwartz and did incur medical and incidental expenses thereby. The exact amount of such expenses is unknown at this present time, but Plaintiff allege that she hassuffered special damages in excess of Ten Thousand Dollars ($10,000.00).

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[13] Id.

65. As a further direct and proximate result of the negligence and carelessness of Defendants, Plaintiff has suffered, and will continue to suffer, pain, suffering, and loss of enjoyment of life in an amount to be proven at trial.

66. As a direct and proximate result of the negligence and carelessness of Defendants, Plaintiff suffered and will continue to suffer lost wagesand/or loss of earning capacity, in an amount to be proven at trial.

67. The actions of the Defendants have forced the Plaintiff to retain counsel to represent her in the prosecution of this action, and she is therefore entitled to an award of a reasonable amount as attorney fees and costs of suit.

## FOURTH CLAIM FOR RELIEF

**(Lack of Informed Consent)**

**Against Defendant DAVID GARVEY, M.D.**

68. The Plaintiff repeat and reallege the allegations in the preceding paragraphs herein, and incorporate the same herein by reference.

69. Informed Consent requires the attending physician explain to the patient or guardian(s) including but not limited to alternatives to the treatment or procedure and the reasonable risks of undergoing the procedure.[14]

70. Dr. Garvey did not explain to the Plaintiff the pros and cons of the procedure and that there are acceptable options, including not doing the procedure at all or having it done by an expert physician.

71. Dr. Garvey did not explain to Plaintiff the reasonable risks of the intubation procedure including the risk of aspiration due to a full stomach and that said aspiration, should it occur, could lead to death.

72. Plaintiff would not have opted to have the intubation procedure had they been informed by Dr. Garvey of the less invasive alternative and of the substantial risks involved with intubation.

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[14] See Affidavit of Kenneth N. Scissors, M.D. attached hereto as "**Exhbit 1**"

73. As a result of Dr. Garvey's lack of informed consent, Mr. Schwartz experienced great pain, discomfort and ultimately suffered death.[15]

74. The actions of the Defendants have forced the Plaintiff to retain counsel to represent them in the prosecution of this action, and they are therefore entitled to an award of a reasonable amount as attorney fees and costs of suit.

75. As a direct and proximate result of the negligence and carelessness of Defendants, Plaintiff has suffered, and will continue to suffer, pain, suffering, and loss of enjoyment of life in an amount to be proven at trial.

76. As a direct and proximate result of the negligence and carelessness of Defendants, Plaintiff suffered and will suffer lost wages, in an amount to be proven at trial.

**FIFTH CLAIM FOR RELIEF**

**(Loss of Consortium)**

**DIANE SCHWARTZ's Claim Against All Defendants**

77. Plaintiff restate and reallege each and every allegation contained in the preceding paragraphs herein, and incorporate the same herein by reference.

78. Plaintiff, Diane Schwartz, is and at all times relevant herein, has been the spouse of Plaintiff Douglas R. Schwartz.

79. As a direct and proximate result of Defendants' negligence and carelessness, has lost and will continue to lose a degree of society, comfort and companionship of his spouse, all to her damage in an amount in excess of Ten Thousand Dollars ($10,000.00).

80. The actions of the Defendants have forced the Plaintiff to retain counsel to represent them in the prosecution of this action, and they are therefore entitled to an award of a reasonable amount as attorney fees and costs of suit.

81. As a direct and proximate result of the negligence and carelessness of Defendants, Plaintiff has suffered, and will continue to suffer, pain, suffering, and loss of enjoyment of life in an amount to be proven at trial.

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[15] Id.

82. As a direct and proximate result of the negligence and carelessness of Defendants, Plaintiff suffered and will suffer lost wages, in an amount to be proven at trial.

WHEREFORE, Plaintiff, DIANE SCHWARTZ, individually and as administrator of the Estate of DOUGLAS R. SCHWARTZ, deceased, expressly reserves her right to amend this Complaint at the time of trial, to include all items of damage not yet ascertained, demand judgment against Defendants, DAVID GARVEY, M.D., an individual; BARRY BARTLETT, an individual; CRUM, STEFANKO, & **JONES LTD** dba RUBY CREST EMERGENCY MEDICINE; PHC-ELKO, INC., dba NORTHEASTERN NEVADA REGIONAL HOSPITAL, a domestic corporation duly authorized to conduct business in the State of Nevada; REACH AIR MEDICAL SERVICES, L.L.C.; DOES I through X; ROE BUSINESS ENTITIES XI through XX, inclusive and each of the defendants as follows:

1. For general damages, in an amount in excess of Ten Thousand Dollars ($10,000.00), to be set forth and proven at the time of trial;
2. For special damages in an amount in excess of Ten Thousand Dollars ($10,000.00), to be set forth and proven at the time of trial;
3. For reasonable attorney's fees;
4. For costs and disbursements of this suit; and
5. For such other relief as to the Court seems just and proper.

DATED this 12th day of February, 2018.

CLAGGETT & SYKES LAW FIRM

Sean K. Claggett, Esq.
Nevada Bar No. 008407
Jennifer Morales, Esq.
Nevada Bar No. 008829
Matthew S. Granda, Esq.
Nevada Bar No. 012753
4101 Meadows Lane, Suite 100
Las Vegas, Nevada 89107
(702) 655-2346 – Telephone
*Attorneys for Plaintiff*

Pursuant to FJDCR 19.1.A. DIANE SCHWARTZ, Plaintiff in this matter, is not in debt or bankruptcy.

**Pursuant to NRS 239.030, counsel hereby affirms that this document contains no social security numbers.**

Jennifer Morales, Esq., Attorney for Plaintiff

# Table of Exhibits

| | | |
|---|---|---|
| Exhibit "1" | Affidavit of Kenneth Scissors, M.D. – | 5 pages |

# Exhibit "1"

## AFFIDAVIT OF KENNETH N. SCISSORS, M.D.

I, Kenneth N. Scissors, MD, being duly sworn, under oath, state that the following assertions are true to the best of my personal knowledge training, experience and belief;

1) I am licensed by the Colorado Board of Medical Examiners to practice medicine in the State of Colorado.

2) My licenses are current with the appropriate State and Federal agencies.

3) My additional qualifications to serve as an expert are set forth in my Curriculum Vitae, attached as Exhibit 1.

4) Based on my training, background, knowledge and experience, I am familiar with the applicable standard of care for the treatment of the signs, symptoms, and condition presented by Mr. Schwartz in the emergency department. I am familiar with the team approach involved in the emergency room to include but not limited to transport teams and nursing care. The areas covered in this report overlap and based on my experience and training I am familiar and qualified in the areas addressed in this report to provide opinions.

5) I am qualified on the basis of my training background, knowledge, experience to offer an expert opinion regarding the accepted standard of medical care of the emergency room physician and the nurse who attempted to intubate Douglas Schwartz, the breaches thereof and the resulting injuries and damages arising therefrom.

### Documents Reviewed

1.) Northeaster Nevada Regional Hospital Medical Records
2.) Elko County Ambulance Medical Records
3.) Certificate of Death

4.) Autopsy Protocol
5.) NMS Lab Report
6.) Elko County Sheriff's Office Investigation Report
7.) Radiology Disc from Northeastern Nevada Regional Hospital

**Summary of Medical Care at Northern Nevada Regional Hospital Emergency Department on June 22, 2016**

On June 22, 2016 Mr. Douglas Schwartz was struck as a pedestrian by a moving vehicle. Paramedics were called at 8:17 p.m. and arrived at the scene within a few minutes. Mr. Schwartz was placed in full C-spine precautions. During his transport to the hospital his vitals were within normal limits, 4L of 02 was started routinely, a monitor was placed showing normal sinus rhythm. Mr. Schwartz was given 4 mg Zofran IVP followed by 100 mcg Fentanyl IVP which helped with his pain. He was transported by Elko County Ambulance to Northern Nevada Regional Hospital on a "non-emergent" transport mode arriving at 8:48 p.m.

Dr. David Garvey performed a physical evaluation of Douglas Schwartz upon arrival to the emergency department. He noted that Douglas Schwartz sustained mild abrasions to the forehead, injury to the right lateral posterior chest with moderate pain, and abrasions of the right bicep, elbow, and knee. Mr. Schwartz had a normal heart rate and rhythm. Mr. Schwartz did not display signs of respiratory distress; his respirations were normal with clear breath sounds throughout. Mr. Schwartz's neurological status was normal. His abdominal evaluation was also within normal limits. Mr. Schwartz's condition was stable.

At approximately 9:02 p.m. several diagnostic studies were ordered to further evaluate Mr. Schwartz's injuries including CT scans of the head, cervical and thoracic spine, chest, abdomen and pelvis.

Dr. Garvey contacted Dr. Ray at University of Utah trauma service who accepted the patient for transfer. According to Dr. Garvey's chart note, Dr. Ray requested that a chest tube be placed and possibly intubation prior to air medical transport.

Dr. Garvey elected to have the flight nurse, Barry, perform the intubation after Rocuronium and Ketamine administration at 0018 hours. The vital signs were stable up until this point. The intubation was first attempted at 0020 unsuccessfully, followed quickly by deterioration of oxygenation and vital signs. Intubation was again unsuccessful at 0033 and a large aspiration of gastric contents was noted. After the aspiration, the vital signs and oxygenation indicated cardiopulmonary arrest and CPR was administered. CPR continued and several subsequent intubation attempts were unsuccessful. At 0120 Mr. Schwartz had asystole (complete lack of heart beat) and he was pronounced dead at 0133

**Deviations from the Standard of Care.**

Northern Nevada Regional Hospital and Ruby Crest Emergency Medicine through its owners, officers, employees, agents and/or contractors, deviated from the applicable standard of care, through the actions of its employee, agent or contractor, Dr. David Garvey who provided medical care and treatment to Mr. Schwartz in the emergency room on June 22, 2016.

Northern Nevada Regional Hospital and Ruby Crest Emergency Medicine are required to properly hire, train, supervise and/or retain employees, including Dr. David Garvey to provide treatment within the appropriate standard of care to patients such as Douglas Schwartz in the emergency room on June 22, 2016.

Dr. David Garvey breached the standard of care in several ways:

1. Deciding to intubate Mr. Schwartz without clinical indications for intubation. Preventive intubation for air flight is not the standard of care. Intubation has inherent risks, especially in a patient who likely has food in the stomach. Intubation is reserved for patients who are unable to breath adequately on their own, yet Mr. Schwartz was breathing without difficulty and had adequate oxygen levels on simple oxygen supplementation.
2. Even if there was a pressing but non-emergent need to intubate Mr. Schwartz with likely food in the stomach, the standard of care would be to request an anesthesiologist to perform the intubation due to the high

risk of aspiration. It is a deviation from the standard of care for an emergency room physician to assign a RN to perform a high risk semi-elective intubation in a patient with likely gastric contents when highly skilled physicians are available.

3. Since this was a non-emergent and non-essential invasive procedure in an awake, cognitive patient, informed consent was required. That means more than just telling the patient what is to be done. The patient must be told the pros and cons of the procedure and that there are acceptable options, including not doing the procedure at all or having it done by an expert physician. Dr. Garvey deviated from the standard of care by not giving Mr. Schwartz the opportunity to decline this risky and unnecessary procedure.
4. Once the initial intubation was unsuccessful, Dr. Garvey elected to continue with the same plan of having a RN attempt intubation rather than trying it himself or supporting the patient with a bag-mask technique and calling in an anesthesiologist as the standard of care would require. This led to a large aspiration of gastric contents and a fatal cardiopulmonary arrest.

Reach Air Medical Services through its owners, officers, employees, agents and/or contractors, deviated from the applicable standard of care, through the actions of its employee, agent or contractor, identified as "Barry RN" who provided medical care and treatment to Mr. Schwartz in the emergency room on June 22, 2016.

Reach Air Medical Services is required to properly hire, train, supervise and/or retain employees, including "Barry RN" to provide treatment within the appropriate standard of care to patients such as Douglas Schwartz in the emergency room on June 22, 2016.

Nurse Barry violated the standard of care in two instances:

1. Nurse Barry should not have agreed to attempt to intubate Mr. Schwartz given that he did not have clear indications for intubation and had a high risk of aspiration of gastric contents. In this situation, a RN should defer to a qualified physician, preferably an anesthesiologist.

2. Nurse Barry should not have attempted a second intubation after the failed first attempt. At that point Mr. Schwartz was struggling, but still supportable with a bag-mask technique. Nurse Barry should have deferred to a qualified physician at this point rather than repeating the same mistake he made initially. The second failed attempt caused a fatal aspiration.

All of the aforementioned breaches of the standard of care caused or contributed to the death of Mr. Schwartz.

All of my opinions expressed herein are to a reasonable degree of medical certainty.

I reserve the right to amend, modify, and add to my opinions upon further review of any additional documents and/or information.

Further Affidant Sayeth Not.

Dated this 21 day of June, 2017

KENNETH N. SCISSORS, M.D.

State of Colorado
County of Mesa
On this 21 day of June, 2017 Kenneth Scissors, MD
personally appeared before me,
X who is personally known to me,
whose identity I verified on the basis of CO - DL .
whose identity I verified on the oath/affirmation of .
a credible witness,
to be the signer of the foregoing document, and he she acknowledged that he/she signed it.

Therese Luellen
Notary Public
My Commission Expires 4-5-2021

THERESE LUELLEN
NOTARY PUBLIC
STATE OF COLORADO
NOTARY ID 20014010801
MY COMMISSION EXPIRES 04/05/2021

# EXHIBIT J

# Journal

OF THE

# SENATE OF THE STATE OF NEVADA

EIGHTEENTH SPECIAL SESSION

THE FIRST DAY

CARSON CITY (Monday), July 29, 2002

Senate called to order at 9:30 a.m.
President Hunt presiding.
President Hunt requested that her remarks be entered in the Journal.

We gather today for this Special Session because an issue of public health has become so critical ―that it's impact on the people of Nevada can be devastating. It is an issue―where there is no consensus―and where there is only heated, and at times, contentious debate.

It is an issue―that has reached a point/where a wide impasse exists causing this body to be brought together.

It goes without saying that settling the issue―without a Special Session would have been preferable to us, to the people of Nevada and certainly to our Governor Kenny Guinn.

But there is a time when leadership must rise to the occasion and take over and that is exactly what Governor Guinn did. And that is exactly what he, and all Nevadans, is looking for us to do.

This is what we were elected to do. The voters didn't send us to the state legislature/to make the easy decisions.

We are the ones to whom they are looking for solution.

To whom they are looking for resolution.

To whom they are looking/to protect them and their families.

We are it folks.

Let's put politics aside and do the right thing for the people of Nevada.

Prayer by the Chaplain, Pastor Bruce Henderson.

Lord, here we are again. Although it's nice to be with friends and colleagues, we're not supposed to be here yet. But, a lot of things have happened since last we met-hard, gut-wrenching terror and knock your socks off economics. Please bless our nation and our state during these times, oh Lord.

So although by the calendar we're not supposed to be here yet, we realize that our timing is not the same as Yours. Be with us during this crucial time for which we meet, and please give us nothing less than Your wisdom which we so need right now. In Your holy and righteous Name.

AMEN.

Pledge of allegiance to the Flag.

MOTIONS, RESOLUTIONS AND NOTICES

Madam President requested Mrs. Claire J. Clift to serve as temporary Secretary of the Senate and Mr. Charles P. Welsh to serve as temporary Sergeant at Arms.

Madam President instructed the temporary Secretary to call the roll of the holdover Senators.
Roll called.
All holdover Senators present.

Madam President appointed Senators O'Connell, Rhoads and Shaffer as a temporary Committee on Credentials to examine the credentials of the newly-appointed Senators.

Madam President announced that if there were no objections the Senate would recess subject to the call of the Chair while credentials of the newly-appointed Senators were examined by the temporary Committee on Credentials.

Senate in recess at 9:34 a.m.

SENATE IN SESSION

At 9:35 a.m.
President Hunt presiding.
Quorum present.

REPORTS OF COMMITTEES

*Madam President:*

Your temporary Committee on Credentials, has had the credentials of the respective Senator-appointees under consideration and begs leave to report that the following persons have been and are duly appointed and are qualified members of the Senate of the Eighteenth Special Session of the Legislature of the State of Nevada; Christine A. Milburn and Jesse C. Paulk. ANN O'CONNELL DEAN A. RHOADS RAYMOND C. SHAFFER

MOTIONS, RESOLUTIONS AND NOTICES

Senator O'Connellmoved that the report of the temporary Committee on Credentials be adopted.

Motion carried.

Madam President appointed Senators Townsend, O'Donnell and Care to escort Chief Justice William A. Maupin of the Supreme Court of Nevada to the rostrum to administer the oath of office to the newly-appointed Senators.

Madam President announced that if there were no objections the Senate would recess subject to the call of the Chair.

Senate in recess at 9:36 a.m.

SENATE IN SESSION

At 9:37 a.m.

President Hunt presiding.

Quorum present.

Chief Justice Maupin administered the oath of office to the newly-appointed Senators.

Madam President announced that if there were no objections the Senate would recess subject to the call of the Chair.

Senate in recess at 9:40 a.m.

SENATE IN SESSION

At 9:46 a.m.

President Hunt presiding.

Quorum present.

Senator Wiener moved that the Chief Justice be extended a unanimous vote of thanks for administering the oath of office.

Motion carried unanimously.

Madam President instructed the temporary Secretary to call the roll of the Senators.

Roll called.

All Senators present.

Senator Raggio moved that the organization of the Senate of the Seventy-first Session of the Nevada Legislature be designated as the organization of the Eighteenth Special Session of the Nevada Legislature.

Motion carried.

Senator Raggio moved that the Secretary of the Senate be instructed to insert the Eighteenth Special Session organization in the Journal of the Senate, as outlined in the handout located on each Senator's desk.

Motion carried.

PRESIDENT PRO TEMPORE OF THE SENATE—
SENATOR LAWRENCE E. JACOBSEN
MAJORITY FLOOR LEADER—
SENATOR WILLIAM J. RAGGIO
ASSISTANT MAJORITY FLOOR LEADER—
SENATOR RAYMOND D. RAWSON
MAJORITY WHIP—
SENATOR MAURICE E. WASHINGTON
ASSISTANT MAJORITY WHIP—
SENATOR MARK E. AMODEI
MINORITY FLOOR LEADER—
SENATOR DINA TITUS
ASSISTANT MINORITY FLOOR LEADER—
SENATOR BERNICE MATHEWS
MINORITY WHIP—
SENATOR VALERIE WIENER
SECRETARY OF THE SENATE—
CLAIRE J. CLIFT

Madam President appointed Senators Rawson, Amodei and Mathews as a committee of three to inform the Assembly that the Senate is organized and ready for business.

Madam President appointed Senators Washington, McGinness and Wiener as a committee of three to inform the Governor that the Senate is organized and ready for business.

A committee from the Assembly composed of Assemblymen Williams, Leslie and Beers appeared before the bar of the Senate and announced that the Assembly was organized and ready for business.

Senator Raggio moved that the following persons be accepted as accredited press representatives, and that they be assigned space at the press table and allowed the use of the appropriate media facilities: ASSOCIATED PRESS, Joe Cavaretta, Brendon Riley; BOULDER CITY NEWS, Chuck Baker; CARSON CITY NEWS, David Morgan; CITADEL COMMUNICATIONS, Adriana Diaz, David Marz; COMSTOCK CHRONICLE/CABLE NEWS SERVICE, Travis T. Hipp; COVER EDGE, Michele Kane, Kevin Ross; COX COMMUNICATIONS, Steve Schorr; DONREY CAPITAL BUREAU, Ed Vogel, Sean Whaley; ELECTRIC NEVADA & ELECTRIC AMERICA, Daniel Joseph, Tiffany Van der Stokker; FERNLEY LEADER/COURIER, Betty Aleck, Laura Tennant; FOX 5, Michael Baldwin, Don Lyle; GAMING TODAY, Chuck DiRocco; HIGH DESERT ADVOCATE, Howard Copelan; HIGHWAY RADIO, Kirk Anderson; KKOH, Kelly McAllister; KLAS-TV, Rich Czerny, George Knapp, Cory Royer, Eric Sorenson, Jon Summers; KNPB-TV/KLVX-TV, Mitch Fox, Mike Garafolo, Jack Kelly, John Kirk, Bonnie Maclean, Rosemary McCarthy, Ethan Salter, Michelle Stander; KNPR RADIO, Florence Rodgers; KOLO TV, Jodee Kenney, Karl Baker, Bruce Bolf, Brent Boynton, Jean Casarez, Beryl Chong, Jenee Conway, Mark Cronon, Beth Ford, Timothy Ill, Jeff Jones, Justin Kanno, Darrell McComb, Edward Pearce, Terri Russell, Erin Scheuerman, Henry Wofford; KRJC/KTSN RADIO, Stacey Sawyer; KRNV TV, Hayley Herst, Wade Barnett, Ben Barnholdt, Kausic Bhakta, Victoria Campbell, Jeneene Chatowsky, Tina Cox, Karen Cuninghame, Jeff Deitch, Bill Frankmore, Matt Guccini, Joe Hart, Sarah Johns, Michael Johnson, Malayna Kerton, John Killoran, Renee Phillips, Aaron Rothkopf, Eduardo Rubio, Mark Sayre, Shelby Sheehan, Julie Simon, Mike Taylor, James Walker, Richard Worsley, Debbie Worthen, Jana Wyld, John Zuchelli; KRXI/KAME TV, Steve Halliwell; KTVN TV, Scott Birmingham, Brian Shaw, Josh Brackett, Kerrie Cassani, Sherrie Cerutti, Angeline Chew, John Chrystal, Wendy Damonte, Chad Gasper, Jessie Harris, Kirsten Joyce, Gina Martini, John Mercer, Jose Pilarim, Tony Shin, Christina White, Randy Brown, Greg Grehz, Steve Kiggins, Joyce Kirsten, Kurtis Ming, Paul Nelson, Marty Ozer, Laura Sambol, Brian Hickey; KUBC, Beth Fisher, Ken Johnson; KUUV; Garrett Breit, Ann Rubin; LAS VEGAS REVIEW-JOURNAL, Amy Bennett, Kevin Cannon, John Edwards, John Gurzinski, Don Ham, Mary Hynes, Jim Laurie, Thomas Mitchell, Jan Moller, Craig Moran, Jane Ann Morrison, Jeff Scheid, Steve Sebelius, John Smith, Gary Thompson, Charles Zobell, LAS VEGAS SUN, Jeff German, Aaron Mayes, Erin Neff, Jace Radke, Cy Ryan, Susan Snyder; LINCOLN COUNTY RECORD, Shelly Hartman, Connie Simkins; LOTUS BROADCASTING, Andrew Kolb; LOVELOCK REVIEW-MINER/NEVADA RANCHER, Gwen Carter; MASON VALLEY NEWS, Robert Perea, David Sanford, Keith Trout; NEVADA APPEAL, Geoff Dornan, Bob Thomas; RENO GAZETTE-JOURNAL, Tim Anderson, Andy Barron, Jennifer Crowe, Tonia Cunning, Jeff Delong, Jeff Donaldson, Tim Dunn, Cory Farley, Ray Hagar, Janice Hoke, Sevil Hunter, Mark Lundahl, Elizabeth Margerum, Frank Mullen, Marilyn Newton, Bill O'Driscoll, David Parker, Scott Sady, John Smetana, Steve Smith, Steve Timko, Lisa Tolda, Candice Towell, Susan Voyles; RENO NEWS & REVIEW, Jimmy Boegle, Brian Burghart, Carli Cutchin, Kelley Lang, Deidre Pike, William Puchert, Adrienne Rice; SENIOR SPECTRUM NEWSPAPERS, Chris McMullen, Connie McMullen; SIERRA NEVADA COMMUNITY ACCESS TV, John Ponzo, Earl Spriggs, Don Alexander, Chris Jensen; SPARKS TRIBUNE, Andrew Barbano; TASPAC NEWS, Donna Andres, Peter Hutchinson; THE HUMBOLDT SUN, Dave Woodson; VIRGINIA CITY REGISTER, Terry Daisy, Gary Gehrm, Thomas Hunter, Bill Meakin, Bill Sjovangen, Douglas Truhill; WE THE PEOPLE, Shayne Del Cohen; VARTEK, Michael Vargas.

Motion carried.

Madam President announced that if there were no objections, the Senate would recess subject to the call of the Chair.

Senate in recess at 9:53 a.m.

SENATE IN SESSION

At 10:49 a.m.
President Hunt presiding.
Quorum present.

Senator Rawson reported that his committee had informed the Assembly that the Senate is organized and ready for business.

Senator Washington reported that his committee had informed the Governor that the Senate is organized and ready for business.

MESSAGES FROM THE GOVERNOR
STATE OF NEVADA
OFFICE OF THE GOVERNOR

EXECUTIVE ORDER

A PROCLAMATION BY THE GOVERNOR:

WHEREAS, Section 9 of Article V of the Constitution of the State of Nevada provides that, "The Governor may on extraordinary occasions, convene the Legislature by Proclamation and shall state to both houses when organized, the purpose for which they have been convened, and the Legislature shall transact no legislative business, except that for which they were specially convened, or such other legislative business as the Governor may call to the attention of the Legislature while in Session;"

WHEREAS, believing that an extraordinary occasion now exists which requires immediate action by the Legislature;

NOW, THEREFORE, I, KENNY C. GUINN, GOVERNOR OF THE STATE OF NEVADA, by virtue of the authority vested in me by the Constitution of the State of Nevada, do hereby convene the Legislature into a Special Session to begin at 9:00 a.m., on July 29, 2002.

During this Special Session, I ask the Legislature to consider:

1.Establishing limits on the amount of non-economic damages available in medical malpractice cases;
2.Adopting a several liability standard for medical malpractice cases when non-economic damages are considered;
3.Adopting a new joint and several liability standard for medical malpractice cases when economic damages are considered;
4.Limiting the liability for acts occurring in a governmental or non-profit center for the treatment of trauma;
5.Allowing a judge, at the request of either party, discretion to enter a judgment providing that money for future damages be paid periodically;
6.Shortening the time period within which a medical malpractice case may be filed;
7.Reviewing the medical and dental screening panels to revise existing procedures and/or change the composition of the panels;
8.Providing discretion in the award of pre-judgment interest;
9.Strengthening the reporting requirements regarding disciplinary actions, claims, settlements and/or awards against physicians;
10. Requiring that district court judges have training in medical malpractice litigation before handling such cases;
11. Making it mandatory for attorneys to personally pay for the additional costs, expenses and fees that arise as a result of their unreasonable conduct in civil litigation.

During the Special Session, the Legislature may also consider other matters brought to its attention by the Governor.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Great Seal of the State of Nevada to be affixed in Las Vegas, this 26th day of July, in the year two thousand two

KENNY C. GUINN
*Governor*

DEAN HELLER
*Secretary of State*

RENEE PARKER
*Chief Deputy Secretary of State*

REMARKS FROM THE FLOOR

Senator Raggio requested that his remarks be entered in the Journal.

Pursuant to his constitutional authority, Governor Kenny C. Guinn has convened a special session of the legislature to address an issue of extraordinary importance to all Nevadans. There is a crisis in the availability and affordability of medical liability insurance that threatens to impact access to health care. It is essential that Nevada retain its medical providers, especially for those citizens who suffer traumatic injuries where literally every second counts.

The Senate will be considering a package of proposals to ensure continued access to medical care while protecting the interests of patients injured in the course of receiving treatment. However, pursuant to article 5, section 9 of the Constitution of Nevada: "…the legislature shall transact no legislative business, except that for which they were specially convened, or such other legislative business as the governor may call to the attention of the legislature while in session."

We have before us the Governor's proclamation detailing the issues we have been convened to address and we are constitutionally bound to restrict our transactions to those items.

Because the subject of medical malpractice has numerous aspects and special sessions are of necessity limited in duration, we need to proceed expeditiously. To facilitate this process, we will meet as a Committee of the Whole.

We anticipate morning, afternoon and evening meetings for the next three days. This approach will require careful management of the time allotted for each phase of our process. We will attempt to provide a reasonable opportunity for all positions to be heard but it will be necessary to observe time limits so this body can conclude its work in a reasonable period. The Senate will therefore pursue its deliberations in the following manner:

We will focus on one specific topic at a time;

Within a fixed amount of time, representatives of interested groups will be accorded equal time to address each topic without interruption;

At the conclusion of these presentations, the majority party and the minority party will have equal time allotted to their members to pose questions or to make statements. We will observe time limits in this phase of our proceedings as well;

Because of the constitutional limits on subject matter, any discussions beyond the topics in the Governor's proclamation will not be in order;

After legislators have finished their questions or statements, there will be an opportunity for public comment on the item under discussion;

Following public comment, the Senate will vote on that specific agenda item. In this manner, we will not only help move discussions along, we will also allow our bill drafters to keep pace with us and avoid prolonged delay at the end of our deliberations while we wait for a final version;

Thereafter, the process will be repeated for each agenda item until we have considered the proposal before us in its entirety.

Finally, at the end of each day, the Committee of the Whole will rise and return to the Senate Chamber to adjourn for the day.

We are faced with a critical task and an arduous schedule. However, I am confident our combined efforts can produce a sound public policy solution to the present crisis.

MOTIONS, RESOLUTIONS AND NOTICES

By Senator Raggio:

Senate Resolution No. 1—Adopting the Rules of the Senate for the 18th Special Session of the Legislature.

RESOLVED BY THE SENATE OF THE STATE OF NEVADA, That the following Rules of the Senate for the 18th Special Session of the Legislature are hereby adopted:

*I. APPLICABILITY*

*Rule No. 1. Generally.*

*The Rules of the Senate for the 18th Special Session of the Legislature are applicable only during the 18th Special Session of the Legislature.*

*II. OFFICERS AND EMPLOYEES*

*DUTIES OF OFFICERS*

*Rule No. 2. President.*

*The President shall take the chair and call the Senate to order precisely at the hour appointed for meeting. He shall preserve order and decorum, and in case of any disturbance or disorderly conduct within the Senate Chamber, shall order the Sergeant at Arms to suppress it, and may order the arrest of any person creating any disturbance within the Senate Chamber. He may speak to points of order in preference to members, rising from his seat for that purpose, and shall decide questions of order without debate, subject to an appeal to the Senate by two members, on which appeal no member may speak more than once without leave of the Senate. He shall sign all acts, addresses and joint resolutions, and all writs, warrants and subpoenas issued by order of the Senate; all of which must be attested by the Secretary. He has general direction of the Senate Chamber.*

*Rule No. 3. President pro Tem.*

*The President pro Tem has all the power and shall discharge all the duties of the President during his absence or inability to discharge the duties of his office. In the absence or inability of the President pro Tem to discharge the duties of the President's office, the Senate shall elect one of its members as the presiding officer for that occasion.*

*Rule No. 4. Secretary.*

*1. The Secretary of the Senate is elected by the Senate, and shall:*

*(a) Interview and recommend persons to be considered for employment to assist the Secretary.*

*(b) See that these employees perform their respective duties.*

*(c) Administer the daily business of the Senate, including the provision of secretaries as needed.*

*(d) Unless otherwise ordered by the Senate, transmit as soon as practicable those bills and resolutions upon which the next action is to be taken by the Assembly.*

*2. The Secretary is responsible to the Majority Leader.*

*Rule No. 5. Sergeant at Arms.*

*1. The Sergeant at Arms shall attend the Senate during its sittings, and execute its commands and all process issued by its authority. He must be sworn to keep the secrets of the Senate.*

*2. The Sergeant at Arms shall:*

*(a) Superintend the upkeep of the Senate's Chamber, private lounge, and meeting rooms.*

*(b) Interview and recommend persons to be considered for employment to assist the Sergeant at Arms.*

*3. The Sergeant at Arms is responsible to the Majority Leader.*

*Rule No. 6. Assistant Sergeant at Arms.*

*The Assistant Sergeant at Arms shall be doorkeeper and shall preserve order in the Senate Chamber and shall assist the Sergeant at Arms. He shall be sworn to keep the secrets of the Senate.*

*III. SESSIONS AND MEETINGS*

*Rule No. 7. Call of Senate—Moved by Three Members.*

*A Call of the Senate may be moved by three Senators, and if carried by a majority of all present, the Secretary shall call the roll and note the absentees, after which the names of the absentees shall again be called over. The doors shall then be closed and the Sergeant at Arms directed to take into custody all who may be absent without leave, and all Senators so taken into custody shall be presented at the bar of the Senate for such action as to the Senate may seem proper.*

*Rule No. 8. Absence—Leave Required.*

*No Senator shall absent himself from the service of the Senate without leave, except in case of accident or sickness, and if any Senator or officer shall so absent himself his per diem shall not be allowed him.*

*Rule No. 9. Open Meetings.*

*1. Except as otherwise provided in the Constitution of the State of Nevada and in subsection 2 of this rule, all meetings of the Senate and the Committee of the Whole must be open to the public.*

*2. A meeting may be closed to consider the character, alleged misconduct, professional competence, or physical or mental health of a person.*

*IV. DECORUM AND DEBATE*

*Rule No. 10. Points of Order.*

*1. If any Senator, in speaking or otherwise, transgresses the rules of the Senate, the President shall, or any Senator may, call him to order. If a Senator is so called to order, he shall not proceed without leave of the Senate. If such leave is granted, it must be upon the motion, "That he be allowed to proceed in order," and the Senator shall confine himself to the question under consideration and avoid personality.*

*2. Every decision of points of order made by the President is subject to appeal, and a discussion of a question of order may be allowed only upon the appeal of two Senators. In all cases of appeal, the question must be, "Shall the decision of the Chair stand as the judgment of the Senate?"*

*Rule No. 11. Breaches of Decorum.*

*1. In cases of breaches of decorum or propriety, any Senator, officer or other person is liable to such censure or punishment as the Senate may deem proper.*

*2. If any Senator is called to order for offensive or indecorous language or conduct, the person calling him to order shall report the offensive or indecorous language or conduct to the presiding officer. No member may be held to answer for any language used on the floor of the Senate if business has intervened before exception to the language was taken.*

*3. Indecorous conduct or boisterous or unbecoming language is not permitted in the Senate Chamber.*

*V. QUORUM, VOTING, ELECTIONS*

*Rule No. 12. Action Required to be Taken in Senate Chamber.*

*Any action taken by the Senate must be taken in the Senate Chamber.*

*Rule No. 13. Recorded Vote—Three Required to Call For.*

*1. A recorded vote must be taken upon final passage of a bill or joint resolution, and in any other case when called for by three members. Every Senator within the bar of the Senate shall vote "aye" or "no" or record himself as "not voting," unless excused by unanimous vote of the Senate.*

*2. The votes and names of those absent or recorded as "not voting" and the names of Senators demanding the recorded vote must be entered in the Journal.*

*Rule No. 14. President to Decide—Tie Vote.*

*A question is lost by a tie vote, but when the Senate is equally divided on any question except the passage of a bill or joint resolution, the President may give the deciding vote.*

*Rule No. 15. Manner of Election—Voting.*

*1. In all cases of election by the Senate, the vote must be taken viva voce. In other cases, if a vote is to be recorded, it may be taken by oral roll-call or by electronic recording.*

*2. When a recorded vote is taken, no Senator may:*

*(a) Vote except when at his seat;*

*(b) Vote upon any question in which he is in any way personally or directly interested;*

*(c) Explain his vote or discuss the question while the voting is in progress; or*

*(d) Change his vote after the result is announced.*

*3. The announcement of the result of any vote must not be postponed.*

*VI. LEGISLATIVE BODIES*

*Rule No. 16. Committee of the Whole.*

*1. All bills and resolutions may be referred only to the Committee of the Whole.*

*2. The Majority Leader shall preside as chairman of the committee or name a chairman to preside.*

*3. Any meeting of the Committee of the Whole may be conducted outside the Senate Chamber, as designated by the chairman of the committee.*

*4. A member of the committee may speak only once on an item listed on the committee's agenda, for a period of not more than 10 minutes, unless he is granted leave of the chairman to speak for a longer period or more than once. If a member is granted leave to speak for a longer period or more than once, the chairman may limit the length of additional time that the member may speak.*

*5. The chairman may require any vote of the committee to be recorded in the manner designated by the chairman.*

*6. All amendments proposed by the committee:*

*(a) Must first be approved by the committee.*

*(b) Must be reported by the chairman to the Senate.*

*7. The minutes of the committee's meetings must be entered in the final Journal.*

*Rule No. 17. Rules Applicable to Committee of the Whole.*

*The Rules of the Senate shall apply to proceedings in Committee of the Whole, except that the previous question shall not be ordered. The rules of parliamentary practice contained in Mason's Manual of Legislative Procedure shall govern the committee in all cases in which they are applicable and in which they are not inconsistent with the rules and orders of the Senate.*

*Rule No. 18. Motion to Rise Committee of the Whole.*

*A motion that the committee rise shall always be in order, and shall be decided without debate.*

*VII. RULES GOVERNING MOTIONS*

*A. MOTIONS GENERALLY*

*Rule No. 19. Entertaining.*

*1. No motion may be debated until it is announced by the President.*

*2. By consent of the Senate, a motion may be withdrawn before amendment or decision.*

*Rule No. 20. Precedence of Motions.*

*When a question is under debate, no motion shall be received but the following, which shall have precedence in the order named:*

*1. To adjourn.*

*2. For a call of the Senate.*

*3. To lay on the table.*

*4. For the previous question.*

*5. To postpone to a day certain.*

*6. To commit.*

*7. To amend.*

*8. To postpone indefinitely.*

*The first four shall be decided without debate.*

*Rule No. 21. When Not Entertained.*

*1. When a motion to commit, to postpone to a day certain, or to postpone indefinitely has been decided, it must not be again entertained on the same day.*

*2. When a question has been postponed indefinitely, it must not again be introduced during the special session.*

*3. There must be no reconsideration of a vote on a motion to postpone indefinitely.*

*B. PARTICULAR MOTIONS*

*Rule No. 22. To Adjourn.*

*A motion to adjourn shall always be in order. The name of the Senator moving to adjourn, and the time when the motion was made, shall be entered in the Journal.*

*Rule No. 23. Lay on the Table.*

*A motion to lay on or take from the table shall be carried by a majority vote.*

*Rule No. 24. To Strike Enacting Clause.*

*A motion to strike out the enacting clause of a bill or resolution has precedence over a motion to commit or amend. If a motion to strike out the enacting clause of a bill or resolution is carried, the bill or resolution is rejected.*

*Rule No. 25. Division of Question.*

*1. Any Senator may call for a division of a question.*

*2. A question must be divided if it embraces subjects so distinct that if one subject is taken away, a substantive proposition remains for the decision of the Senate.*

*3. A motion to strike out and insert must not be divided.*

*Rule No. 26. Explanation of Motion.*

*Whenever a Senator moves to change the usual disposition of a bill or resolution, he shall describe the subject of the bill or resolution and state the reasons for his requesting the change in the processing of the bill or resolution.*

*VIII. DEBATE*

*Rule No. 27. Speaking on Question.*

*1. Every Senator who speaks shall, standing in his place, address "Mr. or Madam President," in a courteous manner, and shall confine himself to the question before the Senate. When he has finished, he shall sit down.*

*2. Except as otherwise provided in Senate Rules Nos. 10 and 45 of the 18th Special Session, a Senator may speak only once on a question before the Senate, for a period of not more than 10 minutes, unless he is granted leave of the President to speak for a longer period or more than once. If a Senator is granted leave to speak for a longer period or more than once, the President may limit the length of additional time that the member may speak.*

*3. Incidental and subsidiary questions arising during debate shall not be considered the same question.*

*Rule No. 28. Previous Question.*

*The previous question shall not be put unless demanded by three Senators, and it shall be in this form: "Shall the main question be now put?" When sustained by a majority of Senators present it shall put an end to all debate and bring the Senate to a vote on the question or questions before it, and all incidental questions arising after the motion was made shall be decided without debate. A person who is speaking on a question shall not while he has the floor move to put that question.*

*IX. CONDUCT OF BUSINESS*

*A. GENERALLY*

*Rule No. 29. Mason's Manual.*

*The rules of parliamentary practice contained in Mason's Manual of Legislative Procedure shall govern the Senate in all cases in which they are applicable and in which they are not inconsistent with the rules and orders of the Senate for the 18th Special Session of the Legislature, and the Joint Rules of the Senate and Assembly for the 18th Special Session of the Legislature.*

*Rule No. 30. Suspension of Rule.*

*No rule or order of the Senate for the 18th Special Session of the Legislature shall be rescinded or changed without a majority vote of the Senate; but, except as otherwise provided in Senate Rule No. 39 of the 18th Special Session of the Legislature, a rule or order may be temporarily suspended for a special purpose by a majority vote of the members present. When the suspension of a rule is called for, and after due notice from the President no objection is offered, he can announce the rule suspended and the Senate may proceed accordingly; but this shall not apply to that portion of Senate Rule No. 39 of the 18th Special Session of the Legislature relating to the third reading of bills, which cannot be suspended.*

*Rule No. 31. Protest.*

*Any Senator, or Senators, may protest against the action of the Senate upon any question, and have such protest entered in the Journal.*

*Rule No. 32. Privilege of the Floor.*

*1. To preserve decorum and facilitate the business of the Senate, only the following persons may be present on the floor of the Senate during formal sessions:*

*(a) State officers;*

*(b) Officers and members of the Senate;*

*(c) Employees of the Legislative Counsel Bureau;*

*(d) Attachés and employees of the Senate; and*

*(e) Members of the Assembly whose presence is required for the transaction of business.*

*2. Guests of Senators must be seated in a section of the upper or lower gallery of the Senate Chamber to be specially designated by the Sergeant at Arms. The Majority Leader may specify special occasions when guests may be seated on the floor of the Senate with a Senator.*

*3. A majority of Senators may authorize the President to have the Senate Chamber cleared of all persons except Senators and officers of the Senate.*

*4. The Senate Chamber may not be used for any business other than legislative business during a legislative session.*

*Rule No. 33. Material Placed on Legislators' Desks.*

*1. Only the Sergeant at Arms and officers and employees of the Senate may place papers, letters, notes, pamphlets and other written material upon a Senator's desk. Such material must contain the name of the Legislator requesting the placement of the material on the desk or a designation of the origin of the material.*

*2. This rule does not apply to books containing the legislative bills and resolutions, the daily histories and daily journals of the Senate or Assembly, or Legislative Counsel Bureau material.*

*Rule No. 34. Petitions and Memorials.*

*The contents of any petition or memorial shall be briefly stated by the President or any Senator presenting it. It shall then lie on the table or be referred, as the President or Senate may direct.*

*Rule No. 35. Objection to Reading of Paper.*

*Where the reading of any paper is called for, and is objected to by any Senator, it shall be determined by a vote of the Senate, and without debate.*

*Rule No. 36. Questions Relating to Priority of Business.*

*All questions relating to the priority of business shall be decided without debate.*

*B. BILLS*

*Rule No. 37. Requests for the Drafting of Bills, Resolutions and Amendments.*

*The Legislative Counsel shall not honor a request for the drafting of a bill, resolution or amendment to be introduced in the Senate unless it is submitted by the Committee of the Whole, a Conference Committee or the Governor.*

*Rule No. 38. Introduction of Bills.*

*1. Except as otherwise provided in this rule, no bill or resolution may be introduced in the Senate unless it is first approved by the Committee of the Whole.*

*2. The provisions of subsection 1 do not apply to a bill or resolution that is:*

*(a) Required to carry out the business of the Senate or the Legislature; or*

*(b) Requested by the Governor.*

*3. Skeleton bills may not be introduced.*

*Rule No. 39. Reading of Bills.*

*1. Every bill must receive three readings before its passage, unless, in case of emergency, this rule is suspended by a two-thirds vote of the members elected to the Senate.*

*2. The first reading of a bill is for information, and if there is opposition to the bill, the question must be, "Shall this bill receive no further consideration?" If there is no opposition to the bill, or if the question to reject is defeated, the bill must then take the usual course.*

*3. No bill may be committed until once read, nor amended until twice read.*

*4. The third reading of every bill must be by sections.*

*Rule No. 40. Second Reading File—Consent Calendar.*

*1. All bills or joint resolutions reported by the Committee of the Whole must be placed on a second reading file unless recommended for placement on the consent calendar.*

*2. The Committee of the Whole shall not recommend a bill or joint resolution for placement on the consent calendar if:*

*(a) An amendment of the bill or joint resolution is recommended;*

*(b) It contains an appropriation;*

*(c) It requires a two-thirds vote of the Senate; or*

*(d) It is controversial in nature.*

*3. A bill or joint resolution must be removed from the consent calendar at the request of any Senator. A bill or joint resolution so removed must be immediately placed on the second reading file for consideration in the usual order of business.*

*4. When the consent calendar is called, the bills remaining on the consent calendar must be read by number and summary, and the vote must be taken on their final passage as a group.*

*Rule No. 41. Reading of Bills—General File.*

*1. Upon reading of bills on the second reading file, Senate and Assembly bills reported without amendments must be placed on the general file.*

*2. Only amendments proposed by the Committee of the Whole or a Conference Committee may be considered.*

*3. Amendments proposed by the Committee of the Whole and reported with bills may be adopted by a majority vote of the members present. Bills so amended must be reprinted, engrossed or reengrossed, and placed on the general file. The file must be posted in the Senate Chamber and made available to members of the public each day by the Secretary.*

*Rule No. 42. Reconsideration of Vote on Bill.*

*No motion to reconsider a vote is in order.*

*C. RESOLUTIONS*

*Rule No. 43. Treated as Bills.*

*Resolutions addressed to Congress, or to either House thereof, or to the President of the United States, or the heads of any of the national departments, or proposing amendments to the State Constitution are subject, in all respects, to the foregoing rules governing the course of bills. A joint resolution proposing an amendment to the constitution shall be entered in the journal in its entirety.*

*Rule No. 44. Treated as Motions.*

*Resolutions, other than those referred to in Senate Rule No. 43 of the 18th Special Session of the Legislature, shall be treated as motions in all proceedings of the Senate.*

*Rule No. 45. Order of Business.*

1. *Roll Call.*
2. *Prayer and Pledge of allegiance to the Flag.*
3. *Reading and Approval of the Journal.*
4. *Reports of the Committee of the Whole.*
5. *Messages from the Governor.*
6. *Messages from the Assembly.*
7. *Communications.*
8. *[Reserved.]*
9. *Motions, Resolutions and Notices.*
10. *Introduction, First Reading and Reference.*
11. *Consent Calendar.*
12. *Second Reading and Amendment.*
13. *General File and Third Reading.*
14. *Unfinished Business.*
15. *Special Orders of the Day.*
16. *Remarks from the Floor; Introduction of Guests. A member may speak under this order of business for a period of not more than 5 minutes each day.*

*Rule No. 46. Privilege.*

*Any Senator may rise and explain a matter personal to himself by leave of the President, but he shall not discuss any pending question in such explanation.*

*Rule No. 47. Preference to Speak.*

*When two or more Senators rise at the same time the President shall name the one who may first speak—giving preference, when practicable, to the mover or introducer of the subject under consideration.*

*Rule No. 48. Special Order.*

*The President shall call the Senate to order on the arrival of the time fixed for the consideration of a special order, and announce that the special order is before the Senate, which shall be considered, unless it be postponed by a two-thirds vote, and any business before the Senate at the time of the announcement of the special order shall go to Unfinished Business.*

Senator Raggio moved the adoption of the resolution.

Remarks by Senators Raggio and Neal.

Senator Raggio requested that the following remarks be entered in the Journal.

SENATOR RAGGIO:

Senate Resolution No. 1 provides for the adoption of the Senate rules for the 18th Special Session of the Legislature. Because of the limited time available to consider the issues presented in the Governor's proclamation, these rules have been drafted to accommodate the special circumstances of this session. The rules provide that the Senate will meet as a Committee of the Whole to hear all testimony on the legislation to be considered. This ensures that all members of the Senate can have input into the process and avoids the duplication of testimony. A bill or resolution may not be introduced unless it is first approved by the committee. Exceptions have been provided for bills that are necessary to carry out the business of the Senate and bills requested by the Governor so that the Senate may begin to conduct its business as soon as possible. The committee must also approve any amendment to legislation being considered. An amendment that is not proposed by the Committee of the Whole or by a conference committee may not be considered.

Because of the limited time available to complete this session, there are certain limitations on the period of time a member of the Committee of the Whole and members of Senate, when the Senate is in session, may speak on a question. Members of the committee may speak on an item on the committee's agenda for no more than ten minutes. A member of the Senate may speak on a question for a period of not more than ten minutes. However, it is understood that a certain amount of flexibility is required to allow a proper understanding of the issues before us. Therefore, the rules allow the chairman of the committee or the President of the Senate to extend the amount of time for discussion if required for a full understanding of an issue being addressed.

Finally, it may be necessary to shorten the length of time required to process bills. To ensure that there is no unnecessary delay in completing the session, the rules of the Senate may be suspended by a majority vote unless a two-thirds vote is required by the State Constitution. For this same purpose, a motion to reconsider a vote will not be in order.

If you have any questions, I will be glad to answer them at this time.

SENATOR NEAL:

Thank you, Madam President. I appreciate the explanation the Majority Leader has given relative to the rules to govern this Special Session. I am acutely aware that the rules have been drafted to allow for the control of the Majority in this House. I do not object to that, but I want to make it clear, for the Majority Leader has spoken to this, that the views any Senator might have, relative to whatever the phantom proposal may be dealing with regard to malpractice, and after reading it, I would be able to address it in a fashion whereby there may be a need for an amendment to make some correction to meet the needs of the public on this issue.

We have been reading and getting certain reports this morning through various individuals that someone is meeting with trial lawyers, doctors, people from the Assembly and the Governor to come up with some type of draft to be presented to this body. I want to be certain that all parties are involved in this issue, particularly, the patient and the insurance companies. We hear about the lawyers and the doctors arriving at an agreement, but we have not heard anything about the insurance companies or the patients coming to an agreement. After reading the language of the proposal concerning malpractice

to be presented to us, I would like to address this particular issue in a fashion which will make it a part of the record even if we are not able to get it into law.

Madam President, we no doubt are dealing with a situation, and the situation has brought us here today. The malpractice issue, to people such as myself, seems that by putting a cap on the damages for pain and suffering life itself is being devalued in this process. If the Majority Leader is saying that under Rule No. 37 dealing with bills, resolutions and amendments, we would be able to ask that our proposal be put into writing and to present that to the committee, that would be sufficient. It would allow us to present a different view, if necessary, after reading the proposal. I thank him for the apparent fairness for trying to establish a process that would be amicable to all of us in addressing this critical issue and allowing us to voice our view on this particular issue.

SENATOR RAGGIO:

Let me advance that a little further. My feeling would be this: when we meet as a Committee of the Whole, during the time that is allotted, if any member of the Senate wants to proffer an amendment that is pertinent and relevant, it should be the member's privilege to present that amendment because we are all interested in anything that makes the proposed bill better. If that member needs some help in drafting an amendment in writing, for ordinarily it might come up as just a verbal suggestion, the bill drafters office will be available. Let us hope we do not have 63 people asking for 5 or 10 amendments because we will never get through the process. I think we will exercise a sense of reason in the process. It is also my feeling that if, for example, the committee authorizes a member to request and introduce a bill through the Committee of the Whole that the member's name should go on the bill. Any amendments adopted, otherwise, by the committee should be Committee of the Whole amendments. I think that is as fair as we can be in this process. If anyone objects, let us know.

Resolution adopted unanimously.

By Senators Raggio and Titus:

Senate Resolution No. 2—Providing that no allowances will be paid for the 18th Special Session of the Nevada Legislature for periodicals, stamps, stationery or communications.

Senator Raggio moved the adoption of the resolution.

Remarks by Senator Raggio.

Resolution adopted unanimously.

By Senators Raggio and Titus:

Senate Resolution No. 3—Providing for the appointment of attachés.

RESOLVED BY THE SENATE OF THE STATE OF NEVADA, That the following persons are elected as attachés of the Senate for the 18th Special Session of the Nevada Legislature: Mary Jo Mongelli, Ann-Berit Moyle, Mary R. Phillips, Molly Dondero, Susan S. Whitford, Jane Gill, Charles P. Welsh, John D. Turner, Ronald Sandoval, Shirley Hammon, Dorothy Souza, JoAnn Wessel, Sandy Arraiz, Judy Jacobs, Barbara Moss, Angel Robinson, Judith Toscano and Patricia Vardakis.

Senator Raggio moved the adoption of the resolution.

Remarks by Senator Raggio.

Resolution adopted unanimously.

MESSAGES FROM THE ASSEMBLY

ASSEMBLY CHAMBER, Carson City, July 29, 2002

*To the Honorable the Senate:*

I have the honor to inform your honorable body that the Assembly on this day adopted Assembly Concurrent Resolutions Nos. 1, 2.

PATRICIA R. WILLIAMS
*Assistant Chief Clerk of the Assembly*

MOTIONS, RESOLUTIONS AND NOTICES

Assembly Concurrent Resolution No. 1—Adopting the Joint Rules of the Senate and Assembly for the 18th Special Session of the Legislature.

RESOLVED BY THE ASSEMBLY OF THE STATE OF NEVADA, THE SENATE CONCURRING, That the following Joint Rules of the Senate and Assembly for the 18th Special Session of the Legislature are hereby adopted:

APPLICABILITY OF JOINT RULES

Rule No. 1. Generally.

The Joint Rules for the 18th Special Session of the Legislature are applicable only during the 18th Special Session of the Legislature.

CONFERENCE COMMITTEES

Rule No. 2. Procedure Concerning.

1. In every case of an amendment of a bill, or joint or concurrent resolution, agreed to in one House, dissented from in the other, and not receded from by the one making the amendment, each House shall appoint a committee to confer with a like committee to be appointed by the other; and the committee so appointed shall meet publicly at a convenient hour to be agreed upon by their respective chairmen and announced publicly, and shall confer upon the differences between the two Houses as indicated by the amendments made in one and rejected in the other and report as early as convenient the result of their conference to their respective Houses. The report shall be made available to all members of both Houses. The whole subject matter embraced in the bill or resolution shall be considered by the committee, and it may recommend recession by either House, new amendments, new bills or resolutions, or other changes as it sees fit. New bills or resolutions so reported shall be treated as amendments unless the bills or resolutions are composed entirely of original matter, in which case they shall receive the treatment required in the respective Houses for original bills, or resolutions, as the case may be.

2. The report of a conference committee may be adopted by acclamation, and such action may be considered equivalent to the adoption of amendments embodied therein. The report is not subject to amendment. If either House refuses to adopt the report, or if the first conference committee has so recommended, a second conference committee may be appointed. No member who served on the first committee may be appointed to the second.

3. There shall be but two conference committees on any bill or resolution. A majority of the members of a conference committee from each House must be members who voted for the passage of the bill or resolution.

MESSAGES

Rule No. 3. Procedure Concerning.

1. Proclamations by the Governor convening the Legislature in extra session shall, by direction of the presiding officer of each House, be read immediately after the convening thereof, filed and entered in full in the Journal of proceedings.

2. Whenever a message from the Governor is received, the Sergeant at Arms will announce: "Mr. President, or Mr. Speaker, the Secretary of the Governor is at the bar." The secretary will, upon being recognized by the presiding officer, announce: "Mr. President, or Mr. Speaker, a message from His Excellency, the Governor of Nevada, to the Honorable, the Senate or Assembly," and hand same to the Sergeant at Arms for delivery to the Secretary of the Senate or Chief Clerk of the Assembly. The presiding officer will direct any message from the Governor to be received, read and entered in full in the Journal of proceedings.

3. Messages from the Senate to the Assembly shall be delivered by the Secretary or Assistant Secretary, and messages from the Assembly to the Senate shall be delivered by the Chief Clerk or Assistant Chief Clerk.

NOTICE OF FINAL ACTION

Rule No. 4. Communications.

Each House shall communicate its final action on any bill or resolution, or matter in which the other may be interested, by written notice. Each such notice sent by the Senate must be signed by the Secretary of the Senate, or a person designated by the Secretary. Each such notice sent by the Assembly must be signed by the Chief Clerk of the Assembly, or a person designated by the Chief Clerk.

BILLS AND JOINT RESOLUTIONS

Rule No. 5. Signature.

Each enrolled bill or joint resolution shall be presented to the presiding officers of both Houses for signature. They shall, after an announcement of their intention to do so is made in open session, sign the bill or joint resolution and their signatures shall be followed by those of the Secretary of the Senate and Chief Clerk of the Assembly.

Rule No. 6. Joint Sponsorship.

1. A bill or resolution introduced by a committee of the Senate or Assembly may, at the direction of the chairman of the committee, set forth the name of a committee of the other House as a joint sponsor, if a majority of all members appointed to the committee of the other House votes in favor of becoming a joint sponsor of the bill or resolution. The name of the committee joint sponsor must be set forth on the face of the bill or resolution immediately below the date on which the bill or resolution is introduced.

2. A bill or resolution introduced by one or more Legislators elected to one House may, at the direction of the Legislator who brings the bill or resolution forward for introduction, set forth the names of one or more Legislators who are members elected to the other House and who wish to be primary joint sponsors or non-primary joint sponsors of the bill or resolution. The number of primary joint sponsors must not exceed five per bill or resolution. The names of each primary joint sponsor and non-primary joint sponsor must be set forth on the face of the bill or resolution in the following order immediately below the date on which the bill or resolution is introduced:

(a) The name of each primary joint sponsor, in the order indicated on the colored back of the introductory copy of the bill or resolution; and

(b) The name of each non-primary joint sponsor, in alphabetical order.

3. The Legislative Counsel shall not cause to be printed the name of a committee as a joint sponsor on the face of a bill or resolution unless the chairman of the committee has signed his name next to the name of the committee on the colored back of the introductory copy of the bill or resolution that was submitted to the front desk of the House of origin or the statement required by subsection 5. The Legislative Counsel shall not cause to be printed the name of a Legislator as a primary joint sponsor or non-primary joint sponsor on the face of a bill or resolution unless the Legislator has signed the colored back of the introductory copy of the bill or resolution that was submitted to the front desk of the House of origin or the statement required by subsection 5.

4. Upon introduction, any bill or resolution that sets forth the names of primary joint sponsors or non-primary joint sponsors, or both, must be numbered in the same numerical sequence as other bills and resolutions of the same House of origin are numbered.

5. Once a bill or resolution has been introduced, a primary joint sponsor or non-primary joint sponsor may only be added or removed by amendment of the bill or resolution. An amendment which proposes to add or remove a primary joint sponsor or non-primary joint sponsor must not be considered by the House of origin of the amendment unless a statement requesting the addition or removal is attached to the copy of the amendment submitted to the front desk of the House of origin of the amendment. If the amendment proposes to add or remove a Legislator as a primary joint sponsor or non-primary joint sponsor, the statement must be signed by that Legislator. If the amendment proposes to add or remove a committee as a primary joint sponsor or non-primary joint sponsor, the statement must be signed by the chairman of the committee. A copy of the statement must be transmitted to the Legislative Counsel if the amendment is adopted.

6. An amendment that proposes to add or remove a primary joint sponsor or non-primary joint sponsor may include additional proposals to change the substantive provisions of the bill or resolution or may be limited only to the proposal to add or remove a primary joint sponsor or non-primary joint sponsor.

PRINTING

Rule No. 7. Ordering and Distribution.

Each House may order the printing of bills introduced, reports of its own committees, and other matter pertaining to that House only; but no other printing may be ordered except by a concurrent resolution passed by both Houses. Each Senator is entitled to the free distribution of four copies of each bill introduced in each House, and each Assemblyman to such a distribution of two copies. Additional copies of such bills may be distributed at a charge to the person to whom they are addressed. The amount charged for distribution of the additional copies must be determined by the Director of the Legislative Counsel Bureau to approximate the cost of handling and postage for the entire session.

RESOLUTIONS

Rule No. 8. Types, Usage and Approval.

1. A joint resolution must be used to:

(a) Propose an amendment to the Nevada Constitution.

(b) Ratify a proposed amendment to the United States Constitution.

(c) Address the President of the United States, Congress, either House or any committee or member of Congress, any department or agency of the Federal Government, or any other state of the Union.

2. A concurrent resolution must be used to:

(a) Amend these joint rules.

(b) Request the return from the Governor of an enrolled bill for further consideration.

(c) Resolve that the return of a bill from one House to the other House is necessary and appropriate.

(d) Express facts, principles, opinion and purposes of the Senate and Assembly.
(e) Establish a joint committee of the two Houses.
(f) Direct the Legislative Commission to conduct an interim study.
3. A concurrent resolution or a resolution of one House may be used to:
(a) Memorialize a former member of the Legislature or other notable or distinguished person upon his death.
(b) Congratulate or commend any person or organization for a significant and meritorious accomplishment.

VETOES

Rule No. 9. Special Order.

Bills which have passed a previous Legislature, and which are transmitted to the Legislature next sitting, accompanied by a message or statement of the Governor's disapproval, or veto of the same, shall become the subject of a special order; and when the special order for their consideration is reached and called, the said message or statement shall be read, together with the bill or bills so disposed or vetoed; and the message and bill shall be read in the Senate by the Secretary of the Senate and in the Assembly by the Chief Clerk of the Assembly, without interruption, consecutively, one following the other, and not upon separate occasions; and no such bill or message shall be referred to any committee, or otherwise acted upon, save as provided by law and custom; that is to say, that immediately following such reading the only question (except as hereinafter stated) which shall be put by the Chair is, "Shall the bill pass, notwithstanding the objections of the Governor?" It shall not be in order, at any time, to vote upon such vetoed bill without the same shall have first been read, from the first word of its title to and including the last word of its final section; and no motion shall be entertained after the Chair has stated the question save a motion for "The previous question," but the merits of the bill itself may be debated.

ADJOURNMENT

Rule No. 10. Limitations and Calculation of Duration.

1. In calculating the permissible duration of an adjournment for 3 days or less, the day of adjournment must not be counted but the day of the next meeting must be counted, and Sunday must not be counted.

2. The Legislature may adjourn for more than 3 days by motion based on mutual consent of the houses or by concurrent resolution. One or more such adjournments may be taken to permit a committee or the Legislative Counsel Bureau to prepare the matters respectively entrusted to them for the consideration of the Legislature as a whole.

EXPENDITURES FROM THE LEGISLATIVE FUND

Rule No. 11. Manner of authorization.

Except for routine salary, travel, equipment and operating expenses, no expenditures shall be made from the Legislative Fund without the authority of a concurrent resolution regularly adopted by the Senate and Assembly.

RECORDS OF COMMITTEE PROCEEDINGS

Rule No. 12. Duties of Secretary of Committees and Director.

1. Each committee shall cause a record to be made of the proceedings of its meetings.
2. The secretary of a committee shall:
(a) Label each record with the date, time and place of the meeting and also indicate on the label the numerical sequence in which the record was made;
(b) Keep the records in chronological order; and
(c) Deposit the records immediately following the final adjournment of the special session of the Legislature with the Director of the Legislative Counsel Bureau.
3. The Director of the Legislative Counsel Bureau shall:
(a) Index the records;
(b) Make the records available for accessing by any person during office hours under such reasonable conditions as he may deem necessary;
(c) Maintain a log as a public record containing the date, time, name and address of any person accessing any of the records and identifying the records accessed; and
(d) Retain the records for two bienniums and at the end of that period keep some form or copy of the record in any manner he deems reasonable to ensure access to the record in the foreseeable future.

LIMITATIONS ON REQUESTS FOR
DRAFTING OF LEGISLATIVE MEASURES

Rule No. 13. Germaneness Required for Amendments.

1. The Legislative Counsel shall not honor a request for the drafting of an amendment to a bill or resolution if the subject matter of the amendment is independent of, and not specifically related and properly connected to, the subject that is expressed in the title of the bill or resolution.

2. For the purposes of this Rule, an amendment is independent of, and not specifically related and properly connected to, the subject that is expressed in the title of a bill or resolution if the amendment relates only to the general, single subject that is expressed in that title and not to the specific whole subject matter embraced in the bill or resolution.

CONTINUATION OF LEADERSHIP OF THE SENATE
AND ASSEMBLY DURING THE INTERIM
BETWEEN SESSIONS

Rule No. 14. Tenure and Performance of Statutory Duties.

1. Except as otherwise provided in subsections 2 and 3, the tenure of the President pro Tem, Majority Leader and Minority Leader of the Senate and the Speaker, Speaker pro Tem, Majority Floor Leader and Minority Floor Leader of the Assembly extends during the interim between regular sessions of the Legislature.

2. The Senators designated to be the President pro Tem, Majority Leader and Minority Leader for the next succeeding regular session shall perform any statutory duty required in the period between the time of their designation after the general election and the organization of the next succeeding regular session of the Legislature if the Senator formerly holding the respective position is no longer a Legislator.

3. The Assemblymen designated to be the Speaker, Speaker pro Tem, Majority Floor Leader and Minority Floor Leader for the next succeeding regular session shall perform any statutory duty required in the period between the time of their designation after the general election and the organization of the next succeeding regular session.

POLICY AND PROCEDURES REGARDING
SEXUAL HARASSMENT

Rule No. 15. Maintenance of Working Environment; Procedure for Filing, Investigating and Taking Remedial Action on Complaints.

1. The Legislature hereby declares its intention to maintain a working environment which is free from sexual harassment. This policy applies to all Legislators and lobbyists. Each member and lobbyist is responsible to conduct himself or herself in a manner which will ensure that others are able to work in such an environment.

2. In accordance with Title VII of the Civil Rights Act, for the purposes of this rule, "sexual harassment" means unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:

(a) Submission to such conduct is made either explicitly or implicitly a term or condition of a person's employment;

(b) Submission to or rejection of such conduct by a person is used as the basis for employment decisions affecting the person; or

(c) Such conduct has the purpose or effect of unreasonably interfering with a person's work performance or creating an intimidating, hostile or offensive working environment.

3. Each person subject to these rules must exercise his own good judgment to avoid engaging in conduct that may be perceived by others as sexual harassment. The following noninclusive list provides illustrations of conduct that the Legislature deems to be inappropriate:

(a) Verbal conduct such as epithets, derogatory comments, slurs or unwanted sexual advances, invitations or comments;

(b) Visual conduct such as derogatory posters, photography, cartoons, drawings or gestures;

(c) Physical conduct such as unwanted touching, blocking normal movement or interfering with the work directed at a person because of his sex;

(d) Threats and demands to submit to sexual requests to keep a person's job or avoid some other loss, and offers of employment benefits in return for sexual favors; and

(e) Retaliation for opposing, reporting or threatening to report sexual harassment, or for participating in an investigation, proceeding or hearing conducted by the Legislature or the Nevada Equal Rights Commission or the federal Equal Employment Opportunity Commission,

when submission to such conduct is made either explicitly or implicitly a term or condition of a person's employment or submission to or rejection of such conduct by a person is used as the basis for employment decisions affecting the person or such conduct has the purpose or effect of unreasonably interfering with a person's work performance or creating an intimidating, hostile or offensive working environment.

4. A person may have a claim of sexual harassment even if he has not lost a job or some other economic benefit. Conduct that impairs a person's ability to work or his emotional well-being at work constitutes sexual harassment.

5. If a Legislator believes he is being sexually harassed on the job, he may file a written complaint with:

(a) The Speaker of the Assembly;

(b) The Majority Leader of the Senate; or

(c) The Director of the Legislative Counsel Bureau, if the complaint involves the conduct of the Speaker of the Assembly or the Majority Leader of the Senate.

The complaint must include the details of the incident or incidents, the names of the persons involved and the names of any witnesses.

6. Except as otherwise provided in subsection 7, the Speaker of the Assembly or the Majority Leader of the Senate, as appropriate, shall refer a complaint received pursuant to subsection 5 to a committee consisting of Legislators of the same House. A complaint against a lobbyist may be referred to a committee in either House.

7. If the complaint involves the conduct of the Speaker of the Assembly or the Majority Leader of the Senate, the Director of the Legislative Counsel Bureau shall refer the complaint to the Committee on Elections, Procedures and Ethics of the Assembly or the Committee of the Whole of the Senate, as appropriate. If the Speaker of the Assembly or the Majority Leader of the Senate is a member of one of these committees, the Speaker or the Majority Leader, as the case may be, shall not participate in the investigation and resolution of the complaint.

8. The committee to which the complaint is referred shall immediately conduct a confidential and discreet investigation of the complaint. As a part of the investigation, the committee shall notify the accused of the allegations. The committee shall facilitate a meeting between the complainant and the accused to allow a discussion of the matter, if both agree. If the parties do not agree to such a meeting, the committee shall request statements regarding the complaint from each of the parties. Either party may request a hearing before the committee. The committee shall make its determination and inform the complainant and the accused of its determination as soon as practicable after it has completed its investigation.

9. If the investigation reveals that sexual harassment has occurred, the Legislature will take appropriate disciplinary or remedial action, or both. The committee shall inform the complainant of any action taken. The Legislature will also take any action necessary to deter any future harassment.

10. The Legislature will not retaliate against a person who files a complaint and will not knowingly permit any retaliation by the person's supervisors or coworkers.

11. The Legislature encourages a person to report any incident of sexual harassment immediately so that the complaint can be quickly and fairly resolved.

12. Action taken by a complainant pursuant to this rule does not prohibit the complainant from also filing a complaint of sexual harassment with the Nevada Equal Rights Commission or the federal Equal Employment Opportunity Commission.

13. All Legislators and lobbyists are responsible for adhering to the provisions of this policy. The prohibitions against engaging in sexual harassment and the protections against becoming a victim of sexual harassment set forth in this policy apply to employees, Legislators, lobbyists, vendors, contractors, customers and visitors to the Legislature.

14. This policy does not create any enforceable legal rights in any person.

Senator Raggio moved the adoption of the resolution.

Remarks by Senator Raggio.

Resolution adopted.

Resolution ordered transmitted to the Assembly.

Assembly Concurrent Resolution No. 2.

Senator Raggio moved the adoption of the resolution.

Remarks by Senator Raggio.

Resolution adopted.

Resolution ordered transmitted to the Assembly.

INTRODUCTION, FIRST READING AND REFERENCE

By Senators Raggio and Titus:

Senate Bill No. 1—AN ACT making an appropriation to the legislative fund for the costs of the 18th Special Session; and providing other matters properly relating thereto.

Senator Raggio moved that all rules be suspended, reading so far had considered first reading, rules further suspended, Senate Bill No. 1 be declared an emergency measure under the Constitution and placed on third reading and final passage.

Remarks by Senator Raggio.

Motion carried unanimously.

GENERAL FILE AND THIRD READING

Senate Bill No. 1.

Bill read third time.

Senator Raggio moved that the Senate recess subject to the call of the Chair.

Motion carried.

Senate in recess at 11:21 a.m.

SENATE IN SESSION

At 11:25 a.m.

President Hunt presiding.

Quorum present.

Remarks by Senators Raggio and Neal.

Roll call on Senate Bill No. 1:

YEAS—21.

NAYS—NONE.

Senate Bill No. 1 having received a constitutional majority, Madam President declared it passed.

Senator Raggio moved that all rules be suspended and that Senate Bill No. 1 be immediately transmitted to the Assembly.

Motion carried unanimously.

Bill ordered transmitted to the Assembly.

MOTIONS, RESOLUTIONS AND NOTICES

Senator Raggio moved that all rules be suspended, that for the remainder of the Eighteenth Special Session, reading so far had considered second reading, rules further suspended, and that all bills and joint resolutions reported out of the Committee of the Whole for floor consideration be declared emergency measures under the Constitution and placed on third reading and final passage.

Remarks by Senator Raggio.

Senator Raggio requested that his remarks be entered in the Journal.

Madam President. This will speed up the legislative process of the Special Session by moving bills and joint resolutions immediately to the General File for passage or amendment.

Motion carried unanimously.

Senator Raggio moved that all rules be suspended, and that all bills and resolutions returned from reprint be immediately placed on the appropriate reading file, time permitting.

Remarks by Senator Raggio.

Senator Raggio requested that his remarks be entered in the Journal.

Madam President. This will also speed up the legislative process by eliminating the one-day wait to consider amended bills and resolutions on the General or Resolution File.

Motion carried unanimously.

Senator Raggio moved that all rules be suspended and that all bills and resolutions be immediately transmitted to the Assembly.

Remarks by Senator Raggio.

Senator Raggio requested that his remarks be entered in the Journal.

Moving bills and resolutions immediately to the Assembly will expedite the opportunity for the other House to address important issues during this Special Session.

Motion carried.

Senator Raggio moved that the Senate recess subject to the call of the Chair.

Senate in recess at 11:31 a.m.

SENATE IN SESSION

At 3 p.m.
President Hunt presiding.
Quorum present.

MESSAGES FROM THE ASSEMBLY

ASSEMBLY CHAMBER, Carson City, July 29, 2002

*To the Honorable the Senate:*

I have the honor to inform your honorable body that the Assembly on this day passed Senate Bill No. 1.

PATRICIA R. WILLIAMS
*Assistant Chief Clerk of the Assembly*

INTRODUCTION, FIRST READING AND REFERENCE

By Senators Raggio, Titus, Amodei, Care, Carlton, Coffin, Jacobsen, Mathews, McGinness, Milburn, O'Connell, O'Donnell, Paulk, Rawson, Rhoads, Schneider, Shaffer, Townsend, Washington and Wiener:

Senate Bill No. 2—AN ACT relating to malpractice; limiting the liability of certain medical providers for negligent acts under certain circumstances; establishing a limitation on the amount of noneconomic damages that may be awarded in an action for medical malpractice or dental malpractice; providing for several liability of a defendant for noneconomic damages in an action for medical malpractice; making various changes concerning the payment of future economic damages in actions for medical malpractice; providing for the mandatory dismissal of an action for medical malpractice or dental malpractice under certain circumstances; repealing the provisions pertaining to the use of screening panels for an action for medical malpractice or dental malpractice; revising the statute of limitations for filing an action for medical malpractice or dental malpractice; making various other changes concerning actions for medical malpractice or dental malpractice; requiring certain district judges to receive training concerning the complex issues involved in medical malpractice litigation; requiring courts to impose certain sanctions on attorneys in certain circumstances; making various changes relating to the reporting of claims of malpractice or negligence; and providing other matters properly relating thereto.

Senator Raggio moved that the bill be referred to the Committee of the Whole.

Motion carried.

MOTIONS, RESOLUTIONS AND NOTICES

Senator Raggio moved that the Senate resolve itself into a Committee of the Whole for the purpose of considering Senate Bill No. 2.

Motion carried.

PRESIDENT HUNT:

The Senate will convene the Committee of the Whole in Room 1214 with Senator Raggio as Chairman. Once the Committee of the Whole is dissolved, we will return to the Senate Chamber. The Senate is now resolved into a Committee of the Whole.

IN COMMITTEE OF THE WHOLE

At 3:11 p.m.
Senator Raggio presiding.
Senate Bill No. 2 considered.

The Committee of the Whole was addressed by Senator Raggio; Governor Kenny Guinn; Jan Needham, Principal Deputy Legislative Counsel; Bradley A. Wilkinson, Principal Deputy Legislative Counsel; Scott Young, Principal Research Analyst; Bill Bradley, Attorney, Nevada Trial Lawyers Association; Mark Brown, M.D., Chairman, Nevada Mutual Insurance Company; John Cotton, Attorney, Nevada Physicians Task Force; J. R. Crockett, Jr., Attorney, Nevada Trial Lawyers Association; James D. DeRoche, Attorney; John Echeverria, Attorney, Nevada Trial Lawyers Association; Lonnie L. Hammargren, M.D., Neurosurgical Associates of Nevada; Dean Hardy, Nevada Trial Lawyers Association; Florence Jameson, M.D., OB/GYN Physician; Ikram U. Khan, M.D., General Surgery; Charles Laws, Green Party, Candidate for Governor; Robert B. McBeath, M.D., Nevada Medical Liability Physicians Task Force; Daniel S. McBride, M.D., Physician, Chairman, Nevada Mutual Insurance Company; Diane Meyer; Wende Nostro; Kristie O'Neill; Tim O'Neill; Susan Roe, Registered Nurse; Robert W. Schreck, M.D., President, Nevada Medical Association; Charles (Chip) Wallace, Communications Director/Cofounder, Nevada Mutual Insurance Company.

Senator Raggio requested that the remarks made during the Committee of the Whole be entered in the Journal.

SENATOR RAGGIO:

We are sitting as a Committee of the Whole to consider Senate Bill No. 2. As I noted this morning in the Senate, we have before us the Governor's proclamation detailing the issues we have been convened to address. We are constitutionally bound to restrict our transactions to those items. We will meet in the Committee of the Whole, morning, afternoon and evenings, for whatever time is necessary to hear all of the matters that come before us properly. I want to re-emphasize we will attempt to provide a reasonable opportunity for all positions to be heard, but it will be necessary to observe time limits so that we can conclude our work in a timely fashion. At a press conference, that was just convened, there is an indication that the parties that have been at opposite ends of these issues have come together in an accord, and that accord is, apparently, now reflected in Senate Bill No. 2. It may be that we will not have opponents on each one of these issues that are before us.

In any event, let me again mention the procedures we will be observing in the Committee of the Whole. After the Governor's presentation on the bill, we will focus on one specific topic at a time. Today, our attention will be on the portion of the bill dealing with the cap on noneconomic damages and any related item to caps on damages. Within a fixed amount of time, representatives of interested groups will testify, and we will provide equal time to address each topic without interruption. At the conclusion of these presentations, the members of the majority party and the members of the minority party will have an equal amount of time for questions and statements. We will observe time limits in this phase of our proceedings to accommodate efficiency.

Because of the constitutional limits on the subject matter, any discussions beyond the topics in the Governor's proclamation will be ruled out of order. After legislators have finished questions or statements, there also will be an opportunity for any additional public comment. It may not be necessary, now the sides have come together, but we will afford them that opportunity. We will have to observe some time limits as well if we are going to be able to conclude an orderly presentation and have the deliberations that are necessary. Following that, the Senate may vote on that specific agenda item. We will do so if we make a decision in this committee, and if there are any changes or amendments, then the bill drafters can prepare a final version of the bill. As I explained on the floor this morning, any amendment to the bill or any request for a bill draft will require a majority vote of the committee for that purpose. The process is going to be repeated, if necessary, for each agenda item until we consider the proposal before us in its entirety.

During these hearings, in the Committee of the Whole, the members of the committee as well as others will please turn off all pagers, cell phones and computers. This is not as formal as the Senate itself, although, we will observe the decorum that is usual in the Senate. If you want to remove your jackets or be more comfortable, please feel free to do so. Finally, at the end of each day, the Committee on the Whole will rise and return to the Senate Chambers to adjourn for the day. After the Governor and his staff's presentation, we will adopt some rules for the committee, and then proceed to our agenda.

Before we hear from the Governor, are there any questions or comments from members of the committee? Are there any comments from the staff?

If not, we are pleased, today, to have with us Governor Kenny Guinn. We appreciate your efforts in calling forth this session to deal with this crisis, and we welcome your appearance before this committee.

GOVERNOR GUINN:

Good afternoon. Before I begin my testimony, I want to be sure everyone understands that my testimony is not all-inclusive of the bill. You have a copy of the bill. It is in great detail. It is incumbent of me, as a Governor to make sure that I produce testimony that will be a formal record as we move forward in this process. In many cases I will read the testimony because it is important for us to stay on track and to indicate the support on the basis of which we make these recommendations to you through this law. I would like to thank my staff; Marybel Batjer, Chief of Staff; Mike Hillerbee, Deputy; and Keith Monroe, Legal Counsel. Also, I want to thank Brenda Erdoes, Kim Morgan and the other Legal staff members. I do not know how they work as many hours as they do without sleep. Without them, we could not have brought you this law in this time period. I want to thank them publicly. Without them, we would not be here today. They have all done a tremendous amount of work.

I have convened this special session, today, because Nevada is in a health care crisis. The cost of medical liability insurance has risen to unacceptable levels. The inability of doctors to obtain their insurance at reasonable rates is endangering the health of our citizens. Therefore, I believe immediate change in our laws is necessary to address this health care crisis.

The events leading up to this crisis began late last year, when, as many of you know, the St. Paul Insurance Company announced its decision to stop providing medical liability insurance to over 60 percent of Las Vegas doctors. St. Paul's decision was based upon an estimate that it was losing several million dollars annually because of lawsuits and claims against Nevada doctors.

As Governor, it was my duty to address this crisis head on. On Wednesday, January 23, I met with over 30 Las Vegas area doctors. At this meeting the doctors told me that medical liability insurance had become unavailable to them, and as a result, doctors were going to have to turn patients away, limit their services, or in the worst case, close their practices. At this meeting, I also learned that some insurers were quoting premium increases of 300 to 500 percent, citing the high number of medical malpractice lawsuits in Nevada, and the lack of a "cap" on noneconomic damages. To illustrate this concern, the doctors told me that medical malpractice cases in Clark County more than doubled over the past six years, with $21 million in jury awards last year alone.

Concerned that a lack of medical liability insurance was affecting access to medical care, on February 4, only eight days after my first meeting with the doctors, I directed the Insurance Commissioner to issue a Notice of Hearing. I wanted each and every medical liability insurance carrier authorized to do business in Nevada to provide testimony regarding their market intentions and conduct, practices in rating and underwriting, their premium payment plans, including "tail coverage," and their loss experience in Nevada. The hearing was scheduled for March 4, the first possible day for holding the hearing under Nevada legal notice requirements.

At the hearing, representatives from 13 insurance companies were present and testified on medical liability insurance coverage in the State. Also present and testifying were several medical representatives and associations, individual physicians and surgeons, insurance agents and brokers, representatives of the Nevada Trial Lawyers Association, and a representative from the Reinsurance Association. The record of the hearing also remained open for an additional week to allow all parties the opportunity to submit testimony. At the close of the administrative record, on March 12, the Insurance Commissioner determined that the unavailability of medical malpractice insurance had reached a critical stage.

The Commissioner found, and I quote, "There is overwhelming evidence that medical malpractice insurance is unavailable for medical practitioners in the State of Nevada. It is essential that services provided to Nevada citizens by the medical community not be curtailed. There is evidence that, in particular, certain medical specialties are affected by the unavailability of medical malpractice insurance, including, but not limited to, those physicians in OB/GYN, emergency trauma, radiology, surgery and ophthalmology, and there is evidence that, of the insurers present at the hearing, two companies are leaving the State of Nevada, and of the remaining insurers offering medical malpractice insurance in Nevada, most would not offer it to those doctors in the specialty areas of OB/GYN, emergency trauma, radiology, surgery and ophthalmology."

After reviewing the evidence and findings, I knew Nevada was indeed in a health care crisis of great magnitude. It became abundantly clear to me that the State needed to intervene with a short-term solution to prevent doctors from limiting their services, and, at the very worst, closing their doors. I am responsible for the health and safety of all citizens of Nevada. I am compelled to ensure that pregnant women and those in distress receive adequate medical care. Therefore, I took an extraordinary step, I directed the Insurance Commissioner to establish the Nevada Essential Insurance Association, now the Medical Liability Association of Nevada, to provide medical liability insurance to Nevada doctors so that our citizens could continue to receive medical care from experienced and competent doctors, doctors they know and trust. The Association was established by emergency regulations on March 15, 2002.

On March 26, the State Board Of Examiners approved spending $250,000 to create and initially fund the Association. The Association was able to begin accepting applications from Nevada doctors on April 15, just one month after the Insurance Commissioner declared that Nevada was in a health care crisis. Initially, the Association's coverage was "claims-made" with coverage provided on a "go forward" basis from the inception date of the policy. There was no coverage for acts committed prior to the inception date of a policy issued by the Association. Because insurance companies pulled out of Nevada, doctors were forced to pay tens of thousands of dollars, and in some cases more, for "prior acts" or "tail coverage" in addition to increased cost of premiums.

While doctors were first confronted with a lack of available insurance, the crisis of availability had now also turned into a crisis of affordability. In the case of OB/GYNs, doctors were receiving insurance quotes that limited them to 125 births per year. With the requirement that if they went beyond 125

births they would have to pay an additional $20,000. This came at a time when doctors had been delivering an average of 240 babies annually. This made the crisis greater. As one doctor said "It's a terrible day for the entire community when a doctor cannot afford to deliver a baby."

On May 29, I announced that the Association would make upgrades to the plan. The plan would offer prior-acts' coverage to all physicians, would reduce rates for surgical OB/GYNs by 18 percent, approximately $16,000, and would eliminate tiered premiums on deliveries, no longer discouraging OB/GYNs from delivering more than 125 babies a year. I felt the upgraded plan offered by the State would help to provide necessary medical care in emergency rooms and maternity wards.

In addition to our OB/GYN community limiting services, Nevada's only level-1 trauma center, UMC, was now warning the State it might be forced to close its doors. In June, several trauma surgeons and specialty surgeons resigned or requested leave from the UMC trauma center facing imminent closure. As early as February, physicians at the UMC trauma center had warned the community that the lack of affordable malpractice insurance could force the only trauma facility in Southern Nevada to divert patients to other states. In late February, we were told that the UMC trauma center might have to reduce hours because there were not enough trauma surgeons to fill all three shifts. It was quite possible the trauma center would close its doors in June.

On May 31 the trauma surgeons issued another warning; they would be forced to sever their ties with the UMC trauma center unless they could obtain insurance that would protect them at a reasonable rate. As many as 15 specialty surgeons who assist the trauma center's general surgeons said they would not be available this summer unless they could get financial relief from skyrocketing insurance costs, and limited liability.

On June 6, five trauma surgeons and 26 specialty surgeons resigned or requested leave from UMC's trauma center. On June 18, twenty-one doctors were denied their request for a leave of absence from the UMC trauma center when the Clark County Commission decided that the quality of care would be jeopardized if the leaves were granted. The Commission also eliminated voluntary on-call policies, which meant that private physicians with privileges at the medical center would have to cover mandatory hospital shifts in the emergency room and trauma center if necessary. This forced doctors to decide between taking risky on-call emergency shifts or resigning from the hospital. Subsequently, 56 of the 58 orthopedic surgeons resigned from UMC, forcing the trauma center to close its doors on July 3, 2002, during the July 4 holiday. Fortunately, no lives were lost as a result of the closure, and a short-term solution was reached. The center reopened on July 13 after the Attorney General issued an opinion concluding that physicians would be protected by a temporary $50,000 cap on noneconomic damages if they returned to work at the UMC trauma center. Thankfully, 15 doctors returned.

In the meantime, another urgent situation was temporarily averted on June 12, 2002, when the State Board of Examiners recommended an emergency allocation of almost $400,000 to help pay the rising cost of medical malpractice insurance for the doctors and interns at the University of Nevada School of Medicine. I had hoped the short-term solutions would provide stable and reliable medical malpractice insurance for Nevada's doctors until the 2003 legislative session, when laws could be adopted to resolve the crisis. It is incumbent upon me to exercise every emergency power that I have as Governor to address this crisis.

In mid-June, I formally called upon all affected parties to sit down at the table and work in good faith towards finding a common ground on the many complex issues, and to come up with a solution to the crisis within 45 days—a tort reform package I could bring to you. I called for 45 days of earnest negotiations among doctors, lawyers and insurance representatives. I informed the parties that if they could not come up with a plan by July 26 I would follow through as the Governor of this State and recommend a law, which I am doing today.

While the parties agreed on four topics for discussion: tort reform, insurance reform, medical records disclosures, and the State's Medical Dental Legal Screening Panel, they could not reach consensus on the issues. However, great progress was made with many of their ideas, which are contained in this bill. Nevada is out of short-term solutions to mend a long-term problem. We are now faced with the urgent need to develop a long-term solution to the health crisis.

In response to this predicament I was left with only one choice, to convene this special session and present to you my plan to address the crisis, a bill which lays the foundation for reforming the system, and which is a critical first step towards a long-term solution to the health care crisis. As the representatives of the people of Nevada, it is incumbent upon you, the Nevada Legislature, to adopt this bill. The purpose of this law as put forth, today, will be a strong foundation for us to begin the process to bring stability to the entire health care area. You have a unique and special opportunity. We must assure our citizens that quality health care is available now and well into the future.

In convening this special session, I am asking that you adopt new laws and change others, which will maintain the integrity of health care for all Nevadans. As our people's representatives, we all have an obligation to address the serious problems faced by our health care providers. I am presenting a bill to you, which represents comprehensive reform to our State and is the result of extensive discussions with doctors, patients, lawyers, insurance representatives and citizens. The intent of this legislation is to solve our health care crisis. We need to reduce health care premiums paid by health care providers. We need to create an environment where our doctors can continue to treat the most critically injured trauma patients, and where expectant mothers get the specialized care they need. We need to control medical costs and thereby make health care more readily available.

I feel now it is time to take a few minutes to explain the fundamental elements of my bill. One of the most unpredictable elements in the medical malpractice insurance marketplace is the awarding of noneconomic damages by a jury, damages for pain and suffering. The reason for this is because it is inherently difficult for a jury to place a monetary value on noneconomic losses. As a result, these awards can substantially vary from case to case and do. To provide a greater stability in the medical liability insurance market, I recommend the passage of legislation providing that in a medical malpractice case, noneconomic damages, such as pain and suffering, may not exceed $350,000, with exceptions that protect the most grievously injured patients. Such legislation will provide the State of Nevada with greater stability and will make the underwriting practices within the medical liability insurance industry more predictable.

To prevent the real possibility that many doctors will close their practices, leave our State, or turn away patients, I am recommending that you adopt a several liability standard for noneconomic damages in medical malpractice cases. Under the several liability standard, health care providers are ensured that they are responsible only for the portion of noneconomic damages directly attributable to their conduct. This is another established method of dealing with the inherent difficulties in placing monetary value on pain and suffering. Enacting this standard will provide health care providers with greater security so that they can perform high-risk procedures and should also work to lower medical liability insurance costs. Under our existing laws, persons who in good faith render emergency care, such as ambulance operators, firefighters, and members of search and rescue teams, receive immunity from civil liability.

In order to control health care costs to the public and thereby make health care more readily available, I believe it is necessary to extend similar protection to doctors who work in our trauma centers. For a doctor in a trauma setting, who in good faith renders medical care that has been caused by a sudden, unexpected situation, which demands immediate medical attention, I recommend legislation that would limit civil liability to not more than $50,000. Such legislation would provide additional protection for those doctors who work in a difficult environment performing high-risk procedures and will keep health care readily available to our citizens.

As you know, current law pertaining to reporting disciplinary actions, claims, settlements and court awards against providers requires doctors and certain other persons to report this conduct. The intent of this law is to address the issue of doctors who do not practice at the standard of care we expect in our State. The law is comprehensive and provides for severe penalties for failure to report such claims. I recommend that the existing reporting requirements regarding disciplinary actions, claims, settlements and court awards against providers be strengthened. For example, a doctor who fails to report such a claim would be subject to discipline or non-renewal of his or her license. Insurers who fail to report claims within 30 days would be punishable by a fine of up to $10,000 per incident. The same would hold true for hospitals and other medical facilities that fail to report changes in a provider's privileges and fail to report disciplinary proceedings. Everyone must enjoy a presumption of innocence, so the existence of these claims and

proceedings in medical facilities would be confidential, unless required by a court. The claim and settlement information, such as jury awards, which is presently considered a public record, would remain public.

I am recommending that you approve a change to Nevada law to allow a judge the discretion to order that jury-awarded settlements for future damages be paid on a periodic basis. Periodic payments ensure that money paid to an injured plaintiff will be available when the plaintiff incurs the anticipated expenses or losses in the future. Allowing greater discretion to our judges will allow for better flexibility in meeting the needs of the injured patient.

Next, I am recommending legislation to amend our statute of limitations provisions. Having a longer time period for permitting claims to be brought allows for an increase in insurance rates, an increase in medical costs and a lack of medical services available to our public. Under our current law, a plaintiff must file his medical malpractice action not more than four years after the date of injury or two years after the plaintiff discovers or through the use of reasonable diligence, should have discovered the injury. Our courts have long recognized that the legislature may establish time periods affecting liability for past acts. Therefore, I am recommending that legislation be approved that shortens the time frame for filing a medical malpractice action and requires an action to be filed within three years of the date of injury and two years after the date of discovery.

I am recommending the passage of legislation that repeals the medical and dental screening panels. The original intent of the screening panels was to minimize frivolous suits against doctors, to encourage settlement and to lower the costs of malpractice premiums. Conceptually, the screening panels are will intended. However, in practice, as evidenced by our current health crisis, the screening panels have not met the purposes for which they were created. In place of the screening panels, I recommend the legislation requiring the courts to create a fast-track system for medical malpractice cases. The courts should adopt provisions that expedite discovery, mandate early pre-trial and settlement conferences, and require the parties to engage in alternative forms of dispute resolution early in the litigation. This fast-track system should eliminate delay and allow our citizens to have their medical malpractice cases heard in an expedited manner by our courts.

As this health crisis unfolds, I have learned that our judges need more expertise in the area of medical malpractice litigation. Therefore, I am recommending that you enact the provisions of this bill to ensure that judges have training in complex medical malpractice litigation before handling such cases. This should ensure reliability and accuracy in the results of these difficult cases.

With this bill, I am also recommending that attorneys, who file and pursue frivolous lawsuits as determined by the judge, be required to pay for all costs, expenses and fees that arise as a result of their unreasonable conduct. While most Nevada lawyers represent their clients in a professional manner, lawyers who are found to have pursued a frivolous case by the judge should be held accountable for their role in increasing costs and delaying justice for legitimate injured plaintiffs.

In conclusion, these measures will better serve our citizens and are intended to lower the cost of medical liability insurance for our health care providers. The bill before you balances the needs of injured parties, patients who seek the best medical care available and the doctors who must purchase and carry insurance to protect themselves and their patients. I called representatives from the legal, medical and insurance communities together and gave them 45 days to build consensus on these very important issues. They were unable to reach consensus. However, progress was made, and this bill contains the elements of their efforts. I have, therefore, written in this bill the elements that I feel will act to resolve our health care crisis. The time has run out. The people of Nevada and I, as Governor, now turn to you. The citizens of Nevada are depending on you to create new laws that will ease their fears and erase their doubts. Our citizens need to be assured that they will receive only the highest level of health care now, and well into Nevada's future.

This is especially true for the expectant mothers in our State. Each year, approximately 25,000 babies are born in Clark County alone. Having a baby is perhaps the most precious, important moment for a mother, father and their extended family. Expectant parents should not be robbed of this special time because there aren't enough doctors to provide adequate pre-natal care and to assist in the birth of a healthy newborn. If you do not act now, by October or November, there will not be enough OB/GYNs practicing in Clark County to provide proper care for thousands of women. You have a unique opportunity in this special session. This bill represents a beginning. I urge its consideration. Thank you.

My staff and I will be available to answer questions to expand on any of the areas because we can only highlight these issues in this presentation.

SENATOR RAGGIO:

I am going to ask our counsel, Brad Wilkinson, at the appropriate time, to go into detail on the bill. Are there any questions for the Governor at this time?

GOVERNOR GUINN:

I want to thank all the doctors, lawyers and the legislative committee. There are not many places outside of Nevada where we can come together from all walks of life and put a bill together as complex as this subject is. We listed 11 items in the proclamation, and those were listed after all the discussion. When we got finished everyone had their explanations that had this interest. I am pleased to say, publicly, that everyone agreed upon 9 out of 11 issues. The discussions we have gone through these last few days have only been for two issues, and those were for good cause. There was give and take on issues such as collateral sources and joint and several. Some of these other areas that we are talking about; lawyer pays, records and disciplinary procedures for doctors who don't follow procedures, and insurance companies, all came about. The only thing we changed out of the 11 is that we dropped 2 small items and added the fast-track system which everyone wanted. It took us to the last minute to put it in the language that we needed. That allowed us to take out the much more difficult recommendation on the hearing panel, the screening panel, and allowed us to say we are going to phase it out. We will keep our screening panel. It is not as clear. I would like it to be in the letter of the law, but the screening panel we have, today, will only be used, when we pass this bill, to phase out the 250 cases and then will "sunshine." Then we will be in a much better position with fast tracking. We are pleased to come about with 9 sustained agreements out of 11, changed 2 small items and turned them into 2 big ones.

SENATOR RAGGIO:

I know that the bill covers a limited amount of liability for doctors operating in a trauma setting. Was any consideration given to situations where doctors act in a pro-bono manner and provide pro-bono service, but there is no egregious conduct or gross negligence, will these be given immunity?

GOVERNOR GUINN:

Yes, absolutely, hopefully, later today or tomorrow, we can work out a time schedule. I plan to do this after talking to you and some of the leadership people on the Assembly side. I. say to you that this is a great opportunity both for the lawyers and for the doctors. What they have agreed to do, and I am certainly willing to add it to the expansion of the proclamation, is say that any doctor, who volunteers his or her time in a non-profit health center where services are given will get complete immunity unless they commit egregious conduct. These doctors can volunteer freely and go there and help those who need that special help. The lawyers agreed to it and worked hard on it, and the doctors have said this is great for everyone, but more importantly, it will be great for those less fortunate than many of us in this room.

SENATOR RAGGIO:

That is not in the bill at the present time?

GOVERNOR GUINN:

I will do that over the next day or so. It is a great opportunity.

SENATOR MATHEWS:

Governor, I was wondering in the deliberations was any consideration given to nurse-midwives? Was there any discussion in that area? Outside of Las Vegas, nurse-midwives are used quite a bit, and their malpractice insurance is going just as high, percentage wise.

GOVERNOR GUINN:
In this case, there was not, but there are a number of areas that we think need to come back during the session. We have to look at all the training and requirements of what it takes for them to be a midwife. I think it is a very good subject for us to look at in the next legislative session.

SENATOR MATHEWS:
Outside of Mississippi, they are lay people, but in this State, they all have to be "masters prepared."

GOVERNOR GUINN:
I am pleased to say I was born outside of a hospital, and I had that experience. They did well.

SENATOR NEAL:
Governor, I just had a cursory review of the bill. It seems to be put together very well. I have one question about the training requirements that are imposed upon the Supreme Court. You seem to want to mandate the court to rule for mandatory, appropriated training on these complex issues dealing with malpractice. My concern is the separation of powers. I wondered had there been any discussions with the Court relative to this issue.

GOVERNOR GUINN:
Yes, I have had a number of discussions and written communications on some of the laws that are already on our books. We were very careful in all these areas and that is why I read into the record what I did, to substantiate why we are doing this for the medical crisis area and not necessarily for insurance. We looked at passed laws. You have every right, but I don't have them. You can direct certain things to the Court, and you have done many times in the passed. It is an encouragement, and we are asking them to set up a procedure. They get to determine their time schedules and the courses needed. We are not directing them to do that. I want to make certain that the intent of this legislation, from your point of view, that the record would show that you would like them to have some specialized training. I can give you an example. I have appointed nine or so judges. I think they have all been doing an outstanding job. Their experience is varied. It goes all the way from 30 to 35 years as an attorney and then some are very young. The last few I appointed come out of a municipal court setting, and they handled a different kind of a case other then medical malpractice or construction defects. At the present time, the courts have a methodology whereby they randomly assign judges to cases. We are asking them not to be randomly appointed until these people get a chance to go to the judicial college and get some special training. Do not randomly hand it to someone with no background. I will say to you that Supreme Court Justice William Maupin has been exceptionally cooperative in that area.

SENATOR NEAL:
One of the things we normally do in this political process in dealing with the third branch of government is we make it permissive rather than mandatory because we cannot mandate to the third branch of government. When I saw this particular language saying, "the Supreme Court shall provide by court rule mandatory training," I have a problem with that language, and I thought the Court would have a problem also. That is why I raised the question.

GOVERNOR GUINN:
They may, but if they do, they certainly can indicate they are not going to follow it. I don't want to get you in a fight, Senator Neal, with the Supreme Court. I can tell you there are a number of laws on our books right now that nobody follows, and I fully intend to see those laws are followed. A couple of them involve different branches of government. By setting forth what we intend to do and working with them, they said we will see that this is done. We are really taking a strong stand. I think that you have the authority. If there were a question of constitutionality you would get a letter from the LCB. I do not believe that you have gotten a letter regarding this. There could be some differences, some give and take. But, what do you do if you pass a law, today, and you have a law on your books already that directs the Supreme Court and the courts to do certain things, and they have not been doing them? I have talked to them, and they are certainly going to do them now, and I'm just the Governor.

I respect your concerns because we have three branches of government, and I do not want to tread on their toes or have you tread on mine. I think it is a real give and take. We are a small enough state that they are willing to help us in this case. I do not think any judge will object to this.

I saw Allen Earl the other day at the Reno airport and asked him where he was going and whether he was handling cases here. He said, "Absolutely not. But, I will tell you, I was assigned a construction defect case, and I have no knowledge in that area. So I am going to the Judicial College because I need that help. I need that experience." That is all we are asking them to do. Here is a person with tremendous experience, let alone, one who is young and has come out of a traffic court situation. It is not good for our citizens, the legal profession or the judicial system. Senator Neal, and this is important for all of you to hear, one of the things that was said at the hearings was our judicial system is lacking in some of these training areas. I am only trying to help so that they will better understand. We cannot have one judge come into a situation under pain and suffering for the same incident, and we can find incidences that are extremely different from $100,000 to $800,000, and not understand what it means to have money left over to be put into economic awards. If there is any further information needed, I will certainly get with you and follow up. I will show you the communications that I have been dealing with the Supreme Court. Their response was outstanding.

SENATOR RAWSON:
I was just going to partially answer the question Senator Mathews asked. I believe section 11 dealing with some of the statute of limitation language does deal with health care providers and defines registered nurses. At least, in part of this, the nurse-midwife would be covered.

SENATOR WIENER:
Governor Guinn, you stated in your remarks we need to reduce premiums paid by our health care providers, and later, you made a comment that this should help us lower our medical liability costs. I am curious as to whether this legislation will deliver that. Do we have any assurances we will have lower premiums because of the negotiations that have occurred? You have mentioned the insurance industry. We have not heard a lot from the particular players there. Have they come to the table in your conversations and said, "We will lower premiums if you do this?"

GOVERNOR GUINN:
I think you might hear from them once they see the final bill. I can't speak for other people, but I did meet with the insurance representatives. They indicated that if we passed a bill that had a $250,000 cap on pain and suffering, noneconomic issues, they would lower their premiums over a period of time pretty substantially. I was concerned because I wanted to know if they are going to lower their premiums when they just increased them in the last six months by 200 or 500 percent as opposed to when we did not have this cap and this problem. Now when we have this problem, will they take it back? The doctors and lawyers realize this, and I think, it will be. We will see a bit of movement, but we are a very small market. We only have about three and, maybe, one or two other small insurance companies. That is why this State had to initiate an insurance company. We are in the insurance business, and I would prefer we be out of it. Right now, for an OB/GYN, we are about $16,000 less than what those people are offering. We have to wait to see if we can draw them in. I looked at every thing that I could think of and wanting something in this bill that would be directly aligned to insurance

companies. You cannot force people from the private sector to issue these. They can set underwriting standards higher, and then nobody can qualify for it. They can set their prices. They can come and go. They are not like a regulation under the PUC or utilities. We are at their mercy. If they do not come down, I will be bringing back some other recommendations to you as we move into the legislative session.

SENATOR WIENER:
You mentioned the state plan and you would rather we not be in that business. Until you have some assurances of the movement you alluded to, are we going to continue to provide that insurance coverage?

GOVERNOR GUINN:
Absolutely, it is our lifeline and has been for the last few months. I cannot even count the number of governors who have called saying, "How did you get an insurance company set up and going, get it approved and funded, and start taking doctors for coverage with not only forward concerns but with the past acts, in a month." We just did what we had to do under emergency powers. We have hundreds of doctors. Let me give you an example of what we did. The company that had been insuring the medical school for eight years gave them a bid, and you were going to have to fund more than the $400,000 that I mentioned but much more than that big dollars. We gave them a bid, and the company came down to meet our bid. We said that is what we are here for, go to the private sector. The university was happy. The insurance company was happy, and I was blessed because I didn't have to do that.

SENATOR TITUS:
Governor, I appreciate your comments about the insurance companies. I hoped that would be one of your points, and we could do some insurance reform. I had planned to come with some amendments, but that will not be appropriate at this time. If things don't work out as we are hoping they will, I would like to come back next session with some insurance reforms. I look forward to working with you to bring those back in February.

GOVERNOR GUINN:
Absolutely, we should see some progress being made because I believe this bill will draw not just the people that are here, but people from outside. You see California has thousands of insurance companies. They have a pool of thousands of people and thousands of doctors. We are very small. The insurance company we have, today, has a great deal of potential. If the people don't rise to the occasion from the private sector, I will bring you a recommendation that will show you how we can become self supported, with good prices for our doctors, and we don't like to be in there. We privatized workers' compensation, but when we have to do something like this, we are not paying any dividends, and we don't have to pay taxes. If we get efficient and learn the business the way we should, we will take care of ourselves in terms of insurance, which means we will take care of our people.

SENATOR TITUS:
And, we don't have to have creative auditing practices either.

GOVERNOR GUINN:
No, we will use the Legislative Counsel Bureau audit team.

SENATOR RAGGIO:
Are there any other questions? Governor, we thank you for appearance, and we will proceed with our work.
The first order of business should be the adoption of the committee rules.
The rules are as follows:
1. All meetings shall be open to the public.
2. Eleven members constitute a quorum of the committee.
3. A majority of the members present is required to pass or reconsider a bill, budget, or resolution, or to take any other action.
4. Proponents and opponents of each specific proposal before the committee will receive uninterrupted equal but limited time to address the committee on the specific proposal under consideration.
5. Following presentations by proponents and opponents of each specific proposal, the members of the majority party and the members of the minority party will be given equal but limited time to ask questions and make statements about the specific proposal under consideration.
6. Matters not within the Governor's Proclamation or not relevant to the specific topic under consideration will be ruled out of order.
7. There will be a period of public comment within specified limits on each specific proposal then under consideration following the questions and statements of the members of the committee.
8. Following public comment, the committee may vote on the specific proposal then under consideration. The committee will then proceed to consider the next specific proposal.
9. Smoking in the committee room is not allowed. All cellular phones and pagers must be turned off.
10. The Chairman will convene and adjourn each committee meeting. All recesses shall be at the call of the Chair.
11. Although witnesses are presumed to be under oath while testifying, the committee has the option of requiring a witness to be placed under oath.

SENATOR TOWNSEND:
I move to adopt the committee rules.

SENATOR RAGGIO:
In the Committee of the Whole, a second to a motion is not necessary. You have a copy of the rules before you. Is there any discussion on the proposed rules? Hearing none, all in favor indicate, aye; any opposed?
The motion carried unanimously.
The rules will be utilized in the committee's deliberations. A number of members of the committee have indicated a need to make disclosures. Let me begin by indicating the following: I am a shareholder in a law firm, which has represented both plaintiffs and defendants in medical malpractice cases. Personally, I have not represented anyone in a medical malpractice case in over ten years, but as a share holder in a law firm, I have a pecuniary interest in legislative measures that limit the amount of damages a plaintiff may recover in medical or dental malpractice actions because such measures could have a negative effect on revenues of any law firm. Because the detriment accruing to me as a result of the enactment of those measures is not greater than that accruing to any other share holder in a law firm that may represent a plaintiff in either medical or dental malpractice action, I am advised the ethics law allows me to vote and participate fully in the consideration of such measures.
In addition, a registered lobbyist who represents certain medical groups on the issue of medical malpractice rents office space from my law firm. Other than the fixed amount this lobbyist pays for rent, the firm does not receive any other revenue from him, including no revenue from his representation of medical groups. The amount of money a firm receives from the lobbyist for rent does not create a pecuniary interest or commitment in a private capacity to the lobbyist on the part of the firm. The amount of rent and payment of the firm is not contingent on whom the lobbyist represents or on the issues on which he lobbies, and I am advised the ethics law allows me to vote on and participate fully in the consideration of measures relating to medical and dental malpractice.

I am also a member of the board of directors and a shareholder of Sierra Health Services, a publicly traded company, that has several subsidiaries, which include a manage care company, a health and life company, and medical group. As a shareholder, I would have a pecuniary interest in and a commitment in the private capacity to the company regarding legislative measures that limit the amount of damages a plaintiff may recover in any such actions because such actions could limit the liability of the subsidiary. I am advised that because the benefit accruing to me is a result of the enactment of those measures is not greater than that accruing to any other shareholder in a company that includes such subsidiaries' medical group, health and life company, etcetera, the ethics law does allow me to vote on and participate fully in the consideration of those measures. Pursuant to the appropriate statute, I have filed a disclosure in this nature with the Director of the Legislative Counsel Bureau.

Are there any other committee members who need to make a disclosure?

SENATOR RAWSON:

I would also like to make a disclosure, and it will be filed with the Director of the Legislative Counsel Bureau. I have a son who is a radiologist, a son who is a podiatrist, a son who is finishing his neurosurgery residency, a daughter in physical therapy, a daughter in nursing school, a son in dental school and a black sheep in the family finishing law school. As a dentist, I have a pecuniary interest in legislative measures that would limit my potential personal liability for dental malpractice, however, because the benefit accruing to me or to any members of my family as a result of the enactment of those measures is not greater than that accruing to any other health professional the ethics laws me to vote on and participate fully in the consideration of those measures.

SENATOR O'DONNELL:

I too have to disclose, I am a managing partner in two companies, Mirror Image Group, CML and LLC. These two groups are holding companies for real estate. I do have partners that are physicians as well as attorneys. My wife is also the bookkeeper, and I get paid for my services. I will give a response to the Legislative Counsel Bureau so that it will be on file.

SENATOR NEAL:

I did not realize that I might have a conflict until Senator Rawson started mentioning his children. I realized that I should disclose the fact that I have a daughter who is in medical practice, but she doesn't practice here. I also have a daughter who is graduating from law school and will be practicing here. It has me torn between two interest groups that I have to make up my mind as to which way I should go. I balance myself.

SENATOR COFFIN:

I am a licensed group-health insurance broker. The subject we are discussing is a casualty insurance product. I do not sell it and am not licensed to sell it. The clients that I represent do not sell it. I am not certain whether I have a conflict, but I will declare the position I have in the insurance business because some people assume all insurance brokers can sell all products. I will talk to the Director and see if I need to file anything in writing with the Legislative Counsel Bureau.

SENATOR AMODEI:

I apologize for not having any prepared remarks. I will disclose, I am a partner in a law firm, which occasionally does trial work in the area of medical malpractice on the defense side. I am informed and believe, thereon, included, in part, this disclosure, the fact that the effect of the operations of that firm are no different than any other firm in the State.

SENATOR MATHEWS:

I am a licensed registered nurse. I have never practiced as a midwife.

SENATOR JACOBSEN:

I have a practical disclosure. I have been an ambulance driver in Douglas County for 56 years.

SENATOR MILBURN:

My stepson is an attorney and practices law in that field.

SENATOR RAGGIO:

There are 21 Senators who comprise the Committee of the Whole and who are present for this procedure. The first topic we are going to discuss is to establish limits on the amount of noneconomic damages available in medical malpractice cases. If time permits, we will also consider the subject of limiting liability for acts occurring in a governmental or nonprofit center for treatment of trauma. When the agendas were prepared, we were of the impression that there were major differences between those who were negotiating on these issues. It appears to the committee that, at this time, there may be a coming together on these issues. So, instead of favoring the limits or opposing the limits, I am going to invite those who are representatives of the groups that have been in these negotiations to come forward. We will give you an opportunity to make a presentation, uninterrupted. It is now 4:20 p.m. I am going to ask those of you that are here how much time you feel would be reasonable to hear this portion of the issue. Will someone give us an indication of how much time would be needed?

DEAN HARDY (Nevada Trial Lawyers Association):

We do have a presentation on the issue of caps. Our presentation probably would not take longer than 10 to 12 minutes. We have a video we would like to present.

SENATOR RAGGIO:

Who is here representing the medical group or health providers, anyone? I want to make certain everyone who has to say something has the time. I also have a list of people who indicated they want to testify. Has everyone who wishes to testify signed in? While we are waiting, let me introduce our counsel, from the Legal Division, Brad Wilkinson, and Scott Young is from our Research Division. Both are familiar with this bill and this subject. Both have served the Legislature and the appropriate committees for many sessions on these particular issues. We are fortunate to have them. Also, Jan Needham, Deputy Legal Counsel, is available. They are all available for any questions you might have. Mr. Wilkinson, at this point, give us an overview of what the bill provides and point to the sections on noneconomic damages.

BRADLEY A. WILKINSON (Principal Deputy Legislative Counsel):

The provisions pertaining to caps on noneconomic damages are contained in sections 3, 4 and 5 of the bill. Section 5 establishes a general limitation on the amount of noneconomic damages that can be awarded to a plaintiff, which is $350,000. The exceptions to the $350,000 cap are set forth is subsection 3 and are cases involving: organic brain damage; hemaplegia, paraplegia or quadriplegia; death of a parent, spouse or child; total blindness; actual physical loss of a limb, including a foot or hand; permanent loss or damage to a reproductive organ resulting in sterility; a case in which the conduct of the defendant is determined to constitute gross malpractice; or a case in which, following return of a verdict by the jury, the court determines, by clear and convincing evidence that an award in excess of $350,000 for noneconomic damages is justified under the circumstances. In those circumstances, in which there is an exception to the cap, the plaintiff is able to recover whichever is greater, $350,000 or the amount of money remaining under the malpractice insurance policy limit of the defendant after economic damages are subtracted from that amount. Further, irrespective of the

number of individual plaintiffs in the action, no single defendant can be held liable for noneconomic damages in the aggregate, in excess of the policy limits of the defendant.

SENATOR RAGGIO:
In section 18, there is a requirement that a licensed physician shall not practice in the State unless that physician maintains professional liability insurance in the amount of $1 million per person and not less than $3 million per occurrence, is that correct?

MR. WILKINSON:
That is correct. Sections 25 and 27 contain the same requirement pertaining to dentists and osteopathic physicians.

SENATOR RAGGIO:
Are there any representatives of medical or health provider groups? I am trying to establish some time for your presentations since we do not have a situation where there is an opposition to a cap or support for a cap. How much time is reasonable for a presentation by both of these groups? I want to accommodate you. Are you representing the lawyers group?

MR. HARDY:
Our presentation will be between 30 and 45 minutes.

SENATOR RAGGIO:
How about the medical group?

MARK BROWN, M.D. (Chairman of the Nevada Mutual Insurance Company):
We will need about 15 or 20 minutes to give a general overview.

SENATOR RAGGIO:
We will allow each of you 45 minutes. I would like to have both groups seated at the table to make their presentations without interruption. Then we will have questions. It is now 4:30 p.m. We will allow until 6:00 p.m. if you need that much time to make your presentation on this issue. Are there any others who wish to be involved in this original presentation?

MR. HARDY:
There are other presenters from the Nevada Trial Lawyers Association, including several victims of medical malpractice who want to testify.

SENATOR RAGGIO:
Will all that fit within the time allowed?

MR. HARDY:
They will all fit within our 45 minutes.

SENATOR RAGGIO:
Are there some others outside these groups who wish to participate at this point in time?

DR. BROWN:
We would like approximately 15 minutes to make a presentation from the insurance company perspective.

SENATOR RAGGIO:
Is that on this issue?

DR. BROWN:
Yes, on this issue.

SENATOR RAGGIO:
You need 15 minutes, separate and apart from the rest of the presenters?

DR. BROWN:
Our issue will be separate.

SENATOR RAGGIO:
With that in mind, I will allow up until 6:00 p.m. for presentations from all of you. Will that be acceptable? What order do you think would suit your purposes?

DR. BROWN:
We are prepared at this point.

SENATOR RAGGIO:
There will be 1 hour and 15 minutes, divided between the presenters. Please, be as precise as possible.

SENATOR NEAL:
Could we hear from the insurance person? Because those individuals have not been heard.

SENATOR RAGGIO:
Does everyone who wishes to make a presentation have a copy of Senate Bill No. 2? Everyone who appears before the committee, please indicate your name, spelling it if necessary, and your title or affiliation. Please remain after your presentation for any questions that may arise. Testimony before this committee is deemed to be under oath, even though we may not require anyone to take an oath. Please be mindful of your presentation in that regard.

DANIEL S. MCBRIDE, M.D. (Physician, Chairman, Nevada Mutual Insurance Company)
I am here on behalf of the Nevada Mutual Insurance Company and am member of the Physicians Liability Task Force and represent the American College of Surgeons as the president of the Nevada chapter. I have been intimately involved in these negotiations since the original appearance before the Insurance Commissioner on March 4, 2002. Seated next to me is Charles Wallace.

The last thing I thought I would be doing is appearing on behalf of an insurance company. We are here only as a result of this medical crisis. Our company was founded in response to a lack of affordable coverage that all physicians have faced. Myself, personally, and the group were insured by the

same insurance company. Our insurance was being terminated in June, and we found ourselves in the same predicament as most of the physicians in Clark County. The insurance premiums quoted to us were double and triple the cost of our previous coverage.

This insurance company was founded by doctors, run by doctors and is for the benefit of doctors. It was not founded to return profits to any company. It is a totally non-profit organization. It is never to be sold as the previous mutual insurance company had been to the St. Paul Company, which has led to some of the problems we have now. It was also offered to provide some long-term stability the Governor's plan does not provide or was intended to provide. We are here to try to provide a service for the physicians that would be around in the future and provide stability in the market place.

As you are aware, there was not a flood of insurance companies coming to write policies in this State. The soil in Nevada for the insurance industry was as barren as it gets. What we have done is provide coverage for over 300 Nevada physicians. We have policies in place for reinsurance, plans for long-term growth as well as additional coverage for our physicians. We have no record of underwriting or manipulating the market in this State. We are here solely to provide coverage for physicians and provide their stability, but to do that, we need long-term medical liability insurance reform.

CHARLES (CHIP) WALLACE (Communications Director/Cofounder, Nevada Mutual Insurance Company):

I represent over 300 doctors. Three hospital chains have pledged almost $3 million to get this company going. The reinsurance we have in place provides for a second financial stability and viability in the market place and is quite necessary. We put this program together with the virtues Dr. McBride stated, such as, non-profit status and the ideology that will keep this company in place. That is only part of the equation. We are left with some questions. Does this bill meet the needs of the insurers who gave their sworn testimony on March 4, 2002? The insurance industry has already addressed the governing bodies of the State of Nevada. All we need to do is read their testimony. What the insurance companies stated was that MICRA, the California laws, would bring them back into the insurance industry marketplace. Is this bill short of MICRA? Unfortunately, I am not an expert and have not surveyed this question. The bottom line and answer to that question will determine if these private companies come back into this State.

As a citizen, and I think we should recognize all the opinions and concerns, I ask you, are the patients protected under this bill? Can you say this bill will reduce the cost of premiums? If not, we still have a problem. Will this bill reduce premiums by 5 percent because we watered it down, made changes that may well be necessary, but what is the offset going to be? Looking at this in pragmatic terms, is that going to be 5 percent? If you take a physician who was paying a premium of $30,000 a year and is now paying $68,000 a year, which is moderate, and reduce their premium by 5 percent, are we kidding ourselves into thinking we fooled them as well? Are they going to continue practicing medicine in Nevada? We have seen far too many specialist physicians, who serve an acute patient demographic, leave this community. It is paramount you ask those questions. Do trauma surgeons have liability protection or liability equality at the trauma center? If the answer is yes to the trauma center, what about the patient who shows up at the emergency room (ER)? The patient in the ER is in the same condition as the one in the trauma center. Those are hard questions that need to be asked.

On page 5, I have briefly reviewed the joint and several liability containment, I do not believe it goes far enough.

SENATOR RAGGIO:

What subsection are you referring to?

MR. WALLACE:

The complete language referring to joint and several liability on page 5.

SENATOR RAGGIO:

Please confine your remarks to the caps we are talking about. This part of the discussion is on limiting the amount of noneconomic damages. When we take up that issue, you will be welcome to comment on that topic, but at present we are trying to keep focused on this issue.

MR. WALLACE:

I will withdraw at this time and speak to the issue of joint and several liability at another time.

SENATOR RAGGIO:

What about the sections on establishing limits on the amount of noneconomic damages or governmental or nonprofit treatment centers?

MR. WALLACE:

The dollar amounts are absolutely tied to the language such as joint and several liability that leaves gross exposure; therefore, I would not be able to comment on that.

SENATOR RAGGIO:

You are not commenting on that part of it?

MR. WALLACE:

Arbitrarily, the cap is fine. What is the language within this document that protects those values, that protects the solvency of an insurance company or the exposure of liability of any one physician or group of physicians?

SENATOR RAGGIO:

I am not clear on your position. The bill before us has a $350,000 cap proposed on noneconomic damages, which could be exceeded in those cases in subsection 3, and are outlined where there are certain injuries such as; organic brain damage, paraplegia, quadriplegia or a case in which the defendant conduct is determined to constitute gross malpractice or where the jury gives an award higher and the court determines the clear and convincing evidence the amount for economic damages should be higher. Over all, there is a cap of the policy limits. Are you supporting the cap or proposing a change in that language.

MR. WALLACE:

Without having reviewed the document, I will give a conservative answer. If what is contained in this bill, in the section you are questioning, is consistent with the testimony of the insurers, the testimony from March 4, then I would support it.

DR. MCBRIDE:

Senator, may I ask you a question in reference to your questions on the caps? There was a provision regarding caps on services provided voluntarily, in a non-profit facility. You raised the point in your earlier remarks, and I wanted to ask you a question.

SENATOR RAGGIO:

It is not addressed in the bill. I asked the question whether it had been considered. A situation whether a doctor on a pro-bono basis provides some service in a facility, for indigents, for example, and the Governor responded, it was not in the bill, but he may add it to the "call."

DR. MCBRIDE:

I would encourage you, as a member of this panel, to please put that into a bill draft because I would like to speak to the issue at a future point.

SENATOR RAGGIO:

We do not have the authority at this time since it is not in the proclamation.

SENATOR CARE:
When the California Supreme Court considered the constitutionality of the cap of $250,000, one of the things they looked at was the legislative intent, and that is what we are doing with this testimony. We are laying down legislative intent, so we need to hear this. The Supreme Court in upholding the validity of the caps said, there was a rational relationship between the legislation and the state interest in the courts restraining and sometimes reducing medical malpractice insurance premiums. The court in California was interested in that. I did not hear but, at some point I want to hear, if not from you, gentlemen, something in this bill saying we are going to see insurance premiums restrained or reduced. The Governor addressed that a little earlier.

SENATOR TOWNSEND:
In the spirit of Senator Care's question, are you the actuarial expert who can answer actuarial questions or is there someone with you, today, who might be able to answer questions relative to caps?

MR. WALLACE:
No, the corporate line I was prepared to deliver was this. Were MICRA presented 100 percent, today, then the actuaries of this company and the other insurers doing business in this State would applaud and could attest to the fact that there would be a sharp reduction in malpractice premiums for physicians in the State of Nevada.

SENATOR TOWNSEND:
I would like these two gentlemen to get an answer to the following two questions. One is Senator Care's question. What are the premiums for physicians that practice in a trauma center in the areas of OB/GYN? Two, if this bill becomes law with a $350,000 cap on noneconomic damages with the exceptions that would then go to the policy limits, should a plaintiff in a case be willing to accept $50,000 to settle the suit, instantly, and the doctor agrees to that, but you as the insurance carrier say no, then it ends up going to litigation, and you lose to the caps. How do you actuarially account for the difference when you rate that physician at the next premium level?

MR. WALLACE:
We will have them follow up.

SENATOR O'DONNELL:
I have a question on page 5, paragraph (h). How does the court determine by clear and convincing evidence that an award in excess of $350,000 for noneconomic damages is justified? Does that leave the door open for the attorney to make a case to the judge that this case warrants more than the $350,000 cap? Is that per victim or per instance if there are four victims in a wrongful death suit?

MR. WALLACE:
When I brought up page 5, I was referring to the ambiguities in this law from an insurers and business perspective. We are looking at removing these uncertainties. Already there are a few. Therefore, without a concrete answer to the question, we are still in the same boat.

SENATOR RAGGIO:
I believe counsel has the answer to the question. It is per victim?

MR. WILKINSON:
Yes, that is correct. It is $350, 000 per victim.

SENATOR O'DONNELL:
Does counsel have an idea of how the court determines the clear and convincing evidence to warrant awarding an excess of $350,000.

MR. WILKINSON:
The bill, as it is currently drafted, does not provide a specific procedure by which that determination would be made following the verdict of the jury. Unless the jury returned a verdict for a noneconomic damage in excess of the cap amount, the judge would not be in a position to do that in any case. But there is no specific provisions saying how that procedure is going to take place.

SENATOR RAGGIO:
Let me suggest, on that issue, we hear the presentation from the legal and medical groups. After which we can take those questions. We are going to allow 40 minutes for the presentation from the legal profession representatives and 40 minutes from the medical profession. Is that adequate for your purposes?

MR. HARDY:
I would think so. While we are preparing for the video, I would like to introduce Bill Bradley, past president of the Nevada Trial Lawyers Association and current co-chair of our political action committee, and John Echeverria, a lawyer in both the State of Nevada and State of California who practices in this arena.

SENATOR RAGGIO:
You might mention that Mr. Echeverria's father was a former member of the Senate in Nevada.

MR. HARDY:
Yes, he was a distinguished member and was a lot more than just a member. We also have several victims who will be testifying later.

SENATOR COFFIN:
Are there any people who have been left out of this bill perhaps through lack of representation or some other way as we found out from an e-mail sent from a nurse-midwife. We need to know that in your presentation. Did I make myself clear?

MR. BRADLEY:
Your question was clear. Because the screening panel covered doctors and osteopathic physicians, that is what this bill applies to as well as hospitals.

Video presentation. The following is text of the video is provided by Fierro Communications, Inc., Long Format, Citizens for Justice, Trt:8:15, 7.27.02, the case of Mike Nostro.

WENDE NOSTRO:
He was the guidance counselor at Brindley Middle School and far the favorite. You know, both staff and students alike just loved this man, just an incredible person. I mean loved by everybody and such a dynamic human being. It was a needle biopsy that was supposed to be performed. He was

terrified. He was complaining about the pain in his chest, the pressure. He wasn't able to breathe. He just sounded terrified. The doctors response, and I will never forget this as long as I live, was "suck it up Mike, we're almost done." The doctor had punctured his aorta several times, and he couldn't breathe. I was right outside the door listening to my husband die.

Text of the case of Kevin O'Neill

KRISTIE O'NEILL:
He was completely full term. He was 8 pounds, 9 ounces. He was a big boy when he was born, so yeah he was very healthy. I asked my doctor if I could have a c-section, and he said, no. He just wanted to try and induce labor. He didn't even listen to what I had to say. He just said, no, he'd like to try to induce labor. I didn't even know he wasn't going to be there. He wasn't there, once, the entire time I was in labor.

TIM O'NEILL:
We were going to bring Kevin home to his already-made room, and everything was all done. We had all his stuff painted. His bassinet was ready to go. Everything was done just like the other children. Um, we didn't expect this. There was no indication of something was going to be like this. Kevin was perfectly normal. There was nothing wrong with him.

KRISTIE O'NEILL:
When he was born, he was not breathing. He was pretty, I mean, low apscar scores. He had had a seizure because of lack of oxygen.

TIM O'NEILL:
I knew then there were going to be severe problems, and I thought he was dead.

Text of the case of Diane Meyer

DIANE MEYER:
Two weeks before I went into the hospital, I'd had a complete physical, and I was perfectly fine. Everything was good. I mean, totally. I love being outside, and we love going for walks, climbing on paths and marching around at Red Rock. Anywhere you could take me, I wanted to go, and still do.
The first two adventures in that hospital, just Richter-scale bad. They just . . . And you know the sad thing is that we were the only people in the emergency room waiting. I laid there, and I was, at that point, so incredibly sick and so incredibly ill, I couldn't get the attention of anyone to take care of me. They said you have a tiny kidney stone, take this pin medicine and go home. A week and a half later, I'm so sick I don't have legs anymore. Um, at one point, they even considered taking my hands, and it was, thank God, my daughter and son and my husband just refused to let them do that. So for the lack of one simple little prescription, I no longer have legs.

WENDE NOSTRO:
I never thought he would die. I never thought that for a second. I still wake up and can't believe its real.

DIANE MEYER:
There are catastrophic cases that change your life and change your life and disfigure you forever, change every bit of it. It'll never come back. It won't. I hope I live 30 more years, and yet, I'm always going to be the same, nothing is going to grow legs back for me. Nothing is going to give me my independence.

KRISTIE O'NEILL:
There are a lot of great doctors, but I mean the decision that my doctor made, Kevin is going to have to pay for, for the rest of his life.

WENDE NOSTRO:
Originally, I tried to file a complaint with the Nevada State Board of Medical Examiners, and this is the board that licenses the doctors. They are not even policing their own physicians. Physicians are not policing colleagues. There are repeat offenders everywhere, and it so hard for me to have any trust in any doctor of any kind today.

DIANE MEYER:
It's just so hard to put a pretty outfit on and put my legs on, and I try to stand there and look just the way I used to look. I can never stand up straight. I can't stand correctly. There is nothing about me that looks the way I used to look. My whole life has changed, and it's just not going to change back. It's my job to make you comfortable around me because now I feel like a freak. I feel like a freak. It's really tough. It's really tough.

KRISTIE O'NEILL:
Having a child with special needs has changed my entire family.

WENDE NOSTRO:
Not one doctor in Nevada has ever lost his home, his car because of something like this. The insurance companies paid these malpractice claims, not the doctors, out of their personal bank accounts. So what have they lost?

KRISTIE O'NEILL:
We both almost died because of the carelessness of him and the hospital.

WENDE NOSTRO:
If there is any cap on a malpractice case, the incidents of malpractice will rise. They'll feel more protected, more comfortable. More mistakes will be made. Lives will be lost, I know it. In my heart, I know it.

DIANE MEYER:
I deserve the right to be heard by a jury. I deserve that. I deserve that. They need to hear what happened to me. And it will stop a doctor and make him be just a dot more aware of what he's doing and how he's affecting our lives for the rest of our lives.

WENDE NOSTRO:
There will be less accountability if malpractice is capped at $250,000. That will be nothing to them, nothing.

KRISTIE O'NEILL:
I think it's ridiculous because I think doctors and hospitals or anyone who makes the mistake should be held responsible for that mistake.

DIANE MEYER:
Your whole life is rearranged because of an accident that happened, someone's lack of concern for you in the hospital. That's what happened to me.

KRISTIE O'NEILL:
They don't know how much he suffers, and I don't know how they can put a price on that.

How the $250,000 MICRA cap affected one California Victim's lawsuit. David L.'s California physician was found guilty of malpractice for not providing the proper vaccine. As a result of that malpractice, David's hand and legs were amputated. Under MICRA, David was compensated for his loss of income. The insurance pays for the prosthetic legs he walks on, for the hooks he uses in place of hands. For his pain and suffering, David receives less than $12 per day because of the $250,000 cap.

End of video presentation.

MR. HARDY:
The video was brought here not designed to pull at anyone's heartstrings. I tell you that with all sincerity because of what is occurring in this field relative to limitations on people's access to our justice system. It breaks my heart as a trial lawyer when people's access to the justice system is reduced or diminished. Because we are not talking about technicalities, we are talking about people's access to have a jury hear their case and make a decision based upon the facts of that case, which are a constitutional guarantee and not a technicality. I have lived in Nevada for over 31 years. I went to Clark High School and UNLV. If I thought what I do for a living compromised people's access to health care or compromised the physician's opportunity to practice medicine, I would change what I do.

I am not convinced the data supports that malpractice premium increases are being driven by the civil justice system. The number of cases has risen with the population growth at the same level. The size of cases has risen as well. You have heard that testimony and read it in the newspaper. The size of those cases have risen for several reasons part of which has to do with health care costs. Again, we have information that does not support that health care cost increases are being driven by the civil justice system. What occurred at the end of calendar year, 2001, and the beginning of this year is simple, there was an economic downturn. We had one insurance company that had 60 percent of the market share of malpractice insurance in southern Nevada that pulled out of the business across the United States, including those states that have an active limitation on people's access to justice—what we euphemistically calling caps. This company pulled out across the United States for what we think were business decisions based upon their lack of investment return. This company did not achieve a 60 percent market share of underwriting medical malpractice in southern Nevada except for one very good reason; they kept their malpractice rates down. Their malpractice rates only rose 5.4 percent between 1994 and 2001. They ignored their own underwriting criteria. They insured every doctor that filled out an application, some of which had double digit claims against them. Insurance companies are certainly in the business to earn money, and we do not begrudge them that. When those insurance company practices impact people's ability to have appropriate health care, drive them out of the market, drive their competitors out of the market and then blame the justice system, we are asking for one simple thing to show us the data. We have concerns about this. Please show us the support.

You have heard, time and again, the answer to this problem, and I do not call it a crisis. We have a problem that the insurance industry calls a crisis because they call it a crisis. That is the same industry whose auditors, Arthur Anderson, audited those same multi-national corporations that are now in bankruptcy. It is important to note one aspect of this, on Friday, in the State of California that has all the answers for this problem, two of the larger insurers, NORCAL and Medical Insurance Exchange of California (MIEC), asked for double-digit rate increases for medical malpractice insurance. NORCAL asked for a 13 percent rate increase, and MIEC asked for a 10 percent increase. Is that because they need more tort reform in California? I think not. I think it is do to economic conditions, business determinations, and it is not being driven by the civil justice system. I cannot tell you how important this issue is to the State of Nevada. It is extremely important. I cannot tell you that we should ignore a very serious problem. What I can tell you is, if they are asking for insurance rate increases in California on Friday and if you think they did not know this Special Session was going to take place, today, I think we are all wrong. The reason will be answered in the testimony you will hear all through this bill. The answer is not limiting people's access or opportunity to go to our justice system. This is a multi-faceted problem dealing with doctors' reimbursement rates, the economy and a myriad of other problems, and it will not be resolved with a simple, quick fix that limits people's access to justice.

We have some people who would like to testify on the issue of caps. I like the questions that have been asked here, today, and you are going to do a responsible job because I have participated in this process for some time. Do not let the answer to Senator's Care's and Senator Townsend's questions go unanswered. Because, if you enact this legislation, which includes the issue of caps, and we see insurance companies asking for increase in rates, as occurred in California on Friday, then are we going to be here in February, 2003, or 2005 or 2007 seeking more limits on people's access to justice? Our system is being looked at by the world as the cornerstone of our democracy. Do not take what you are doing lightly for you are trampling on sacred documents. Those documents are our United States Constitution and Nevada State Constitution that preserves the right to a trial by jury. Our forefathers understood that to be the best system and remains, 200-plus years later, the best system of justice ever derived. Please do not take this lightly because we are limiting people's access to justice. I understand the political realities as you do. When you eliminate, reduce, diminish an opportunity to seek redress through our courts, you are trampling on the Constitution, and that is a civil guarantee that breaks my heart almost as much as that video.

JOHN ECHEVERRIA (Attorney, Nevada Trial Lawyers Association):
I had the privilege of meeting quite a number of you last year at the legislative session when you honored my father. Little did I know then I would be back here in the special session addressing you on other issues. I was born in Reno and lived there until I decided to go to San Francisco to practice law. I returned to Reno last summer.

This issue has arisen, and I have been asked to talk to you about the impact caps have played in California. I have spent my career representing injured people as did my father for a large part of his career. I am doing it in both Nevada and California. I have litigated under both legal systems and under the limitations that have been placed in California and have seen the effect of limitations on economic damages. As a lawyer, representing injured persons, I am unalterably opposed to the caps on any noneconomic or economic damages. I, as well as many other members of the NTLA (Nevada Trial Lawyers Association) and members of this legislative body, belong to an organization called ABTA (American Board of Trial Advocates) which is a group of lawyers, nationwide, who are invited to belong to the group, composed of insurance defense lawyers and plaintiff lawyers. It is one of the most highly respected groups of lawyers who represent litigants in this field in the country. The ABTA's position is that they are on both sides of this fence and are unalterably opposed to the limitation on the recovery of noneconomic damages in any form. The guiding principal of the organization is, and we firmly believe in, the right of a trial by jury. Limitations on damages, limitations on access to the courts, limitations on what are commonly termed as tort reform, deny litigants the right to the fundamental constitutional right of a trial by jury on all issues.

Limitations on the amount of money a victim of medical negligence can recover have a very pernicious effect. Its stated purpose, without proof of these limitations, is to make insurance affordable. I have been practicing under the system in California for over 25 years since MICRA was enacted and have not seen a significant effect in insurance premiums nor, have I heard any testimony that limiting someone's right to general damages will lower premiums. To me what is more important is, doctors have taken the position they want more affordable insurance. The purpose of these proposals is apparently to create affordable insurance, which is something beyond just reducing premiums from where they are today. I urge you in considering what I am going to discuss as the implication and impingement on the victims of medical negligence rights to access to the court that you ask for and receive

very committed, documented assurances that enactments such as you are considering, which change people's rights and limit their amounts of recovery will accomplish the goal of making health care accessible to Nevadans.

In my opinion the real reason these types of limitations are asked for in these crises is to give an advantage to the insurance industry in situations of medical negligence. I say that because of my experience in watching how litigation arises, how it is pursued, how it is defended, and what happens. Limitations on noneconomic damages discriminate against those people that do not have large economic damages such as a housewife whose injured and has no earnings loss in the open market place, who has healthcare covered by insurance, who may have lost both of her legs, fingers and parts of her hands and has little or no economic damage. In that situation the person's recovery is $250,000, which is discriminatory to me against someone else in a similar situation but may have some large economic damages. The injury is the same and the suffering is the same. In my experience and practice in representing people under the California system it drives a great number of victims into bankruptcy because part of the concept of general damages is to compensate them for those things for which they are not otherwise out of pocket. Economic damage compensates them for loss of earnings, their medical bills not covered by insurance under the California system, and basically tries to make them whole again in terms of their out of pocket losses but the limitations on general damages does nothing to help them deal with their issues and other aspects of their life. To that extent those economic damages do not cover many of the tangibles and victims very often have to go into bankruptcy or are placed on the limitations of the welfare system of our country. Then we have transferred the medical negligent actor to the victim and ultimately to the taxpayer, which is a very pernicious act. Before you begin enacting legislation like this you should assure yourselves that it will accomplish the goal of getting affordable insurance.

More importantly, what a cap on limitations of damages does is deny access to the courtrooms. There are economic realities and practicalities in the handling of a medical negligence case. The insurance industry knows it and that is why they seek and pursue these caps on limitations. Cases like this cannot be handled for anything under less than $30,000, $50,000, $60,000 or $70,000 and in a complex case it would not be unusual for us on behalf of our clients to spend $100,000. That money if we are going to pursue our client's rights in a very egregious case such as I have previously described becomes unaffordable because the cases are so expensive to pursue, and the risk of recovery or loss makes it almost impossible. In my experience and in my office on very many unfortunate occasions I have had to tell people because of the limitations on recovery in California we cannot undertake your case because economically it is not viable and justified. Make no mistake, in my view that is the reason why caps are requested. It destroys the ability of a large segment of our population and victims, I have seen this and watched it since 1976 when MICRA came into California, and you cannot understand the number of times I tell this to people who I believe have been wronged but who cannot get redress in the court system which creates an anger because they believe in our system we all have the right to justice and they would if it were not limited. That is what caps do and that is the most pernicious effect of caps on damages in a large number of cases.

In some respects what you are considering is a very important issue and is done under extreme pressure. I recognize and understand the pressure. It is the same thing we went through in California. The same kind of urgency and the same pressures but we have some experience in looking back and seeing whether what is being requested really works. In my view they do not, they deny access. I understand the political realities but I would suggest before you make a decision to limit people's access, deny them compensation for general damages or limit their recovery you get some assurance that it will produce the anticipated benefit. I have seen it work to the disadvantage of many in California.

J. R. CROCKETT, JR. (Attorney, Nevada Trial Lawyers Association):

I have lived in Nevada for 50 years. My career has been exclusively devoted to representing injured people. There have been some great questions posed by Senators Wiener, Care, and Townsend that are the focus of the subject I will discuss—constitutionality of the law. We are a government of the people, by the people and for the people. We are not a government of the insurance industry, by the insurance industry and for the insurance industry, and I hope we will not become so. Whenever you pass a law that impairs an individual's constitutional rights where the clear and unequivocal body of law in our country says that if you are going to impair individual rights, there must be a rational relationship between what you are doing to impair their rights and the public good you are attempting to accomplish. If you cannot establish a rational relationship and you have not used the least, drastic means to accomplish you goal, then the law, however well intentioned, is unconstitutional and will be stricken by the courts. In terms of its rational relationship, we distributed a publication titled *The Reality About Medical Malpractice Law* to the members of the Legislature. The first graph on page 2 shows the impact tort reform has had on insurance premiums in the United States.

The graph shows the 2001 insurance rates for states without caps on damages for a general surgeon were $26,144, and the rates in states with caps on damages were $26,746 a year. It was $600 a year more expensive to buy medical malpractice insurance in states with caps on damages—caps you are being asked to enact today. What is the real connection between rates and the insurance industry?

We have distributed two handouts, which are extremely important. Both carry the NTLA stamp in the corner for identification. One of them is a federal court decision. As you will see, the federal court said it is not a matter of excessive verdicts that are causing the problem; it is the cause of excessive malpractice. The court said the absurdity of the situation that the insurance companies are asking for these rate increases when in fact they are losing money on Wall Street would be analogous to a car manufacturer requesting and receiving a limitation on liability because of low sales in a previous year.

The second page quotes insurance industry representatives. Donald J. Zuke, who is the insurance chief executive for a California medical malpractice insurance company, says, "I don't like to hear insurance-company executives say it is the tort injury-law system. It is self inflicted." Sherman Joyce, who is the president of the American Tort Reform Association, says, "we would not tell you or anyone that the reason to pass tort reform would be to reduce insurance rates." Victor Schwartz, a partner with Schuck, Hardy and Bacon, a leading tort-reform advocate, said, "Many tort-reform advocates do not contend that restricting litigation will lower insurance rates. I have never said that in 30 years." And, as final proof of the fact the insurance industry is the culprit, Governor Guinn, who testified here, instructed the attorneys for the State of Nevada to sue the St. Paul Insurance Company for creating the medical malpractice insurance crisis in the State of Nevada. Governor Guinn said the St. Paul Insurance Company under priced the market. They gave illegal kickbacks to the state medical association, and they have the premiums dangerously low, below acceptable rates. Govern Guinn, on behalf of the State of Nevada, sued St. Paul saying they caused the crisis. Congress has instructed the General Accounting Office to investigate the accounting practices of the insurance industry to see if they created this insurance crisis. There has to be a connection between the two. That great invisible giant, the insurance companies, will not even come and tell you, if you do this, we will do that. In failing to do that, they are building a constitutional infirmity into this law, therefore, making your process a futile act of passing a law that turns out to be unconstitutional. Allow us to continue to live in a state that is governed of, by and for the people and not of, by and for the insurance industry. Thank you.

JAMES DE ROCHE (Attorney):

I am not only a lawyer but also a parent of a child who was subjected to medical malpractice. The reason I have been asked to come here by the NTLA is because I find myself in a unique situation of not being able to retain a lawyer to represent my family because of the malpractice to my son. I will not go into the details of the malpractice, but the issue is that he was a "special needs" child. It is a wrongful death claim, and it is not worth a lawyer's time in the State of California to represent our interests. The reason is that the cost of a medical malpractice case—the expert laden aspect of it, in conjunction with the fact that the cases are often "defensed," juries tend to believe doctors because they are technical and tend to be above a jury's understanding which is why so many experts are needed. A "special needs" child is not going to shower his parents with money when they enter their old age so the value of the case is just not worth a lawyer's time. I have talked to several lawyers about it, but they all say the same thing, and I can fully appreciate what they are saying. The California statute has a lot of problems because of the cap, and I am pursuing this in the courts. My first amendment right is being infringed upon. The United States Supreme Court and the California Supreme Court has said that as citizens of this country, we have the right to

petition the three branches of government. My right to petition the Legislature is being exercised right now but also to exercise the Executive branch and the Judicial branch and that includes "a meaningful right to be heard," which in a complex litigation matter means a right to counsel.

I heard one Senator talk about a California Supreme Court case. They did not address that particular issue. In fact, Justice Kaus specifically mentioned it but said there was no evidence put forth at the trial court level so they were not going to consider it. As a consequence, I think you should be very wary of setting a fixed cap. A fixed cap reminds me of Sybil in Greek mythology. There was a beautiful young woman who the god Apollo, or someone, was smitten by her, and he came down and said, "I will grant you any wish you want." She said, "I want to live forever." Apollo immediately knew that was a mistake because she did not say, "I want to live as a young, beautiful woman forever." As the decades and years rolled on, she became more and more decrepit. The problem with MICRA, at the $250,000 cap, is that times change. There is no provision for allowing the cap to fluctuate based upon the economy, lawyers rates or the standard of living.

As a consequence, the cap, today, based upon the consumer index, is about $84,000. You can imagine what that is worth. As a consequence, I feel that as time has gone on, the cap has become more and more restrictive in 2002 dollars to where it is a first amendment issue. It is unreasonable, and there are a lot of people who are not getting access to the court for their grievances. Most doctors try their best, even the bad ones try their best, but the point is the bad ones are out there and do commit malpractice. When that happens, there needs to be redress, not just in the civil cases but also before the license board, so that the bad are separated from the good.

ROBERT MCBEATH, M.D. (Nevada Medical Liability Physicians Task Force):

I graduated from Clark High School and obtained my undergraduate degree at UNR and my medical degree at the University of Nevada School of Medicine. After a six year Nevada residency, I returned to Las Vegas in 1994 to practice.

This issue ultimately requires us to reevaluate our medical-injury compensation system. We seek to create a new balance between the need to protect the injured patient in an act of medical negligence with the ability of our community to have access to quality, stable medical care. In February of this year, in response to the most significant threat to the stability of our community's health care system that we have seen, nine separate physicians' organizations including the Clark County OB/GYN Society, the Clark County Medical Society, the American College of Surgeons, the American College of Emergency Room Physicians, the Nevada Orthopedic Society, the American College of Physicians in Internal Medicine, Physicians of Nevada, the Nevada State Medical Association and also our liaison came together to form the Nevada Medical Liability Physicians Task Force. Through this organization, the physicians have worked hard to find a solution to reform our severely broken medical-injury compensation system based on California's MICRA legislation. Our position is clear. Our patients and people of our community are at significant risk of losing access to their physicians and other vital health care services.

In 1975, Nevada and California were both experiencing a crisis in their medical liability in health care systems. Our neighbor state enacted meaningful reforms called MICRA while Nevada created the screening panel. Since that time, California has enjoyed a stable medical-injury compensation system providing them the foundation to build a world-class health care system. We are now experiencing our fourth malpractice crisis in 27 years. Our current system is severely ill, but we have the diagnosis, and we know the cure. In the last 2 years, alone, jury awards have increased by over 800 percent, and over the last 15 years, the average, closed-claim costs have increase by 630 percent far outpacing all other medical or wage inflations by more than a factor of 5. This result has been a dramatic increase in premium rates for, primarily, Clark County physicians, some approaching 500 percent. Also, it is combined with the marked reduction in the availability of insurance companies willing to provide and write policies in our State. The good news is there is a time-tested cure to what ails this system. This prestigious body might take some comfort in the knowledge that the MICRA reform package, which the physicians are abdicating in line with what our Governor has presented and similar legislation was adopted 27 years ago by California, has been successful in stabilizing and creating a healthy competitive environment for the malpractice insurers to operate. It has kept physicians malpractice premium rates at affordable levels, and most importantly, it has insured fair compensation to injured patients as a result of medical negligence, at the same time, maintaining access to high quality health care to all of their citizens. It is this type of reform package, which the Nevada Medical Liability Physicians Task Force urges you to consider and adopt this important legislation and breathe new life into the medical community and guarantee continued access to quality and affordable health care for all our citizens.

IKRAM U. KHAN, M.D. (General Surgery):

I am a practicing general surgeon for the last 24 years, member of the Nevada Medical Liability Physicians' Task Force and serve as the Governor's liaison to this task force. I am also serving as a member of a federal medical advisory board to the United States Secretary of Defense and have had the privilege of serving on the Nevada Board of Medical Examiners for eight years.

I would like to thank the Governor for calling this special session of the Nevada Legislature to debate and vote for a long-term solution of this unprecedented, monumental crisis of skyrocketing premiums for medical liability insurance, which has shattered and shaken the foundation of health-care access and is poised to threaten the entire infrastructure of health-care delivery systems, not only in Clark County but in the entire State.

We in the medical profession owe the Governor a debt of gratitude for making medical liability insurance available in record time, and now with his leadership and the leadership of the Legislature, a meaningful, effective and durable resolution can be achieved.

The Governor's bill introduced, today, with bipartisan support is a tremendous and bold beginning. What you accomplish over the next few days in consolidating this bill could go in the annals of history as a legacy of daring and courageous leadership for the right cause. Each of you represents thousands of constituents, who have high hopes and expectations. The decision you make here will reaffirm their belief in the democratic values and principals and will go a long way in helping them have uninterrupted access to one of the best heath care systems in the world.

This is not an issue about doctors. Doctors have become the football in the game of soccer. You can kick the ball around the court. But, if you kick the ball out of the court, the game stops and the team has to regroup. The game has stopped. It is time for us all to regroup and get the ball back in the court so the game can reconvene, and the people of Nevada, once again , can have access to their doctors.

Given the current medical liability crisis, the doctors cannot protect their family's financial future. The endless and limitless jury awards in verdicts have engulfed the doctors and their families, exposing them to financial ruin. Doctors must, therefore, leave for a safe haven.

We have laws to protect animals in the forest from unforgiving, relentless hunters. We have laws for the protection of the environment. We also limit the number of animals that can be hunted to protect those animals from extinction. Ironically, there are almost no laws to protect the medical professional from extinction.

Like all other professionals, a doctor's first and foremost obligation, religiously, ethically and morally, is to his spouse and children. To expect doctors under their Hippocratic oath to abandon their responsibilities and obligations to their families is grossly irresponsible and inherently unfair. Based on clear and convincing data available from several states, the doctors have concluded the only way to protect their families and have an economically viable practice in Nevada is to have a meaningful, comprehensive tort reform based on the principles of MICRA.

Any effort to dilute, modify or delete any component of MICRA have resulted in minimal impact on medical liability insurance premiums in other states. Texas is a glaring example. Texas has only three out of seven components of MICRA. They are going through a crisis of their own, today, and the governor of Texas is calling for MICRA reforms. The State of Ohio tried to implement caps but was overturned by the courts in 1985, and their malpractice insurance rates have risen.

It has been concluded in several independent, objective national studies, Harvard, Stanford, American Academy of Actuaries and the Congressional budget office studies, that MICRA of California is the gold standard for long-term, affordable, sustainable stability in medical liability insurance premiums. It has also been firmly established that the most crucial and pivotal component is a cap on noneconomic damages, and caps on attorney's fees is an integral and inseparable component of it. The trial attorneys, for self interest, have aggressively and vociferously opposed these caps.

We watched a video earlier concerning the rights of victims, we are all for the rights of the victims. We are also protecting the rights of the victims. In fact, we recommend we go a step further, give the victims more then they receive under current Nevada law. It is sad to see those victims in the video that had to defer up to 40 percent of their awards in legal fees. Under California law, the victims of an adverse medical outcome receive 17 percent more then they do elsewhere because of those caps.

All doctor's fees are capped. Medicare and Medicaid cap doctors and privately managed care companies. The supposed savings from these caps are to be passed on to the consumer. There are also caps on utilities and power. Then, why is there an objection to cap attorney's fees? The medical profession has become the most regulated profession in this country.

This debate is about injured people, a minority of a few hundred versus the 2 million whose right of access to health care is being denied. The injured person must be made whole for past, present and future economic losses and an additional $250,000 cap in California for pain and suffering. Under our Governors' plan, the cap will be $350,000.

Unfortunately, it is the unrestricted guarantees to handsome rewards that the defenders of these victims retain most of those awards that denies them their real right to that access. We also heard testimony about offering the civil justice system. This is not about the civil justice system at all. The civil justice system has been sound and safe in California for 27 years, and 33 million people are reaping the benefits of it. The civil justice system is not compromised in Utah, Indiana, Montana or Colorado. All have caps of $250,000, and 24 other states have caps of some sort. Their civil justice system is not compromised. How, then, will Nevada's civil justice system be compromised with our meager population of only 2 million people. We believe the civil justice system will be strengthened and streamlined, and more money will be going to the victim. If such legislation is not passed, we cannot sleep with a clear conscience or look in the eyes of pregnant mothers, children with cancer or senior citizens who have no access to medical care.

Insurance industry data suggest to us that a cap of $500,000 in noneconomic damages, by estimate, could reduce insurance premiums by a meager 15 percent over 3 to 8 years. Whereas, a cap of $250,000 for noneconomic damages is expected to reduce the premiums from 30 to 40 percent over the same period. A cap of $350,000, as the Governor has proposed will reduce premiums about 25 percent for the doctor. Imagine a doctor with a 100 to 300 percent increase in premiums hanging his hopes on a meager 15 percent reduction in insurance premiums in 3 to 8 years if the cap were $500,000.

While a cap of $500,000 on noneconomic damages may be a "feel-good number," the people of Nevada expect a "do-good number." We feel the $500,000 number is not a "do-good number" but $350,000 is a good beginning.

If legislation does not evolve from this special session, the doctors will continue to leave. This is a painful reality. I to am seriously considering leaving Nevada in March of 2003. My insurance went up 100 percent this last year with no payments made on my behalf for over 15 years. I have had a 100-percent increase in my insurance premiums, and my insurance carrier has applied for a raise to the Insurance Commissioner. If this raise is even one percent more, I will not be able to sustain myself and my family in this community. This is a painful decision because Nevada and Nevadans have been very kind and gracious to us. We have established our roots here. Our children grew up in Las Vegas and went to public schools and to UNLV. I have done my share of community service and have fulfilled my civic duties. Unfortunately, I cannot sacrifice the well being and financial security of my family and shall move to where my family's future is protected.

Do not abandon our beliefs, our principles and our values to make a policy that we will live to regret. The citizens of Nevada will never forgive us for denying them their constitutional right to the pursuit of happiness and their right to protect their families from harm.

FLORENCE JAMESON, M.D. (OB/GYN Physician):

I moved here in 1985. I was born and raised in San Diego, California. I went to UCSD as an undergraduate and attended UCLA Medical School and residency. I am licensed to practice medicine in California, but I choose to come to Nevada. Since 1985, Nevada has been my home. I have been very blessed with a wonderful practice beyond my dreams, hopes and expectations. I have had wonderful relationships, challenges and the richest joy that anyone could hope to have in their career. However, things have changed. When I first came to Nevada, so many of my patients went to Santa Barbara or elsewhere for their checkups, but through the years, we have won their confidence, and they stayed with our local doctors. We have seen specialists come into the city and have watched an incredible medical care system develop. Now, I am watching this care system implode, like one of our casinos. It has been devastating because at least one dozen of my colleagues have left in the last few months. In the last year, some have filed bankruptcy, and most of them have made an average loan from the bank of $60,000 to continue practicing and have experienced many months without paychecks.

When I came here in 1985, I received more for a delivery than I do today. My overhead is higher than when I arrived. It is true I am not a businessperson, but my husband is an accountant, and no matter how we try to skimp, he says, "There is no fat or fluff, dear, to take off any more. You really cannot continue." He has been extremely patient. I started 18 years ago seeing approximately 26 patients a day and had 12 deliveries a month. In order not to sacrifice quality time with the patients, I have now extended my hours from about 7:00 a.m. to 7:00 p.m. In order to keep my doors open, I need to see 45 or more patients a day and the number of deliveries have risen to 20 a month. I cannot, humanly, do more to keep a practice going. From all my consultants and advisers, I do not know how I can make it viable.

A colleague said her son-in-law who is 23 years old with a high school degree and is a plumber makes more than she did last year as an OB/GYN physician. After 12 years in training and only 8 years in practice, she said, "I quit." The joy is gone. Another friend told me, "I had a medical malpractice case and I am not insurable. I cannot get an insurance I can afford."

The bottom line is, my insurance has risen so high, there really is no way I can afford it at this time. My insurance premiums have risen from $28,000 to $32,000 to $42,000, and this year it is $137,00. I have never gone to court, paid a claim or settled. How am I supposed to pay that amount when last year I made only $47,000? We are all hoping that our managed-care companies will reimburse us. I am here for the duration. I do not plan to return to California where I have a license. Nevada is my home. If laws are not enacted to protect me so that I can have affordable insurance and practice without the risk of losing everything, I will simply no longer be able to practice. After all these years of education and practice, did I move to the wrong state? All my friends say I did, but this is my home. I need a really good act of this Legislature to keep me in business. I am not any different from so many of the other physicians. Without reform, it will not work.

Mother Theresa said, "You, that practice in the city, have a much more difficult time. I chose to practice in the country where there are the poor and the dying. I can feed the poor and help the dying, die with dignity. You who have chosen to serve in the inner city have a lot more politics." I never understood what she meant, until the last 6 months. I always thought even if I did not make money, I could barter a chicken or whatever and continue my passion and walk that healing journey with my patients. But, I do not know anymore.

SENATOR RAGGIO:
What was your insurance premium raised to?

DR. JAMESON:
$137,000.

JOHN COTTON (Attorney, Nevada Physicians Task Force):
I am here in Carson City to help with the negotiations and with the language of the bill you have in front of you.

SENATOR RAGGIO:
So far, we have not heard testimony of any compromise that has been accepted by both sides.

MR. COTTON:

No compromise language has been accepted by both sides at this time. The position of the NTLA would be to attack any bill with a cap at some point. The Governor has presented a plan that is workable, and we hope will solve the problem that has clearly caused a crisis in this State.

I am a trial attorney who represents doctors. There are a lot of great doctors in this State. The practical reality is we are losing them. Everyday, I get calls from doctors not able to get insurance in this State. One of the witnesses testified that this is a multi-faceted problem, and I agree. The fact that it is multi-faceted does not mean that we do not address the facet we have in front of us. The simple fact is we are not going to have any insurance carriers to regulate in this State if we do not adopt meaningful tort reform.

What we attempted to do is to adopt something that was a little bit different, had some different wrinkles in it than in other states. We have a larger cap than California. You must understand that many of these things are not necessarily palatable to my clients but are things that will be workable within the system. We adopted some exceptions but also gave some certainty to the insurance industry. When you see videos as we saw here, today, and I look at them with compassion, having had my father die at the age of 52 from malpractice, the fact is no amount of money can replace a person. No amount is too little or too much. The problem is we have a crisis that has to be confronted. For every person you saw on that video, I have 15 to 20 cases juries looked at and threw out. I have another 25 to 30 cases, in the last two years, that have approached trial, after having expended significant amount of time and effort, which get dismissed without payment. There are 20 to 30 cases for every one you may see like that, which is creating the crisis in this State because there is a system that is allowing it to occur. Unlike statements that have been made here, today, under this bill, no one is depriving anyone of a trial by jury.

For the brain-damaged baby cases and the paralyzed cases, for economic losses, for losses of income, and for the medical expenses incurred, there are no caps for those in this bill. Those are provable in a court of law before a jury. What is being capped is the nebulous damage that prevent the insurance carriers from coming into this State and helping my clients and this community. You cannot quantify pain and suffering. You cannot plug it into an underwriting program. States around the country have found the only method of giving any stability to the insurance industry, to help the doctors stay in their states is to give something they can quantify and put numbers on.

Senator Townsend and Senator Care had some questions regarding the impact of what is being proposed. Mr. Wadhams has the data. I will defer to him, and I stand ready to answer any questions regarding the substantive aspects of this bill.

LONNIE L. HAMMARGREN, M.D. (Neurosurgical Associates of Nevada):

I have been serving the trauma center, which was a county hospital, for over 31 years. I operated on a blood clot in the head of a patient on the night the trauma center closed.

I will give you a short case and how it applies to caps. I was sued in 1994, shortly, before Christmas. I was in the operating room at University Hospital and a chronic-back patient walked into St. Rose Dominican Hospital-Rose De Lima Campus. They supposedly called me. There is no record of the contact, but my name was on the chart. The doctor the person saw decided he did not need to be admitted into the hospital so was sent to a nursing home over Christmas. Consequently, that person became a paraplegic. You would think it would be easy to get out of that lawsuit because I had never talked with them. I was miles away and am not authorized to take care of an HMO patient. It is the hospital's responsibility, but because it is an HMO, they could not sue. They saw my name on the chart.

It has taken seven years and $56,000 in attorney's fees to be taken out of the lawsuit. A lot of it is not the monetary award, it is the legal morass that we go through. Remember he would have been transferred to University Hospital. Does the cap apply to the trauma patients or the other patients who come through the emergency room? Many people are transferred from other hospitals. So, would the $50,000 cap apply for treating that patient or would it fit in the exclusion of the $350,000 for noneconomic damages because it is a neurological problem? If you look at all the exceptions, half of them are neurological and some are OB/GYN. If you end up being sterile, then you can sue, and the caps do not apply. How about your heart? Does that make a difference too? There is no logic to these exceptions other than they are high-value lawsuits.

Yes, it is a multifaceted problem, but it is just stunning that the doctors are of one voice in this matter, supporting MICRA, and the attorneys are their own worst enemy. You have three attorneys testifying; two saying MICRA does not work, and the third attorney stated he could not get an attorney in California to support his malpractice suit because of MICRA.

SENATOR RAGGIO:

At this time, I would like to have a couple testifiers from the doctors' group and attorneys' group and others available if there are questions. We are on this issue of limited damages. We have heard testimony from the lawyers' group who generally are in opposition to any cap. We have heard testimony from the doctors who have essentially said we should be adopting MICRA. We just finished a press conference where everybody said they were on board with the bill before us. We are told we have negotiated this; we feel comfortable with this bill; and we can support it. But this body has heard no testimony of that kind. Are we being lead astray? Are you ready to talk about the bill that is before us on this issue of limiting the liability, in sections 3, 4 and 5 of the bill? We would like to hear testimony as to whether this language is appropriate, if there is a need for any change in it or whether there has been some agreement in these negotiations.

BILL BRADLEY (Attorney, Nevada Trial Lawyers Association):

As of 8:30 a.m., there still was some language that was not quite right. We have reviewed it with the Governor's staff and with each other. There are a few minor areas where clarification needs to be made.

SENATOR RAGGIO:

We are addressing sections 3, 4, and 5 of the bill. Will you gentlemen indicate whether this language has been agreed to or are there areas where we have been given inappropriate information? Where are we on this issue?

DR. MCBEATH:

From the physicians standpoint we begin to get a comfort level at the cap number that the Governor has put forward. Our whole presentation has been that our reform package be meaningful and by meaningful reform we are looking for two primary and one tertiary things. The two primary things are: the medical malpractice insurance market be stabilized and our premiums rates be reduced. This is very important to us. We have seen 300 to 500 percent increases in our malpractice premiums. Meaningful reform to us is not a 5 or 10 percent reduction.

SENATOR RAGGIO:

This bill does not mandate any reduction in premiums. This committee needs to know if the language before us is the language your groups have agreed to for this purpose.

MR. COTTON:

The Nevada Trial Lawyers Association with whom we have been having discussions with all day to work out some of the language, much like the American Trial Lawyers Association, has a concept that they can never in principal agree to caps because their clients who theoretically have to agree to it.

SENATOR RAGGIO:

Is this language what has resulted from your negotiations?

MR. COTTON:
It is, Mr. Chairman. Other than a few small, technical wrinkles, which we have agreed to insert in the bill, it is the language we have agreed upon.

SENATOR RAGGIO:
What are the wrinkles? The Governor indicated this was an agreed-upon version of the bill.

MR. COTTON:
It is more technical than just taking some words out that do not make sense in the context of the way they are worded and adding a couple of words that represent the agreed upon version. There are just one or two word additions and two or three word subtractions that need to be done for clerical purposes.

SENATOR RAGGIO:
For the purpose of the record, we are looking at the printed bill, Senate Bill No. 2. Then we can look at the page and the line.

MR. BRADLEY:
Page 3, section 3, line 10, when it says, "loss of earnings," the last three words, "or loss of earnings capacity."

SENATOR RAGGIO:
That should read, "loss of earning capacity?"

MR. HARDY:
It should read both "loss of earnings or loss of earning capacity."

SENATOR RAGGIO:
You would add, "or loss of earning capacity." If these are not agreed to, we need to know that as we go through them.

MR. BRADLEY:
Section 5, line 17; "damages awarded to each plaintiff." On line 16, should be followed by "from each defendant."

SENATOR RAGGIO:
Is that an agreement?

MR. BRADLEY:
Yes, sir.
Let me read the whole sentence. "Except as otherwise provided in subsection 3, in an action for damages for medical malpractice or dental malpractice, the noneconomic damages awarded to each plaintiff from each defendant must not exceed $350,000."

SENATOR RAGGIO:
That is agreed to. What is the next one?

MR. BRADLEY:
In paragraph 2, on line 18, where it starts, "In an action for damages for medical malpractice or dental malpractice in the circumstances and types of cases described in subsection 3, the noneconomic damages awarded to a plaintiff from each defendant."

SENATOR RAGGIO:
That is not covered by the previous change?

MR. BRADLEY:
We thought it should be consistent throughout.

SENATOR RAGGIO:
Is that agreeable?

MR. HARDY:
Yes, it is.

MR. BRADLEY:
(continuing) "must not exceed" and the next words, "the greater of $350,000 or" is deleted.

SENATOR RAGGIO:
You are deleting "the greater of $350,000 or?"

MR. BRADLEY:
Starting with the word "the greater" and including the word "or."

SENATOR RAGGIO:
It would then read "must not exceed the amount of money remaining." Is that agreed upon?

MR. BRADLEY:
Yes. Section 5, the end of subsection 2, "This section is not intended to limit the responsibility of any defendant for the economic damages awarded."

SENATOR RAGGIO:
Is that change agreed upon also?

MR. BRADLEY:
I need to get some clarification on that one change.

SENATOR RAGGIO:
We will hold that one aside. That would go at the end of subsection 2.

MR. BRADLEY:
That is the extent of the technical wrinkles.

SENATOR RAGGIO:
Are there any others in sections 3, 4 or 5?

MR. BRADLEY:
No.

SENATOR NEAL:
What is the importance of the change?

SENATOR RAGGIO:
What is the importance of adding this language, "This section is not intended to limit the responsibility of any defendant or economic damages awarded."

MR. BRADLEY:
Regarding economic damages, the defendant will be responsible for the economic damages awarded.

SENATOR RAGGIO:
That is distinguished from noneconomic damages. You are going to look at these changes rapidly and give us either an acceptance or a non-acceptance so we will know where there is an agreement.

MR. COTTON:
Yes.

JAN NEEDHAM (Principal Deputy Legislative Counsel):
May I get a clarification on that last sentence where it says, "this section," is that all of section 5 or only subsection 2?

SENATOR RAGGIO:
Does it apply to section 5 or just to subsection 2?

MR. BRADLEY:
It applies to section 5.

MR. WILKINSON:
Mr. Bradley, as I understand it, this change is being made because lines 24 through 26 do not specifically identify that the limitation applies to noneconomic damages, is that correct?

MR. BRADLEY:
It is not intended to apply to economic damages.

MR. WILKINSON:
Another way of clarifying that issue would be to amend the existing language to indicate that, "in no event would a single defendant be liable for noneconomic damages to the plaintiffs in the aggregate in excess of the professional liability insurance policy." In hearing the remarks, it occurred to me that issue might be clarified by adding a reference to noneconomic damages in the previous sentence rather than tacking on another sentence.

MR. BRADLEY:
You may be correct. These have been such difficult negotiations, and we are very careful about what we read.

DR. MCBEATH:
The point of clarification for the physicians as they understood it did involve the economic damages. There is an issue that the joint and several and the joint liability still be maintained for the economic damages. We want to discuss this. As Mr. Bradley indicated, we just received this portion, and it has been explained two different ways. We would like a little more explanation.

SENATOR RAGGIO:
Will you come back to us before we finish this evening?

DR. MCBEATH:
If we could get our presentation together, we were trying to do that when we were called back in for testimony. We were trying to get this ironed out with our larger caucus.

SENATOR RAGGIO:
Other than that issue, is there any thing else that needs to be changed in sections 3, 4 and 5 or anything that pertains to limits on liability.

MR. HARDY:
At no time, during any of the negotiations to try to reach an agreement, was there a discussion that suggested any caps on economic damages. They were always referred to as noneconomic damages. That is the lynchpin of the Governor's proposal. All costs, medical expenses, lost earnings would be reimbursed if they are provable damages. To come to this table and not understand that is in my estimation almost disingenuous.

SENATOR RAGGIO:
Is there some issue on that, now?

MR. COTTON:
I need to discuss this with my clients. I do not know that using terms like disingenuous is profitable here. I will have a response by the end of the evening.

SENATOR CARE:
I want to be sure I heard what the parties intended as to section 3, line 9, page 3. "Economic damages includes damages for medical treatment, care or custody, loss of earnings, and loss of earning capacity, not "or."

MR. COTTON:
"And/or," may be more appropriate because it may be both or one or the other.

SENATOR CARE:
Is that your understanding?

MR. COTTON:
You are correct, Senator Care. It is “and.”

SENATOR O'DONNELL:
I do not want you to feel that you are going to agree, and we are going to rubber stamp it. What do you mean by the capacity to determine this $350,000 cap? As I understand it, the judge can lift the cap if you make the case that there is gross or egregious negligence. I am speaking about paragraph (h), subsection 3, section 5. Where do you see that coming into effect?

MR. BRADLEY:
When a judge sits in a courtroom for two or three weeks and listens to the evidence, and despite the fact this particular plaintiff’s case does not fit within these exceptions, that under circumstances where someone is catastrophically injured the judge is convinced by a higher standard, after listening to all the evidence, this plaintiff is entitled to something more than $350,000.

SENATOR O'DONNELL:
Is he going to make that determination by himself or are you going to request it?

MR. BRADLEY:
A jury returns a verdict and goes home. A week later, the defense will make a motion to reduce the verdict pursuant to this new statute. At that time, if in the plaintiff’s lawyers opinion there is clear and convincing evidence that this was another type of catastrophic injury, the plaintiff’s lawyer will make a motion requesting the judge to consider the circumstances if the evidence was clear and convincing that the plaintiff is entitled to something above the $350,000 cap.

SENATOR O'DONNELL:
In the cases that have been filed in the courts, eight states have stricken the caps. California’s has been upheld several times, is that true?

MR. BRADLEY:
I do not know about several times. I certainly know about the leading case that upheld it.

SENATOR O'DONNELL:
Do you feel as though this particular bill is constitutionally sound, or is it challengeable?

MR. BRADLEY:
Senator O’Donnell, I hope you do not think I am ducking your question but I have enough trouble keeping up with the specialties of law in which I specialize. I am not a constitutional lawyer, and I cannot answer the question for you.

SENATOR O'DONNELL:
Is it your intention, or the lawyers’ intention to challenge this?

MR. BRADLEY:
You do not take this statute to a court right now and ask whether it is constitutional. You must go through a case and have this statute applied to a case and have it work its way up through the judicial system, At that time, if that lawyer who is involved in that case feels that way, then, that lawyer has the option to make that request.

SENATOR O'DONNELL:
Section 13, subsection 3, paragraph (b).

SENATOR RAGGIO:
This is the section on periodic payments. Please reserve those questions until we discuss that area of the bill.

SENATOR TITUS:
We have heard compelling testimony concerning the reason that we need to put these caps in place is to try to reduce insurance premiums, and we need to do that in order to save our doctors. We, secondarily, heard that if we do not show the linkage between saving doctors, which is good public policy, and reducing the premium, perhaps, it would be a constitutional question. We should put an amendment in the bill that provides that linkage rather than leaving it to chance and the good will of the insurance industry and say roll back those rates. Then, we know we will have that linkage. I would purpose an amendment that says, “roll back the rates 20 percent.” I would offer that to this body.

SENATOR RAGGIO:
That question was raised initially, and it is my understanding that it is outside the Governor’s call. Therefore, it would not be an appropriate amendment.

SENATOR RAWSON:
Can we look at the issue in section 1 and to whom this applies.

SENATOR RAGGIO:
That would be appropriate because it deals with caps.

SENATOR RAWSON:
I would like to suggest an amendment that podiatrists be added.

SENATOR RAGGIO:
What is the line and section?

SENATOR RAWSON:
Section 1, subsection 1, paragraph (c), line 13 or 14. Line 13 lists, “A physician or dentist licensed under the provisions of chapter 630, 631,or 633.”

SENATOR RAGGIO:
Would not a podiatrist come under the definition of a physician?

SENATOR RAWSON:

They have their own chapter 635, and they are listed in several places in the NRS as being appropriately called physicians, NRS.040 and .060.

SENATOR RAGGIO:
Let me ask staff. Would that be appropriate?

MR. WILKINSON:
If there were a desire to include podiatrists under the terms of medical malpractice, that would be appropriate.

SENATOR RAWSON:
It is not my intention to open this up to every group under the sun, but they are listed as physicians. They can practice in hospitals, and they are subject to other provisions in this bill under health care providers. Being able to practice in hospitals, if they are left out of this, will be a tremendous disadvantage to them.

SENATOR RAGGIO:
When it comes time to vote on that issue, then, it would be an appropriate suggestion for an amendment.

SENATOR NEAL:
Let us go back and address this cap language on noneconomic damages as stated in the bill. Let me preface my question with these remarks. There has been a lot of discussion this evening relative to the caps being unconstitutional. Different caps bring different results across the nation, and the caps are not going to reduce the premiums. I have another side to this. Could you tell me whether the caps devalue a human being?

MR. BRADLEY:
Yes.

SENATOR NEAL:
No further explanation? What about the doctors' side?

MR. COTTON:
I do not feel it devalues a human being. It is almost impossible to quantify the types of losses we are talking about. Whether it is $1, $350,000 or $500,000, the losses are not quantifiable. There are quantifiable losses that do go towards devaluing a human being by not providing adequate medical care, not providing for loss of income to their families, those are the economic damages.

SENATOR NEAL:
Are you saying that, when you look at me as a whole person, I am only worth $350,000.

MR. COTTON:
No more than I would say you are worth $1 or $5 million. I cannot say what you are worth. It is such a speculative number, and this is part of the problem. I have tried a number of cases, and I have had juries give awards all across the board for similar types of injuries. It is not something that has a value in my mind one way or the other I generally leave that up to a jury. The practical problem is, without some quantification, we are in a stage where we are not going to get new carriers writing insurance nor providing sufficient coverage for doctors to stay in this State. Mr. Wadhams was going to be here, and I do not have actual numbers. I have been quoted some, but I do not want to quote mistaken numbers. He has represented that there will be significant decreases in the premiums and the ability to keep doctors here. I offset that with, are we devaluing the people who are here who do need medical care? There is the lady who has to drive to Bullhead City. I cannot quantify what that is worth to her for her anxiety to have to leave this State to receive medical care. I think that situation is going to repeat itself in gross fashion if we do not have some solution.

SENATOR NEAL:
As I understand your explanation, the essence of the cap is to keep doctors here. It has nothing to do with the pain and suffering of the individual.

MR. COTTON:
It puts a value on those that will support someone being able to make a business decision as to whether they will win or lose money here. St. Paul has been sent out as a whipping boy. The simple fact is that CNA, MICOWA, NORCAL, MIEC, none of them are writing in this State. It cannot be that large or system-wide of a conspiracy causing them not to write in this State. There are quantifiable numbers here that it is a loser in this State to write business for less than what these doctors are paying right now. They are paying out a significant amount more in damages than they are collecting in premiums, and that is at the current rates. Something has to be done to address the other side of the equation, or we are not going to have an insurance company to regulate.

SENATOR NEAL:
If I lose an arm or a leg, then, quantifying that in terms of cost has to be something that would be provable to the doctors to keep them in this State.

MR. COTTON:
As opposed to caps in most states, what we have under our system on the loss of a limb, or other catastrophic injuries, is that if you had $100,000 of medical expenses, you could recover up to $900,000 worth of pain and suffering in noneconomic damages. We do have increased amounts. The practical problem I was dealing with here is a lot of offsetting concerns, concerns of people who can not get medical care. Doctors are leaving, doctors who can not get policies and are charged a dollar amount for coverage that has a significant impact on our ability to keep our physicians in this State. It is such a tough balancing contest. I do not envy your job in the slightest nor do I intend to tell you how to do it. I would love it if you adopted a lower cap because I think that would keep more doctors here. But the practical matter is, there is a balance, and there gets to be a breaking point, and we are almost there. Where there is any significant savings, and more importantly where people can persuade more insurance carriers to come in and reinsurance carriers to underwrite them, so that we can get some competition back into this State. I would love you to have 20 insurance carriers to regulate. That would be an ideal situation not just for you but also for the citizens of this State.

SENATOR NEAL:
I gather from your remarks that it is not a devaluation of the human being. You do not believe that?

MR. COTTON:
No, Senator, I do not believe that. I did personalize that with my father. There is no amount of money that could replace him. You cannot put a value on his life. I lost him in a malpractice situation. If someone said I would give you $350,000, it would not bring him back. But, in that circumstance, if someone said to me, your mother is going to be deprived of the ability to survive; we are not going to give her economic damages; we are not giving her

anything at all; that would bother me. Under these circumstances, you try to find a balance where society's interests and needs for medical care in this community are offset against an extremely small minority of people. That is the balance test. With a crisis like this, the needs of society versus the need to maintain a free-floating level of damages without a statement as to valuing life, because no one can place a value on life.

SENATOR NEAL:
I find your comments to my question quite interesting, which leads me to make this comment. Are we now looking to grow body parts? Will we create a drug store on the corner where we can purchase an arm or have a farm of individuals that can supply body parts for other people? Are we headed in that direction since we cannot put a value on these things? It seems to me the human being is becoming less and less in the whole sphere of things. That troubles me.

MR. COTTON:
There are other methods of addressing those problems. Other states have compensation funds but is not something that is addressed here. The simple fact is, and it is a sad situation because there are people in our community that lose their arms, their legs, the ability to breathe, not by anyone's fault and I have a great deal of sympathy for those people too, they do not get to sue anyone. They live with it the rest of their lives. It is a happenstance that someone in this case loses legs and they are going to blame it on a doctor. The simple fact I have found in my practice, which has been fairly extensive in defending cases over the years, is most of the time I do not find a doctor responsible for someone's injuries. It is very small percentage of cases where the doctor is held responsible or where I look at a case and determine that somebody did something wrong and should pay. As a consequence, all of the medical industry is confronted with the problem of not being able to practice medicine. This is the solution that has been attempted in most states. It has been effective, statistically, in most states. It has worked to make a viable system work in most states. I would expect every single person in your position has had to anguish over the decision because it is not an easy thing to do.

SENATOR NEAL:
Have you ever thought there might be something other than the cap?

MR. COTTON:
There have been a number attempts to address this issue, as I have indicated, in other systems. The problem is we have run into these traps, and you are in the trap much more than I am with taxation. There are systems that tried to put a tax on medical services and raise monies to create patient compensation funds for those damages that might exceed a cap such as this. But, those are political decisions. There is only so much money to go around. They are tough decisions, and it becomes "that is your problem there, and the doctor's problem over here," and we have the doctor's sharing the burden, entirely, for society as opposed to any real spread of it. In my opinion, it is not a legal issue; it is a social issue. The determination has to be made by this Legislature not by lawyers.

SENATOR TOWNSEND:
Based on the testimony about the constitutional issue, I would recommend we put a provision in this bill concerning several liability so that whatever does pass some of it might stand if it is challenged. The other thing I am puzzled by is this, one side says the crisis is defined as an increase in medical malpractice premiums, the answer to which is a cap. The other side is talking about constitutional and protection issues. We do not have the people to give us the answer. If a cap is passed, whatever level that may be, what does that do for the premium of a doctor who is practicing in the field of either OB/GYN or trauma in southern Nevada? I find it most amusing that we do not have anyone here who is going to stand up and represent the insurance industry to give us specific answers. Now, we are all aware that we only control a certain amount of the insurance side of this issue because of federal protection, and we are precluded from doing things. I do not have an answer from the people who are going to respond to the proponents who say they have a problem. That is what I am wrestling with.

MR. COTTON:
As Mr. Bradley indicated, to get these things down into quantifiable form in sections 3, 4 and 5 was not an easy task. The NTLA has been extremely cooperative and worked hard to do so. I have spent the better part of the day on that point getting some confirmation in my own mind before I would recommend to my clients that there is a significant benefit from an insurance standpoint. We have gotten information developed. I have been told that there will be some people here tomorrow to testify to that issue. It is a critical issue for you to hear.

SENATOR TOWNSEND:
Am I confused, Mr. Chairman, or are we the only 500 people in the State that heard about the special session and what it was about? Why are they not here?

MR. BRADLEY:
As you know, as part of the subcommittee you are a member of, today is July 29. We had a hearing scheduled for today where we for the first time, despite numerous requests, thought there would be some insurers at the subcommittee meeting. We also know that, other than Mr. Wallace, we had no members at any of the subcommittee meetings despite the request from you as well as other legislators at the first meeting of the subcommittee regarding this exact issue. As you can see from the debate you are hearing, as part of the Governor's committee in attempting to discuss the issues across the table, we could not get any answers to the questions you are asking.

SENATOR CARE:
In the interest of legislative intent, I would like to hear what both parties have to say regarding the scope of these caps. We do have NRS 41A.097 that gives a definition of a health care provider, but there was some discussion earlier about midwives, and there was a suggestion that podiatrist would come in to NRS 630, 631, 633. If you look at what happened in California, there is a lot of case law about exactly who is covered—military hospitals, blood banks, transporters of patients from one hospital to another. I would like to hear who you think will enjoy the shield of caps. I am assuming it would include the doctors, the hospitals and their employees. I do not know about independent contractors.

MR. BRADLEY:
This whole debate was driven by a crisis we contend was caused by insurance companies involving physicians. With all due respect to Senator Rawson, we did not hear in the last six months of a crisis in the area of podiatric medicine with availability and affordability of insurance rates. You should proceed with caution with regard to adding additional professionals that did not experience a crisis. From reading the bill, there is a difference at the trauma center regarding who is covered and who is covered at a non-trauma center. The intent was to cover the hospitals, the doctors. Independent contractors are different because of the trauma centers or non-trauma centers, and it is a very complicated question to answer. Previously, the screening panel covered physicians, hospitals and osteopaths. That is where the crisis was in 1985 when the screening panel was created. In all our discussions, midwives and things such as that were never a part of our discussions.

SENATOR CARE:
In the catastrophic case, does that include hospitals?

MR. BRADLEY:
Yes, it does. There is something important that needs to be said, some people have talked about the cap going up to $1 million. In the catastrophic case, the cap does not go up to $1 million, Senator Care. This bill provides, in a noneconomic catastrophic case, the noneconomics awarded against either a physician or a hospital go up to the limits of that particular individual or hospital's professional liability limit. I wish to be perfectly clear. That is not $1 million in many cases. That was the intent.

SENATOR RAGGIO:
The bill does require that doctors carry a $1 million policy.

MR. BRADLEY:
Actually, the bill requires $1 million per incident and $3 million per occurrence. There is also a "self-consuming clause." This is where defense fees are taken off the limits. If you are in three years of litigation and you started off with a $1 million cap and you have a lot of lawyers working on your side, by the time your case is settled, your limit might be down.

SENATOR RAGGIO:
In some cases, the policies do not go that high, but they will be required under this bill.

MR. BRADLEY:
My point was, there are not any self-consuming policies sold now, but if they were, the intent was $1 million per incident and $3 million per occurrence available to the victims of medical negligence. That is in respect to the physician, but the hospitals carry much higher policy limits, and that would be the limit with respect to a hospital.

SENATOR RAWSON:
I love preambles because they help to create rational relationships. We could strengthen this preamble. Looking at page 1 of the bill, following line 7, we add another phrase "and aggrieved patients are afforded appropriate access to jury consideration for redress," or something of that nature. In order to state that, we see there is a problem. We have to do something about that problem. This will adequately protect their constitutional rights. That would help the overall process.

SENATOR RAGGIO:
That is a potential amendment to the preamble, is that what you are saying?

SENATOR RAWSON:
Yes.

SENATOR COFFIN:
Senator Townsend made a good point about several liability. I do not know if it is in the later part of the bill where it usually resides, but it should be in there. One of the things that will help this bill and maintain the caps is the language on page 3 which does allow a judge to pierce that cap. That will help the constitutionality because there are some catastrophic things that will occur that are not on a list. Whenever you build a list, you automatically leave things out. In subsequent sessions, we will be visiting this part of the law adding new acts, which should be catastrophic based upon a legal decision by the courts. It is a good idea to have this in the bill to protect the caps, and it may prevent having a several liability clause. Seeing a list like this always makes me nervous because of what is left out. But, the judge does have flexibility, and I do not think it will drive the premium rates up.

MR. WILKINSON:
Nevada Revised Statute 0.020 already provides "if any provision of the NRS is held invalid, that invalidity will not effect the other provisions." Basically, several liability is already built into every statute. Subsection 2 of NRS 0.020 also provides that the inclusion of express declaration of several liability in a bill does not enhance the several liability of the provision or detract from the several liability of it.

CHARLES LAWS (Green Party, Candidate for Governor):
I am a retired environmental engineer and am familiar with systems analysis. When we are dealing with very complex interacting systems within a system we have to do a great deal of diagnosis to get a better grasp of what the relationships are and how when you pull on one end the other responds. I would like to describe our system as I see it as being totally supported and motivated by the needs of our residents for secure medical practice. What we have serving them is insurance systems which somewhat dictate to the physicians and other caregivers what they can provide. We have a system of service to the caregivers to protect them from accidents and injury to their clients, which has a continuing relationship, and then we have a relationship with all of you, here, to the administration, and the regulatory and licensing boards. At the moment, we have a conflict between two insurance sectors. The insurance companies who provide health insurance do not want to let the doctors do things which would protect the doctors from malpractice events. The malpractice insurers do not want the doctors to do anything but be protected from malpractice cases. Therefore, we have a conflict that goes on behind the scenes.

What Governor Guinn presented, today, is an excellent first step, and he recognized it is going to be a continuing set of steps. I think he went out of his bounds in suggesting that he would be the one to work with you in the Legislature in 2003. Senator Neal and myself would also enjoy the opportunity to sign into legislation a bill. What I am really asking you to undertake is, in regard to caps, the recognition that economic means cannot be used to balance or to award noneconomic losses. They are out of sync. If we were to say it would be possible to mandate that people who have suffered loss receive those services which benefit them in the transition from their loss, this would be a very useful thing and is beyond the scope of what Governor Guinn is recommending you limit yourself to. I know there are things within the system that may need to be looked at in the future. This bill may serve well as a Band-Aid and aspirin to keep things under wraps. But, it does not deal with the sources and causes of what has precipitated the crisis. We must move beyond crisis into some kind of management and development of what the future needs to have in order to provide security to me and the other residents of the state.

MR. WALLACE:
Senator Townsend and Senator Care, I would say the $350,000 cap is quite sellable, but section 5 contains language which attempts to narrow it, but, in the scope of probabilities and the uncertainty of loss, with regard to paragraph (h), as was pointed out by Senator O'Donnell, "you could drive a truck through it." In sections 31 through 37, which of those cases on the video would have breached the $350,000 cap? We know that severity is an issue facing this community, and if this were passed, today, those cases on the video, looking at their malpractice issues, very well would have surpassed the $350,000 cap. I appreciate both sides of the argument. Is there something we can do besides caps? That would be wonderful, but there has been nothing provided to show that there would be a fix without caps. That is why we keep hanging our hat on MICRA.

ROBERT W. SCHRECK, M.D. (President,Nevada Medical Association):
I came, today, to specifically talk about section 5, subsection 3, paragraph (h) to which Senator O'Donnell talked about earlier.

It reads, “A case in which, following return of a verdict by the jury, the court determines by clear and convincing evidence, that an award in excess of $350,000 for noneconomic damages is justified under the circumstances.” The question is what circumstances? Mr. Bradley testified to catastrophic injuries, and it was mentioned several times that they are talking, specifically, about catastrophic injuries. I think that wording should be looked at as a possible addition to the paragraph and possibly even further recommendations might bring it into a meaningful sentence. It just ends in the air stating “circumstances” because you really do not know what circumstances are being talked about in this paragraph.

SENATOR RAGGIO:
Is the group representing the medical profession considering that?

DR. SCHRECK:
They are discussing some of these issues now. I bring it up because Senator O’Donnell said this body is going to use their own thought processes and intelligence.

SENATOR RAGGIO:
We were trying to ferret out what had been agreed to and whether there were any changes that were required by what has been agreed to. We have the opportunity and the right to add whatever we want that is germane to the Governor’s proclamation. Your suggestion is, regardless whether that has been agreed to, that we should look at that language also because it is too general. Is that what you are saying?

DR. SCHRECK:
I am saying that it is something Mr. Bradley said and was repeated. I assume the trial lawyers are in favor of that language, but I do not know whether it has been discussed.

SENATOR RAGGIO:
Do you have any specific suggestions? Are you saying it should be catastrophic?

DR. SCHRECK:
I would suggest catastrophic circumstances.

SENATOR RAWSON:
Before I actually saw language, I was under the impression that paragraph (h) under subsection 3 would be in the case of gross malpractice. I am wondering whether the parties would consider putting an “and” on line 39, so that if it is a case of gross malpractice, “and” there is clear and convincing evidence.

SENATOR RAGGIO:
We will make a note of that suggestion. Is there any other public testimony?

SUSAN ROE (Registered Nurse):
I lost my son three years ago due to medical negligence. We are at the point in the case where we are going to the medical screening panel. I would like to speak about caps. While it is true that no amount of money will make up for the loss of my son, I do feel that what I have experienced, our society understands. We understand litigation. Physicians understand judgments against them. To put the cap at a low enough point that you cannot get a lawyer to take your case is really doing a disservice to my son and everyone else who has been injured or died because of medical malpractice. I hope you will keep that in mind. The loss of a son is something that we will never get over. There are so many intangibles things that enter into this. My husband is unable to work, and his heath has significantly deteriorated since our son’s death. It is a total devastation of our lives, and I would ask you to please bear that in mind when you make your decisions.

SENATOR O'DONNELL:
Where was the hospital located, in northern or southern Nevada?

MRS. ROE:
It was in southern Nevada.

SENATOR O'DONNELL:
Was it at private hospital or public hospital?

MRS. ROE:
It was at a private hospital.

SENATOR O'DONNELL:
If your son was injured in a public hospital, say you had chosen UMC, would you think it would be fair that you would have less compensation then if you went to Sunrise or some other hospital? Do you think $50,000 is good enough at one hospital and $350,000 is okay at another hospital?

MRS. ROE:
No, $5 billion at any hospital would not be enough. The disparity there would be tough to take.

SENATOR RAGGIO:
The only issue we have that is still pending is the suggested language that was to be added to subsection 2. Tomorrow we are going to start with joint and several liability.

SCOTT YOUNG (Principal Research Analyst):
That would be section 1 in the present bill, “liability for acts in a government or nonprofit center.” The next item that we had tentatively listed was the “several liability’s standard,” which is in section 6. After that, we had listed reviewing the medical and dental screening panels to revise existing procedures or change the composition of the panels. Those provisions are largely repealed, but they were addressed in sections 24, 35 and 38. The other item we had tentatively scheduled was strengthening the reporting requirements regarding disciplinary actions, claims settlements and/or awards against physicians, which is contained, now, in sections 14, 19 through 23, and 28 through 34.

SENATOR RAGGIO:
We will recess until 8:30 p.m. They will come back with that information. We will then conclude our deliberations and vote on this part of the bill.
The committee will please come to order. In order to do justice to the issue before us, it is the Chair’s intention to recess the committee this evening. The Senate will have to go back into session, into the Chamber and adjourn formally. This committee will resume at 8:00 a.m. tomorrow. At which time, we will hear any final testimony or input. We will then deliberate and vote on the issues in sections 3, 4 and 5 of Senate Bill No. 2.

Senator Raggio moved that the Senate rise and return to the Senate Chamber.

Motion carried.

SENATE IN SESSION

At 9:37 p.m.
President Hunt presiding.
Quorum present.

GUESTS EXTENDED PRIVILEGE OF SENATE FLOOR

On request of Senator Milburn, the privilege of the floor of the Senate Chamber for this day was extended to Donna Draney, Andrea Anderson and Jim Munson.

On request of Senator Paulk, the privilege of the floor of the Senate Chamber for this day was extended to Lynda L. Paulk.

On request of Senator Shaffer, the privilege of the floor of the Senate Chamber for this day was extended to Don Meyer and Deb Meyer.

On request of President Hunt, the privilege of the floor of the Senate Chamber for this day was extended to Ron Mancuso, Tina Mancuso, Roman Mancuso and Zia Mancuso.

Senator Raggio moved that the Senate adjourn until Tuesday, July 30, 2002 at 7:30 a.m.
Motion carried.

Senate adjourned at 9:38 p.m.

Approved:LORRAINE T. HUNT
*President of the Senate*
Attest: CLAIRE J. CLIFT
*Secretary of the Senate*

# EXHIBIT K

Case No.: CV-C-17-439
Dept. No: 1

FILED
2017 JUN 22 PM 1:02
ELKO CO DISTRICT COURT
CLERK ____ DEPUTY CP

IN THE FOURTH JUDICIAL DISTRICT COURT OF THE

STATE OF NEVADA, IN AND FOR THE COUNTY OF ELKO

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

Plaintiff,

vs.

DAVID GARVEY, M.D., an individual; TEAM HEALTH HOLDINGS, INC., dba RUBY CREST EMERGENCY MEDICINE, PHC-ELKO, INC., dba NORTHEASTERN NEVADA REGIONAL HOSPITAL, a domestic corporation duly authorized to conduct business in the State of Nevada; REACH AIR MEDICAL SERVICES, L.L.C., DOE BARRY, R.N., DOES I through X; ROE BUSINESS ENTITIES XI through XX, inclusive,

Defendants.

**COMPLAINT**
**(Medical Malpractice)**
**and Wrongful Death)**

COMES NOW, Plaintiff, DIANE SCHWARTZ, individual and as the administrator of the Estate of DOUGLAS SCHWARTZ, by and through her attorneys of record, CLAGGETT & SYKES LAW FIRM, for their causes of action against Defendants, DAVID GARVEY, M.D., individually, TEAM HEALTH HOLDINGS, INC., dba RUBY CREST EMERGENCY MEDICINE, PHC-ELKO, INC., dba NORTHEASTERN NEVADA REGIONAL HOSPITAL, REACH AIR

MEDICAL SERVICES, L.L.C. DOES 1 through X; ROE BUSINESS ENTITIES X1 through XX; and each of them and alleges as follows:

1. At all times relevant herein, Plaintiff, DIANE SCHWARTZ, individually and as the Special Administrator on behalf of the Estate of DOUGLAS R. SCHWARTZ (hereinafter the "Plaintiff" or "Diane"), was and is a resident of Elko County, Nevada.

2. At all times relevant herein, Plaintiff DOUGLAS SCHWARTZ (hereinafter the "Plaintiff" or "Mr. Schwartz"), was a resident of Elko County, Nevada.

3. Upon information and belief, at all times relevant herein, Defendant, David Garvey, M.D (hereinafter "Dr. Garvey" or "Defendant"), was and is a medical doctor licensed in the State of Nevada, and a resident of Elko County, Nevada.

4. Upon information and belief, at all times relevant herein, Defendant, TEAM HEALTH HOLDINGS. INC., dba RUBY CREST EMERGENCY MEDICINE (hereinafter "Ruby Crest" or "Defendant"), was and is a domestic corporation existing pursuant to the laws of Delaware, authorized to do business in Nevada, and doing business in the State of Nevada.

5. Upon information and belief, at all times relevant herein, Defendant, PHC-ELKO, INC. dba NORTHEASTERN NEVADA REGIONAL HOSPITAL (hereinafter "NNRH" or "Defendant"), was and is a domestic corporation existing pursuant to the laws of Nevada, authorized to do business in the State of Nevada, and doing business in the State of Nevada.

6. Defendant NNRH was and is at all times relevant operating as a medical care facility in Elko County, Nevada and was and is owned, operated, managed, and controlled as a medical care facility within the County of Elko, State of Nevada, and was held out to the public at large, including the Plaintiff herein, as a properly equipped, fully accredited, completely staffed by qualified and prudent personnel, and operating in compliance with standards of due care maintained by other properly equipped, efficiently operated and administered, accredited medical care facilities in said community, offering full, competent, qualified, and efficient health care services to the general public and to the Plaintiff herein; that Plaintiff herein is informed and believes and thereon alleges, that Defendant, NNRH, administered, governed, controlled, managed, and directed all the necessary

functions, activities, and operations of said medical care facility, including its physician care, nursing care, interns, residents and health staff, and other personnel.

7. Upon information and belief, Defendant REACH AIR MEDICAL SERVICES, LLC, (hereinafter "Reach Air" or "Defendant") is a foreign limited liability company existing pursuant to the laws of California, authorized to do business in the State of Nevada, and doing business in the State of Nevada

8. Plaintiff is informed and believes and thereon alleges that at all times relevant herein, Defendant, Doe Barry, R.N. was and is a resident of Elko, Nevada.

9. That the true names or capacities, whether corporate, associate, individual or otherwise, of Defendants, DOE BARRY, R.N., and DOES I through X, inclusive, were and now are physicians, surgeons, registered nurses, licensed vocational nurses, practical nurses, registered technicians, aides, attendants, physician's assistants, CRNAs, or paramedical personnel holding themselves out as duly licensed to practice their professions under and by virtue of the laws of the State of Nevada, and were and are now engaged in the practice of their professions in the State of Nevada, and are unknown to Plaintiff who, therefore, sues said Defendants by such fictitious names. Plaintiff is informed and believes, and thereon alleges, that each of the Defendants designated herein as a DOE Barry R.N. and DOE is legally responsible in some manner for the events and happenings herein referred to and proximately caused injury and damages thereby to Plaintiff as hereinafter alleged. Plaintiff will seek leave of the Court to amend this Complaint to insert the true names and capacities of DOE BARRY R.N. or DOES I through X when the same have been ascertained and to join such Defendants in this action.

10. That the true names or capacities of Defendants, ROE BUSINESS ENTITIES XI through XX, inclusive, are unknown to Plaintiff who, therefore, sues said Defendants by such fictitious names. Defendants designated herein as ROE BUSINESS ENTITIES XI through XX, and each of them, are corporations, firms, partnerships, associations, other medical entities, including but not limited to nursing staffing companies and/or registry nursing companies, emergency physician services group, predecessors-in-interest, successors-in-interest, and/or agencies otherwise in a joint venture with, and/or serving as an alter ego of, any and/or all Defendants named herein; and/or are

entities responsible for the treatment, diagnosis, surgery, and/or other provision of medical care to Plaintiff herein, and/or otherwise responsible for the supervision of the individually named Defendants at the time of the events and circumstances alleged herein; and/or are entities employed by and/or otherwise directing the individual Defendants in the scope and course of their responsibilities at the time of the events and circumstances alleged herein; and/or are entities otherwise contributing in any way to the acts complained of and the damages alleged to have been suffered by the Plaintiff herein. Plaintiff is informed and, on that basis believes and thereon alleges, that each of the Defendants designated as a ROE BUSINESS ENTITY is in some manner negligently, vicariously, and/or statutorily responsible for the events and happenings referred to and caused damages to Plaintiff as herein alleged. Plaintiff will seek leave of the Court to amend this Complaint to insert the true names of such Defendants when the same have been ascertained.

11. Defendants are agents, servants, employees, employers, trade venturers, and/or partners of each other. At the time of the incident described in this Complaint, Defendants were acting within the color, purpose and scope of their relationships, and by reason of their relationships, Defendants may be jointly and severally and/or vicariously responsible and liable for the acts and omissions of their Co-Defendants.

## GENERAL ALLEGATIONS

1. The Plaintiff repeat and reallege the allegations as contained in the preceding paragraphs herein, and incorporates the same herein by reference.

2. On June 22, 2016, Mr. Schwartz was struck as a pedestrian by a moving vehicle as he was exiting a local restaurant in the 400 block of Commercial Street in Elko, Nevada.

3. Paramedics were called to the scene at 8:17 p.m. and arrived at the scene within a few minutes.

4. Mr. Schwartz was placed in full C-spine precautions. During transport to the hospital, his vitals were within normal limits, 4L of oxygen was started routinely, a heart monitor was placed showing normal sinus rhythm.

5. Mr. Schwartz was transported by Elko County Ambulance to Northeastern Nevada Regional Hospital on a "non-emergent" transport mode arriving at approximately 8:48 p.m.

6. Dr. Garvey performed a physical examination of Mr. Schwartz upon arrival to the emergency department.

7. His assessment revealed that Mr. Schwartz had mild abrasions to the forehead, injury to the right lateral posterior chest with moderate pain, and abrasions to the right bicep, elbow and knee.

8. Mr. Schwartz had a normal heart rate and rhythm.

9. Mr. Schwartz did not display signs of respiratory distress; his respirations were normal with clear breath sounds throughout.

10. Mr. Schwartz's neurological status was normal.

11. Mr. Schwartz's abdominal evaluation was within normal limits.

12. At approximately 9:02 p.m. several diagnostic studies were ordered to further evaluate Mr. Schwartz's injuries including scans of the head, cervical and thoracic spine, chest, abdomen and pelvis.

13. Dr. Garvey contacted Dr. Ray at the University of Utah who accepted the patient for transfer.

14. The air ambulance crew from Reach Air arrived at NNRH to transport Mr. Schwartz to the airport for an air ambulance transport to the University of Utah Hospital.

15. Mr. Schwartz was not informed of the risks of undergoing an intubation. He was not informed of the alternatives to undergoing an intubation procedure.

16. Dr. Garvey elected to have the flight nurse, Doe Barry, R.N. from Reach Air, perform the intubation after Rocuronium and Ketamine were administered at 12:18 a.m.

17. Mr. Schwartz's vital signs were stable up until this point.

18. Doe Barry, R.N. first attempted intubation at 12:20 a.m., unsuccessfully, followed quickly by a deterioration of oxygenation and vital signs.

19. Intubation by Doe Barry, R.N. was again unsuccessful at 12:33 a.m. and a large aspiration of gastric contents was noted.

20. After the aspiration, the vital signs and oxygenation indicated cardiopulmonary arrest and CPR was administered.

21. CPR continued and several subsequent intubation attempts were unsuccessful.

22. At 1:20 a.m. Mr. Schwartz had asystole (complete lack of heart beat) and he was pronounced dead at 1:33 a.m.

**FIRST CLAIM FOR RELIEF**

**(PROFESSIONAL NEGLIGENCE/WRONGFUL DEATH)**

**DR. DAVID GARVEY, DOE BARRY, R.N., RUBY CREST, REACH AIR AND NNRH**

23. The Plaintiff repeat and reallege the allegations as contained in the preceding paragraphs herein, and incorporates the same herein by reference.

24. Defendant Dr. GARVEY owed a duty of care to Mr. Schwartz to render medical care and treatment in a professional manner consistent with the standard of care prescribed in his medical field.

25. Defendant Dr. GARVEY fell below the standard of care by deciding to intubate Mr. Schwartz without clinical indications for intubation.[1]

26. Defendant Dr. GARVEY fell below the standard of care by failing to request an anesthesiologist to perform the intubation due to the high risk of aspiration.[2]

27. Defendant Dr. GARVEY fell below the standard of care by assigning an RN to perform a high risk, semi-elective intubation in a patient who he knew just ate a large meal.[3]

28. Defendant Dr. GARVEY fell below the standard of care by failing to obtain informed consent for Mr. Schwartz when he failed to advise him of the pros and cons of the procedure as well as other acceptable options (including not doing the procedure at all or having it done by an expert physician).[4]

29. Defendant Dr. GARVEY fell below the standard of care by electing to continue with the same plan of having an RN attempt intubation even after the initial intubation procedure was

[1] See Affidavit of Kenneth N. Scissors, M.D., attached hereto as **"Exhibit 1"**.
[2] Id.
[3] Id.
[4] Id.

unsuccessful rather than trying it himself or supporting the patient with a bag-mask technique and/or by calling in an anesthesiologist as the standard of care would require.[5]

30. Defendant Dr. GARVEY thereby caused Mr. Schwartz to suffer severe complications including a large aspiration of gastric contents and a fatal cardiopulmonary arrest.[6]

31. Defendant DOE BARRY, R.N. owed a duty of care to Mr. Schwartz to render medical care and treatment in a professional manner consistent with the standard of care prescribed in his medical field. [6]

32. Defendant DOE BARRY, R.N. fell below the standard of care by agreeing to attempt an intubation of Mr. Schwartz when he did not have clear indications for intubation and had a high risk of aspiration of gastric contents.[7]

33. Defendant DOE BARRY, R.N. fell below the standard of care by not deferring to a qualified anesthesiologist.[8]

34. Defendant DOE BARRY, R.N. fell below the standard of care by attempting a second intubation after the failed first attempt. At that point Mr. Schwartz was struggling, but supportable with a bag-mask technique. Nurse Barry should have deferred to a qualified physician. [9]

35. Defendant DOE BARRY, R.N. thereby caused Mr. Schwartz to suffer severe complications including a large aspiration of gastric contents and a fatal cardiopulmonary arrest.[10]

36. Defendant NNRH employees, agents, and/or servants, including DOE BARRY, R.N. was acting in the scope of his employment, under Defendant's control, and in the furtherance of Defendant's interest at the time his actions caused injuries to Mr. Schwartz.

37. Defendant NNRH in the capacity of a medical hospital, providing medical care to the public owed Mr. Schwartz a non-delegable duty to employ medical staff including Dr. GARVEY to have adequate training in the care and treatment of patients consistent with the degree of skill and

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[5] Id.
[6] Id.
[7] Id.
[8] Id.
[9] Id.
[10] Id.

learning possessed by competent medical personnel practicing in the United States of America under the same or similar circumstances.

38. At all relevant times mentioned herein, Defendants knew or in the exercise of reasonable care should have known, that the provisions of medical care and treatment was of such a nature that, if it was not properly given, was likely to injure or cause death to the person to whom it was given.

39. Defendants, and each of them, fell below the standard of care for a health care provider who possesses the degree of professional learning, skill, and ability of other similar health care providers in failing to timely and properly treat Mr. Schwartz resulting in significant injuries and death. The allegations against Defendants are supported by the Report of Dr. Kenneth N. Scissors.[11]

40. Mr. Schwartz thereby experienced great pain, suffering, and anxiety to his body and mind, with said injuries ultimatley leading to death and damages in the sum in excess of Ten Thousand Dollars ($10,000.00).

41. As a further direct and proximate result of the aforesaid negligence and carelessness of Defendants, Plaintiff have incurred damages, both general and special, including medical expenses as a result of the treatment of Mr. Schwartz's injuries and funeral expenses.

42. As a further proximate result of the aforementioned negligence and carelessness of Defendants, the Plaintiff was required to, and did, employ physicians, surgeons, and other health care providers to examine, treat, and care for her and did incur medical and incidental expenses thereby. The exact amount of such expenses is unknown at this present time, but Plaintiff alleges that she has suffered special damages in excess of Ten Thousand Dollars ($10,000.00).

43. As a further direct and proximate result of the negligence and carelessness of Defendants, Plaintiff has suffered, and will continue to suffer, pain, suffering, and loss of enjoyment of life in an amount to be proven at trial.

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[11]Id.

6. Id.

44. As a direct and proximate result of the negligence and carelessness of Defendants, Plaintiff suffered and will continue to suffer lost wages and/or loss of earning capacity, in an amount to be proven at trial.

45. The actions of the Defendant have forced Plaintiff to retain counsel to represent her in the prosecution of this action, and she is therefore entitled to an award of a reasonable amount as attorney fees and costs of suit.

**SECOND CLAIM FOR RELIEF**

**(Vicarious Liability, Corporate Negligence and Ostensible Agency)**

**Against Defendant NNRH, RUBY CREST AND REACH AIR**

46. The Plaintiff repeats and realleges the allegations as contained in the preceding paragraphs herein, and incorporates the same herein by reference.

47. Employers, masters and principals are vicariously liable for the torts committed by their employees, servants and agents if the tort occurs while the employee, servant, or agent was acting in the course and scope of employment.

48. The Defendants were the employers, masters, principals, and/or ostensible agents of each other, the remaining Defendant, and other employees, agents, independent contractors and/or representatives who negligently failed through their credentialing and re-credentialing process to employ and or grant privileges to an emergency room physician with adequate training in the care and treatment of patients consistent with the degree of skill and learning possessed by competent medical personnel practicing in the United States of America under the same or similar circumstances.[12]

49. Defendants' breach of the applicable standard of care directly resulted in Plaintiff sustaining significant injuries that ultimately led to his death.

50. Mr. Schwartz thereby experienced great pain, suffering, and anxiety to his body and mind, sustaining injuries, damages and death in the sum in excess of Ten Thousand Dollars ($10,000.00).

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[12] Id.

51. As a further direct and proximate result of the aforesaid negligence and carelessness of Defendants, Plaintiff has incurred damages, both general and special, including medical expenses as a result of the necessary treatment of her injuries, and will continue to incur damages for future medical treatment necessitated by incident-related injuries she has suffered.

52. As a further proximate result of the aforementioned negligence and carelessness of Defendants, the Plaintiff was required to, and did, employ physicians, surgeons, and other health care providers to examine, treat, and care forherand did incur medical and incidental expenses thereby. The exact amount of such expenses is unknown at this present time, but Plaintiff alleges that she has suffered special damages in excess of Ten Thousand Dollars ($10,000.00).

53. As a further direct and proximate result of the negligence and carelessness of Defendants, Plaintiff has suffered, and will continue to suffer, pain, suffering, and loss of enjoyment of life in an amount to be proven at trial.

54. As a direct and proximate result of the negligence and carelessness of Defendants, Plaintiff suffered and will continue to suffer lost wages and a loss of earning capacity, in an amount to be proven at trial.

55. Defendants' failure to properly credential and/or re-credential Dr. Garvey or to otherwise assure that an emergency room physician had adequate training in the care and treatment of patients consistent with the degree of skill and learning possessed by competent medical personnel practicing in the United States of America under the same or similar circumstances caused Plaintiff to suffer and ultimately die as a result of his care.

56. The actions of the Defendants have forced Plaintiff to retain counsel to represent her in the prosecution of this action, and she is therefore entitled to an award of a reasonable amount as attorney fees and costs of suit.

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**THIRD CLAIM FOR RELIEF**

**(Negligent Hiring, Training, and Supervision)**

**Against Defendant NNRH, RUBY CREST AND REACH AIR**

57. The Plaintiff repeat and reallege the allegations as contained in the preceding paragraphs herein, and incorporates the same herein by reference.

58. The Defendants, and each of them, hired, trained, supervised and/or retained employees to provide treatment to patients, to include Plaintiff, within the appropriate standard of care, which required Defendants to properly assess and recognize when intubation is needed.

59. The Defendants had a duty to hire, properly train, properly supervise, and properly retain competent employees, agents, independent contractors and representatives.

60. Upon information and belief, the Defendants, breached their duty by improperly hiring, improperly training, improperly supervising and improperly retaining incompetent employees regarding the examination, diagnosis, and treatment of patients.

61. Defendants' breach of the applicable standard of care directly resulted in Plaintiff sustaining significant injuries that ultimatley lead to his untimely death.[13]

62. Plaintiff thereby experienced great pain, suffering, and anxiety to his body and mind, sustaining injuries and damages in the sum in excess of Ten Thousand Dollars ($10,000.00).

63. As a further direct and proximate result of the aforesaid negligence and carelessness of Defendants, Plaintiff has incurred damages, both general and special, including medical expenses as a result of the necessary treatment of her injuries, and will continue to incur damages for future medical treatment necessitated by incident-related injuries she has suffered.

64. As a further proximate result of the aforementioned negligence and carelessness of Defendants, the Plaintiff was required to, and did, employ physicians, surgeons, and other health care providers to examine, treat, and care for Mr. Schwartz and did incur medical and incidental expenses thereby. The exact amount of such expenses is unknown at this present time, but Plaintiff allege that she has suffered special damages in excess of Ten Thousand Dollars ($10,000.00).

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[13] Id

65. As a further direct and proximate result of the negligence and carelessness of Defendants, Plaintiff has suffered, and will continue to suffer, pain, suffering, and loss of enjoyment of life in an amount to be proven at trial.

66. As a direct and proximate result of the negligence and carelessness of Defendants, Plaintiff suffered and will continue to suffer lost wages and/or loss of earning capacity, in an amount to be proven at trial.

67. The actions of the Defendants have forced the Plaintiff to retain counsel to represent her in the prosecution of this action, and she is therefore entitled to an award of a reasonable amount as attorney fees and costs of suit.

**FOURTH CLAIM FOR RELIEF**

**(Lack of Informed Consent)**

**Against Defendant DAVID GARVEY, M.D.**

68. The Plaintiff repeat and reallege the allegations in the preceding paragraphs herein, and incoporate the same herein by reference.

69. Informed Consent requires the attending physician explain to the patient or guardian(s) including but not limited to alternatives to the treatment or procedure and the reasonable risks of undergoing the procedure.[14]

70. Dr. Garvey did not explain to the Plaintiff the pros and cons of the procedure and that there are acceptable options, including not doing the procedure at all or having it done by an expert physician.

71. Dr. Garvey did not explain to Plaintiff the reasonable risks of the intubation procedure including the risk of aspiration due to a full stomach and that said aspiration, should it occur, could lead to death.

72. Plaintiff would not have opted to have the intubation procedure had they been informed by Dr. Garvey of the less invasive alternative and of the substantial risks involved with intubation.

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[14] See Affidavit of Kenneth N. Scissors, M.D. attached hereto as "Exhibit 1"

73. As a result of Dr. Garvey's lack of informed consent, Mr. Schwartz experienced great pain, discomfort and ultimately suffered death.[15]

74. The actions of the Defendants have forced the Plaintiff to retain counsel to represent them in the prosecution of this action, and they are therefore entitled to an award of a reasonable amount as attorney fees and costs of suit.

75. As a direct and proximate result of the negligence and carelessness of Defendants, Plaintiff has suffered, and will continue to suffer, pain, suffering, and loss of enjoyment of life in an amount to be proven at trial.

76. As a direct and proximate result of the negligence and carelessnesss of Defendants, Plaintiff suffered and will suffer lost wages, in an amount to be proven at trial.

**FIFTH CLAIM FOR RELIEF**

**(Loss of Consortium)**

77. Plaintiffs restate and reallege each and every allegation in the preceding paragraphs herein, and incorporate the same herein by reference.

78. Plaintiff, Diane Schwartz, is and at all times relevant herein, has been the spouse of Plaintiff Douglas R. Schwartz.

79. As a direct and proximate result of Defendants' negligence and carelessness, has lost and will continue to lose a degree of society, comfort and companionship of her spouse, all to her damage in an amount in excess of Ten Thousand Dollars ($10,000.00).

80. The actions of the Defendants have forced the Plaintiff to retain counsel to represent them in the prosecution of this action, and they are therefore entitled to an award of a reasonable amount as attorney fees and costs of suit.

81. As a direct and proximate result of the negligence and carelessness of Defendants, Plaintiff has suffered, and will continue to suffer, pain, suffering, and loss of enjoyment of life in an amount to be proven at trial.

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[15] Id.

82. As a direct and proximate result of the negligence and carelessnesss of Defendants, Plaintiff suffered and will suffer lost wages, in an amount to be proven at trial.

83. Defendant's conduct complained of herein was despicable and so contemptible that it would be looked down upon and despised by ordinary, decent people, and was carried on by Defendant with willful and conscious disregard for the safety of Mr. Schwartz, and others in the State of Nevada, entitling Plaintiff to exemplary and punitive damages.

84. The outrageous and unconscionable conduct of Defendant warrants an award of exemplary and punitive damages in an amount appropriate to punish Defendant and make an example of it, and to deter similar conduct in the future.

85. The acts of Defendant complained of herein were willful, malicious, fraudulent, oppressive and done in conscious disregard of Plaintiff's rights and safety, and the rights and safety of others in the State of Nevada, and Plaintiff is entitled to exemplary and punitive damages pursuant to NRS Chapter 42 and common law, for a sum in excess of Ten Thousand Dollars ($10,000.00), to be proven at the time of trial, together with prejudgment interest at the rate allowed

WHEREFORE, Plaintiff, DIANE SCHWARTZ, individually and as administrator of the Estate of DOUGLAS R. SCHWARTZ, deceased, expressly reserves her right to amend this Complaint at the time of trial, to include all items of damage not yet ascertained, demand judgment against Defendants, DAVID GARVEY, M.D., an individual; TEAM HEALTH HOLDINGS, INC., dba RUBY CREST EMERGENCY MEDICINE, PHC-ELKO, INC., dba NORTHEASTERN NEVADA REGIONAL HOSPITAL, a domestic corporation duly authorized to conduct business in the State of Nevada;; REACH AIR MEDICAL SERVICES, L.L.C.; DOE BARRY, R.N., DOES I through X; ROE BUSINESS ENTITIES XI through XX, inclusive and each of the defendants as follows:

For general damages, in an amount in excess of Ten Thousand Dollars ($10,000.00), to be set forth and proven at the time of trial;

86. For general damages, in an amount in excess of Ten Thousand Dollars ($10,000), to be set forth and proven at the time of trial.

87. For special damages in an amount in excess of Ten Thousand Dollars ($10,000.00), to be set forth and proven at the time of trial;

88. For reasonable attorney's fees;

89. For costs and disbursements of this suit; and

90. For such other relief as to the Court seems just and proper.

DATED this 22nd day of June, 2017.

CLAGGETT & SYKES LAW FIRM

Sean K. Claggett, Esq.
Nevada Bar No. 008407
Jennifer Morales, Esq.
Nevada Bar No. 008829
Matthew S. Granda, Esq.
Nevada Bar No. 012753
4101 Meadows Lane, Suite 100
Las Vegas, Nevada 89107
(702) 655-2346 – Telephone
*Attorneys for Plaintiff*

Pursuant to FJDCR 19.1.A. DIANE SCHWARTZ, Plaintiff in this matter, is not in debt or bankruptcy.

**Pursuant to NRS 239.030, counsel hereby affirms that this document contains no social security numbers.**

Jennifer Morales, Esq., Attorney for Plaintiff

# Table of Exhibits

| | | |
|---|---|---|
| Exhibit "1" | Affidavit of Kenneth Scissors, M.D. | 5 pages |

# Exhibit "1"

## AFFIDAVIT OF KENNETH N. SCISSORS, M.D.

I, Kenneth N. Scissors, MD, being duly sworn, under oath, state that the following assertions are true to the best of my personal knowledge training, experience and belief;

1) I am licensed by the Colorado Board of Medical Examiners to practice medicine in the State of Colorado.

2) My licenses are current with the appropriate State and Federal agencies.

3) My additional qualifications to serve as an expert are set forth in my Curriculum Vitae, attached as Exhibit 1.

4) Based on my training, background, knowledge and experience, I am familiar with the applicable standard of care for the treatment of the signs, symptoms, and condition presented by Mr. Schwartz in the emergency department. I am familiar with the team approach involved in the emergency room to include but not limited to transport teams and nursing care. The areas covered in this report overlap and based on my experience and training I am familiar and qualified in the areas addressed in this report to provide opinions.

5) I am qualified on the basis of my training background, knowledge, experience to offer an expert opinion regarding the accepted standard of medical care of the emergency room physician and the nurse who attempted to intubate Douglas Schwartz, the breaches thereof and the resulting injuries and damages arising therefrom.

### Documents Reviewed

1.) Northeaster Nevada Regional Hospital Medical Records
2.) Elko County Ambulance Medical Records
3.) Certificate of Death

4.) Autopsy Protocol
5.) NMS Lab Report
6.) Elko County Sheriff's Office Investigation Report
7.) Radiology Disc from Northeastern Nevada Regional Hospital

**Summary of Medical Care at Northern Nevada Regional Hospital Emergency Department on June 22, 2016**

On June 22, 2016 Mr. Douglas Schwartz was struck as a pedestrian by a moving vehicle. Paramedics were called at 8:17 p.m. and arrived at the scene within a few minutes. Mr. Schwartz was placed in full C-spine precautions. During his transport to the hospital his vitals were within normal limits, 4L of 02 was started routinely, a monitor was placed showing normal sinus rhythm. Mr. Schwartz was given 4 mg Zofran IVP followed by 100 mcg Fentanyl IVP which helped with his pain. He was transported by Elko County Ambulance to Northern Nevada Regional Hospital on a "non-emergent" transport mode arriving at 8:48 p.m.

Dr. David Garvey performed a physical evaluation of Douglas Schwartz upon arrival to the emergency department. He noted that Douglas Schwartz sustained mild abrasions to the forehead, injury to the right lateral posterior chest with moderate pain, and abrasions of the right bicep, elbow, and knee. Mr. Schwartz had a normal heart rate and rhythm. Mr. Schwartz did not display signs of respiratory distress; his respirations were normal with clear breath sounds throughout. Mr. Schwartz's neurological status was normal. His abdominal evaluation was also within normal limits. Mr. Schwartz's condition was stable.

At approximately 9:02 p.m. several diagnostic studies were ordered to further evaluate Mr. Schwartz's injuries including CT scans of the head, cervical and thoracic spine, chest, abdomen and pelvis.

Dr. Garvey contacted Dr. Ray at University of Utah trauma service who accepted the patient for transfer. According to Dr. Garvey's chart note, Dr. Ray requested that a chest tube be placed and possibly intubation prior to air medical transport.

Dr. Garvey elected to have the flight nurse, Barry, perform the intubation after Rocuronium and Ketamine administration at 0018 hours. The vital signs were stable up until this point. The intubation was first attempted at 0020 unsuccessfully, followed quickly by deterioration of oxygenation and vital signs. Intubation was again unsuccessful at 0033 and a large aspiration of gastric contents was noted. After the aspiration, the vital signs and oxygenation indicated cardiopulmonary arrest and CPR was administered. CPR continued and several subsequent intubation attempts were unsuccessful. At 0120 Mr. Schwartz had asystole (complete lack of heart beat) and he was pronounced dead at 0133

**Deviations from the Standard of Care.**

Northern Nevada Regional Hospital and Ruby Crest Emergency Medicine through its owners, officers, employees, agents and/or contractors, deviated from the applicable standard of care, through the actions of its employee, agent or contractor, Dr. David Garvey who provided medical care and treatment to Mr. Schwartz in the emergency room on June 22, 2016.

Northern Nevada Regional Hospital and Ruby Crest Emergency Medicine are required to properly hire, train, supervise and/or retain employees, including Dr. David Garvey to provide treatment within the appropriate standard of care to patients such as Douglas Schwartz in the emergency room on June 22, 2016.

Dr. David Garvey breached the standard of care in several ways:

1. Deciding to intubate Mr. Schwartz without clinical indications for intubation. Preventive intubation for air flight is not the standard of care. Intubation has inherent risks, especially in a patient who likely has food in the stomach. Intubation is reserved for patients who are unable to breath adequately on their own, yet Mr. Schwartz was breathing without difficulty and had adequate oxygen levels on simple oxygen supplementation.
2. Even if there was a pressing but non-emergent need to intubate Mr. Schwartz with likely food in the stomach, the standard of care would be to request an anesthesiologist to perform the intubation due to the high

risk of aspiration. It is a deviation from the standard of care for an emergency room physician to assign a RN to perform a high risk semi-elective intubation in a patient with likely gastric contents when highly skilled physicians are available.

3. Since this was a non-emergent and non-essential invasive procedure in an awake, cognitive patient, informed consent was required. That means more than just telling the patient what is to be done. The patient must be told the pros and cons of the procedure and that there are acceptable options, including not doing the procedure at all or having it done by an expert physician. Dr. Garvey deviated from the standard of care by not giving Mr. Schwartz the opportunity to decline this risky and unnecessary procedure.
4. Once the initial intubation was unsuccessful, Dr. Garvey elected to continue with the same plan of having a RN attempt intubation rather than trying it himself or supporting the patient with a bag-mask technique and calling in an anesthesiologist as the standard of care would require. This led to a large aspiration of gastric contents and a fatal cardiopulmonary arrest.

Reach Air Medical Services through its owners, officers, employees, agents and/or contractors, deviated from the applicable standard of care, through the actions of its employee, agent or contractor, identified as "Barry RN" who provided medical care and treatment to Mr. Schwartz in the emergency room on June 22, 2016.

Reach Air Medical Services is required to properly hire, train, supervise and/or retain employees, including "Barry RN" to provide treatment within the appropriate standard of care to patients such as Douglas Schwartz in the emergency room on June 22, 2016.

Nurse Barry violated the standard of care in two instances:

1. Nurse Barry should not have agreed to attempt to intubate Mr. Schwartz given that he did not have clear indications for intubation and had a high risk of aspiration of gastric contents. In this situation, a RN should defer to a qualified physician, preferably an anesthesiologist.

2. Nurse Barry should not have attempted a second intubation after the failed first attempt. At that point Mr. Schwartz was struggling, but still supportable with a bag-mask technique. Nurse Barry should have deferred to a qualified physician at this point rather than repeating the same mistake he made initially. The second failed attempt caused a fatal aspiration.

All of the aforementioned breaches of the standard of care caused or contributed to the death of Mr. Schwartz.

All of my opinions expressed herein are to a reasonable degree of medical certainty.

I reserve the right to amend, modify, and add to my opinions upon further review of any additional documents and/or information.

Further Affidant Sayeth Not.

Dated this 21 day of June, 2017

MD

KENNETH N. SCISSORS, M.D.

State of Colorado
County of Mesa
On this 21 day of June, 2017 I, Kenneth Scissors, MD
personally appeared before me,
X who is personally known to me.
___ whose identity I verified on the basis of CO-DL.
___ whose identity I verified on the oath/affirmation of _____,
a credible witness.
to be the signer of the foregoing document, and he she acknowledged that he she signed it.

Therese Luellen
Notary Public
My Commission Expires 4-5-2021

THERESE LUELLEN
NOTARY PUBLIC
STATE OF COLORADO
NOTARY ID 20014010801
MY COMMISSION EXPIRES 04/05/2021

# EXHIBIT L

Case No.: CV-C-17-439
Dept. No: 1

**AFFIRMATION**
Pursuant to NRS 239B.030
This document does not contain
any Social Security Numbers



IN THE FOURTH JUDICIAL DISTRICT COURT OF THE

STATE OF NEVADA, IN AND FOR THE COUNTY OF ELKO

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

Plaintiff,

vs.

DAVID GARVEY, M.D., an individual; BARRY BARTLETT, an individual (Formerly Identified as BARRY RN); CRUM, STEFANKO, & JONWA LTF, dba Ruby Crest Emergency Medicine; PHC-ELKO INC. dba NORTHEASTERN NEVADA REGIONAL HOSPITAL, a domestic corporation duly authorized to conduct business in the State of Nevada; REACH AIR MEDICAL SERVICES, L.L.C.; DOES I through X; ROE BUSINESS ENTITIES XI through XX, inclusive,

Defendants.

**AMENDED COMPLAINT**
**(Medical Malpractice)**
**and Wrongful Death)**

COMES NOW, Plaintiff, DIANE SCHWARTZ, individual and as the administrator of the Estate of DOUGLAS SCHWARTZ, by and through her attorneys of record, CLAGGETT & SYKES LAW FIRM, for their causes of action against Defendants, DAVID GARVEY, M.D., individually; BARRY BARTLETT, individually; CRUM, STEFANKO, & JONWA LTF, dba RUBY CREST EMERGENCY MEDICINE; PHC-ELKO, INC., dba NORTHEASTERN NEVADA REGIONAL

HOSPITAL, REACH AIR MEDICAL SERVICES, L.L.C; DOES 1 through X; ROE BUSINESS ENTITIES X1 through XX; and each of them and alleges as follows:

1. At all times relevant herein, Plaintiff, DIANE SCHWARTZ, individually and as the Special Administrator on behalf of the Estate of DOUGLAS R. SCHWARTZ (hereinafter the "Plaintiff" or "Diane"), was and is a resident of Elko County, Nevada.

2. At all times relevant herein, Plaintiff DOUGLAS SCHWARTZ (hereinafter the "Plaintiff" or "Mr. Schwartz"), was a resident of Elko County, Nevada.

3. Upon information and belief, at all times relevant herein, Defendant, David Garvey, M.D. (hereinafter "Dr. Garvey" or "Defendant"), was and is a medical doctor licensed in the State of Nevada, and a resident of Elko County, Nevada.

4. Plaintiff is informed and believes and thereon alleges that at all times relevant herein, Defendant, BARRY BARTLETT, (hereinafter "Bartlett" or "Defendant") was and is a resident of Elko, Nevada.

5. Upon information and belief, at all times relevant herein, Defendant, CRUM, STEFANKO, & JONWA LTF, dba RUBY CREST EMERGENCY MEDICINE (hereinafter "Ruby Crest" or "Defendant"), was and is a domestic corporation existing pursuant to the laws of Delaware, authorized to do business in Nevada, and doing business in the State of Nevada.

6. Upon information and belief, at all times relevant herein, Defendant, PHC-ELKO, INC. dba NORTHEASTERN NEVADA REGIONAL HOSPITAL (hereinafter "NNRH" or "Defendant"), was and is a domestic corporation existing pursuant to the laws of Nevada, authorized to do business in the State of Nevada, and doing business in the State of Nevada.

7. Defendant NNRH was and is at all times relevant operating as a medical care facility in Elko County, Nevada and was and is owned, operated, managed, and controlled as a medical care facility within the County of Elko, State of Nevada, and was held out to the public at large, including the Plaintiff herein, as a properly equipped, fully accredited, completely staffed by qualified and prudent personnel, and operating in compliance with standards of due care maintained by other properly equipped, efficiently operated and administered, accredited medical care facilities in said community, offering full, competent, qualified, and efficient health care services to the general

public and to the Plaintiff herein; that Plaintiff herein is informed and believes and thereon alleges, that Defendant, NNRH, administered, governed, controlled, managed, and directed all the necessary functions, activities, and operations of said medical care facility, including its physician care, nursing care, interns, residents and health staff, and other personnel.

8. Upon information and belief, Defendant REACH AIR MEDICAL SERVICES, LLC, (hereinafter "Reach Air" or "Defendant") is a foreign limited liability company existing pursuant to the laws of California, authorized to do business in the State of Nevada, and doing business in the State of Nevada

9. That the true names or capacities, whether corporate, associate, individual or otherwise, of DOES I through X, inclusive, were and now are physicians, surgeons, registered nurses, licensed vocational nurses, practical nurses, registered technicians, aides, attendants, physician's assistants, CRNAs, or paramedical personnel holding themselves out as duly licensed to practice their professions under and by virtue of the laws of the State of Nevada, and were and are now engaged in the practice of their professions in the State of Nevada, and are unknown to Plaintiff who, therefore, sues said Defendants by such fictitious names. Plaintiff is informed and believes, and thereon alleges, that each of the Defendants designated herein as a DOE Barry R.N. and DOE is legally responsible in some manner for the events and happenings herein referred to and proximately caused injury and damages thereby to Plaintiff as hereinafter alleged. Plaintiff will seek leave of the Court to amend this Complaint to insert the true names and capacities of DOE BARRY R.N. or DOES I through X when the same have been ascertained and to join such Defendants in this action.

10. That the true names or capacities of Defendants, ROE BUSINESS ENTITIES XI through XX, inclusive, are unknown to Plaintiff who, therefore, sues said Defendants by such fictitious names. Defendants designated herein as ROE BUSINESS ENTITIES XI through XX, and each of them, are corporations, firms, partnerships, associations, other medical entities, including but not limited to nursing staffing companies and/or registry nursing companies, emergency physician services group, predecessors-in-interest, successors-in-interest, and/or agencies otherwise in a joint venture with, and/or serving as an alter ego of, any and/or all Defendants named herein; and/or are entities responsible for the treatment, diagnosis, surgery, and/or other provision of medical care to

Plaintiff herein, and/or otherwise responsible for the supervision of the individually named Defendants at the time of the events and circumstances alleged herein; and/or are entities employed by and/or otherwise directing the individual Defendants in the scope and course of their responsibilities at the time of the events and circumstances alleged herein; and/or are entities otherwise contributing in any way to the acts complained of and the damages alleged to have been suffered by the Plaintiff herein. Plaintiff is informed and, on that basis believes and thereon alleges, that each of the Defendants designated as a ROE BUSINESS ENTITY is in some manner negligently, vicariously, and/or statutorily responsible for the events and happenings referred to and caused damages to Plaintiff as herein alleged. Plaintiff will seek leave of the Court to amend this Complaint to insert the true names of such Defendants when the same have been ascertained.

11. Defendants are agents, servants, employees, employers, trade venturers, and/or partners of each other. At the time of the incident described in this Complaint, Defendants were acting within the color, purpose and scope of their relationships, and by reason of their relationships, Defendants may be jointly and severally and/or vicariously responsible and liable for the acts and omissions of their Co-Defendants.

## GENERAL ALLEGATIONS

1. The Plaintiff repeat and reallege the allegations as contained in the preceding paragraphs herein, and incorporates the same herein by reference.

2. On June 22, 2016, Mr. Schwartz was struck as a pedestrian by a moving vehicle as he was exiting a local restaurant in the 400 block of Commercial Street in Elko, Nevada.

3. Paramedics were called to the scene at 8:17 p.m. and arrived at the scene within a few minutes.

4. Mr. Schwartz was placed in full C-spine precautions. During transport to the hospital, his vitals were within normal limits, 4L of oxygen was started routinely, a heart monitor was placed showing normal sinus rhythm.

5. Mr. Schwartz was transported by Elko County Ambulance to Northeastern Nevada Regional Hospital on a "non-emergent" transport mode arriving at approximately 8:48 p.m.

6. Dr. Garvey performed a physical examination of Mr. Schwartz upon arrival to the emergency department.

7. His assessment revealed that Mr. Schwartz had mild abrasions to the forehead, injury to the right lateral posterior chest with moderate pain, and abrasions to the right bicep, elbow and knee.

8. Mr. Schwartz had a normal heart rate and rhythm.

9. Mr. Schwartz did not display signs of respiratory distress; his respirations were normal with clear breath sounds throughout.

10. Mr. Schwartz's neurological status was normal.

11. Mr. Schwartz's abdominal evaluation was within normal limits.

12. At approximately 9:02 p.m. several diagnostic studies were ordered to further evaluate Mr. Schwartz's injuries including scans of the head, cervical and thoracic spine, chest, abdomen and pelvis.

13. Dr. Garvey contacted Dr. Ray at the University of Utah who accepted the patient for transfer.

14. The air ambulance crew from Reach Air arrived at NNRH to transport Mr. Schwartz to the airport for an air ambulance transport to the University of Utah Hospital.

15. Mr. Schwartz was not informed of the risks of undergoing an intubation. He was not informed of the alternatives to undergoing an intubation procedure.

16. Dr. Garvey elected to have the flight nurse, Barry Bartlett, from Reach Air, perform the intubation after Rocuronium and Ketamine were administered at 12:18 a.m.

17. Mr. Schwartz's vital signs were stable up until this point.

18. Barry Bartlett, first attempted intubation at 12:20 a.m., unsuccessfully, followed quickly by a deterioration of oxygenation and vital signs.

19. Intubation by Barry Bartlett, was again unsuccessful at 12:33 a.m. and a large aspiration of gastric contents was noted.

20. After the aspiration, the vital signs and oxygenation indicated cardiopulmonary arrest and CPR was administered.

21. CPR continued and several subsequent intubation attempts were unsuccessful.

22. At 1:20 a.m. Mr. Schwartz had asystole (complete lack of heart beat) and he was pronounced dead at 1:33 a.m.

**FIRST CLAIM FOR RELIEF**

**(PROFESSIONAL NEGLIGENCE/WRONGFUL DEATH)**

**DR. DAVID GARVEY, BARRY BARTLETT,**

**RUBY CREST, REACH AIR, AND NNRH**

23. The Plaintiff repeat and reallege the allegations as contained in the preceding paragraphs herein, and incorporates the same herein by reference.

24. Defendant Dr. GARVEY owed a duty of care to Mr. Schwartz to render medical care and treatment in a professional manner consistent with the standard of care prescribed in his medical field.

25. Defendant Dr. GARVEY fell below the standard of care by deciding to intubate Mr. Schwartz without clinical indications for intubation.[1]

26. Defendant Dr. GARVEY fell below the standard of care by failing to request an anesthesiologist to perform the intubation due to the high risk of aspiration.[2]

27. Defendant Dr. GARVEY fell below the standard of care by assigning an RN to perform a high risk, semi-elective intubation in a patient who he knew just ate a large meal.[3]

28. Defendant Dr. GARVEY fell below the standard of care by failing to obtain informed consent for Mr. Schwartz when he failed to advise him of the pros and cons of the procedure as well as other acceptable options (including not doing the procedure at all or having it done by an expert physician).[4]

29. Defendant Dr. GARVEY fell below the standard of care by electing to continue with the same plan of having an RN attempt intubation even after the initial intubation procedure was

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[1] See Affidavit of Kenneth N. Scissors, M.D., attached hereto as **"Exhbit 1"**.

[2] Id.

[3] Id.

[4] Id.

unsuccessful rather than trying it himself or supporting the patient with a bag-mask technique and/or by calling in an anesthesiologist as the standard of care would require.[5]

30. Defendant Dr. GARVEY thereby caused Mr. Schwartz to suffer severe complications including a large aspiration of gastric contents and a fatal cardiopulmonary arrest.[6]

31. Defendant BARRY BARTLETT, owed a duty of care to Mr. Schwartz to render medical care and treatment in a professional manner consistent with the standard of care prescribed in his medical field. [6]

32. Defendant BARRY BARTLETT, fell below the standard of care by agreeing to attempt an intubation of Mr. Schwartz when he did not have clear indications for intubation and had a high risk of aspiration of gastric contents.[7]

33. Defendant BARRY BARTLETT, fell below the standard of care by not deferring to a qualified anesthesiologist.[8]

34. Defendant BARRY BARTLETT, fell below the standard of care by attempting a second intubation after the failed first attempt. At that point Mr. Schwartz was struggling, but supportable with a bag-mask technique. Nurse Barry should have deferred to a qualified physician. [9]

35. Defendant BARRY BARTLETT, thereby caused Mr. Schwartz to suffer severe complications including a large aspiration of gastric contents and a fatal cardiopulmonary arrest.[10]

36. Defendant NNRH employees, agents, and/or servants, including BARRY BARTLETT, was acting in the scope of his employment, under Defendant's control, and in the furtherance of Defendant's interest at the time his actions caused injuries to Mr. Schwartz.

37. Defendant NNRH in the capacity of a medical hospital, providing medical care to the public owed Mr. Schwartz a non-delegable duty to employ medical staff including Dr. GARVEY to

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[5] Id.
[6] Id.
[7] Id.
[8] Id.
[9] Id.
[10] Id.

have adequate training in the care and treatment of patients consistent with the degree of skill and learning possessed by competent medical personnel practicing in the United States of America under the same or similar circumstances.

38. At all relevant times mentioned herein, Defendants knew or in the exercise of reasonable care should have known, that the provisions of medical care and treatment was of such a nature that, if it was not properly given, was likely to injure or cause death to the person to whom it was given.

39. Defendants, and each of them, fell below the standard of care for a health care provider who possesses the degree of professional learning, skill, and ability of other similar health care providers in failing to timely and properly treat Mr. Schwartz resulting in significant injuries and death. The allegations against Defendants are supported by the Report of Dr. Kenneth N. Scissors.[11]

40. Mr. Schwartz thereby experienced great pain, suffering, and anxiety to his body and mind, with said injuries ultimatley leading to death and damages in the sum in excess of Ten Thousand Dollars ($10,000.00).

41. As a further direct and proximate result of the aforesaid negligence and carelessness of Defendants, Plaintiff have incurred damages, both general and special, including medical expenses as a result of the treatment of Mr. Schwartz's injuries and funeral expenses.

42. As a further proximate result of the aforementioned negligence and carelessness of Defendants, the Plaintiff was required to, and did, employ physicians, surgeons, and other health care providers to examine, treat, and care for her and did incur medical and incidental expenses thereby. The exact amount of such expenses is unknown at this present time, but Plaintiff alleges that she has suffered special damages in excess of Ten Thousand Dollars ($10,000.00).

43. As a further direct and proximate result of the negligence and carelessness of Defendants,Plaintiff has suffered, and will continue to suffer, pain, suffering, and loss of enjoyment of life in an amount to be proven at trial.

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[11] Id.

44. As a direct and proximate result of the negligence and carelessness of Defendants, Plaintiff suffered and will continue to suffer lost wages and/or loss of earning capacity, in an amount to be proven at trial.

45. The actions of the Defendant have forced Plaintiff to retain counsel to represent her in the prosecution of this action, and she is therefore entitled to an award of a reasonable amount as attorney fees and costs of suit.

**SECOND CLAIM FOR RELIEF**

**(Vicarious Liability, Corporate Negligence and Ostensible Agency)**

**Against Defendant NNRH, RUBY CREST, AND REACH AIR**

46. The Plaintiff repeats and realleges the allegations as contained in the preceding paragraphs herein, and incorporates the same herein by reference.

47. Employers, masters and principals are vicariously liable for the torts committed by their employees, servants and agents if the tort occurs while the employee, servant, or agent was acting in the course and scope of employment.

48. The Defendants were the employers, masters, principals, and/or ostensible agents of each other, the remaining Defendant, and other employees, agents, independent contractors and/or representatives who negligently failed through their credentialing and re-credentialing process to employ and or grant privileges to an emergency room physician with adequate training in the care and treatment of patients consistent with the degree of skill and learning possessed by competent medical personnel practicing in the United States of America under the same or similar circumstances.[12]

49. Defendants' breach of the applicable standard of care directly resulted in Plaintiff sustaining significant injuries that ultimately led to his death.

50. Mr. Schwartz thereby experienced great pain, suffering, and anxiety to his body and mind, sustaining injuries, damages and death in the sum in excess of Ten Thousand Dollars ($10,000.00).

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[12] Id.

51. As a further direct and proximate result of the aforesaid negligence and carelessness of Defendants, Plaintiff has incurred damages, both general and special, including medical expenses as a result of the necessary treatment of her injuries, and will continue to incur damages for future medical treatment necessitated by incident-related injuries she has suffered.

52. As a further proximate result of the aforementioned negligence and carelessness of Defendants, the Plaintiff was required to, and did, employ physicians, surgeons, and other health care providers to examine, treat, and care forherand did incur medical and incidental expenses thereby. The exact amount of such expenses is unknown at this present time, but Plaintiff alleges that she has suffered special damages in excess of Ten Thousand Dollars ($10,000.00).

53. As a further direct and proximate result of the negligence and carelessness of Defendants, Plaintiff has suffered, and will continue to suffer, pain, suffering, and loss of enjoyment of life in an amount to be proven at trial.

54. As a direct and proximate result of the negligence and carelessness of Defendants, Plaintiff suffered and will continue to suffer lost wages and a loss of earning capacity, in an amount to be proven at trial.

55. Defendants' failure to properly credential and/or re-credential Dr. Garvey or to otherwise assure that an emergency room physician had adequate training in the care and treatment of patients consistent with the degree of skill and learning possessed by competent medical personnel practicing in the United States of America under the same or similar circumstances caused Plaintiff to suffer and ultimately die as a result of his care.

56. The actions of the Defendants have forced Plaintiff to retain counsel to represent her in the prosecution of this action, and she is therefore entitled to an award of a reasonable amount as attorney fees and costs of suit.

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## THIRD CLAIM FOR RELIEF

**(Negligent Hiring, Training, and Supervision)**

**Against Defendant NNRH, RUBY CREST, AND REACH AIR**

57. The Plaintiff repeat and reallege the allegations as contained in the preceding paragraphs herein, and incorporates the same herein by reference.

58. The Defendants, and each of them, hired, trained, supervised and/or retained employees to provide treatment to patients, to include Plaintiff, within the appropriate standard of care, which required Defendants to properly assess and recognize when intubation is needed.

59. The Defendants had a duty to hire, properly train, properly supervise, and properly retain competent employees, agents, independent contractors and representatives.

60. Upon information and belief, the Defendants, breached their duty by improperly hiring, improperly training, improperly supervising and improperly retaining incompetent employees regarding the examination , diagnosis, and treatment of patients.

61. Defendants' breach of the applicable standard of care directly resulted in Plaintiff sustaining significant injuries that ultimatley lead to his untimely death.[13]

62. Plaintiff thereby experienced great pain, suffering, and anxiety to his body and mind, sustaining injuries and damages in the sum in excess of Ten Thousand Dollars ($10,000.00).

63. As a further direct and proximate result of the aforesaid negligence and carelessness of Defendants, Plaintiff has incurred damages, both general and special, including medical expenses as a result of the necessary treatment of her injuries, and will continue to incur damages for future medical treatment necessitated by incident-related injuries she has suffered.

64. As a further proximate result of the aforementioned negligence and carelessness of Defendants, the Plaintiff wasrequired to, and did, employ physicians, surgeons, and other health care providers to examine, treat, and care for Mr. Schwartz and did incur medical and incidental expenses thereby. The exact amount of such expenses is unknown at this present time, but Plaintiff allege that she hassuffered special damages in excess of Ten Thousand Dollars ($10,000.00).

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[13] Id.

65. As a further direct and proximate result of the negligence and carelessness of Defendants, Plaintiff has suffered, and will continue to suffer, pain, suffering, and loss of enjoyment of life in an amount to be proven at trial.

66. As a direct and proximate result of the negligence and carelessness of Defendants, Plaintiff suffered and will continue to suffer lost wagesand/or loss of earning capacity, in an amount to be proven at trial.

67. The actions of the Defendants have forced the Plaintiff to retain counsel to represent her in the prosecution of this action, and she is therefore entitled to an award of a reasonable amount as attorney fees and costs of suit.

## FOURTH CLAIM FOR RELIEF

**(Lack of Informed Consent)**

**Against Defendant DAVID GARVEY, M.D.**

68. The Plaintiff repeat and reallege the allegations in the preceding paragraphs herein, and incorporate the same herein by reference.

69. Informed Consent requires the attending physician explain to the patient or guardian(s) including but not limited to alternatives to the treatment or procedure and the reasonable risks of undergoing the procedure.[14]

70. Dr. Garvey did not explain to the Plaintiff the pros and cons of the procedure and that there are acceptable options, including not doing the procedure at all or having it done by an expert physician.

71. Dr. Garvey did not explain to Plaintiff the reasonable risks of the intubation procedure including the risk of aspiration due to a full stomach and that said aspiration, should it occur, could lead to death.

72. Plaintiff would not have opted to have the intubation procedure had they been informed by Dr. Garvey of the less invasive alternative and of the substantial risks involved with intubation.

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[14] See Affidavit of Kenneth N. Scissors, M.D. attached hereto as "**Exhbit 1**"

73. As a result of Dr. Garvey's lack of informed consent, Mr. Schwartz experienced great pain, discomfort and ultimately suffered death.[15]

74. The actions of the Defendants have forced the Plaintiff to retain counsel to represent them in the prosecution of this action, and they are therefore entitled to an award of a reasonable amount as attorney fees and costs of suit.

75. As a direct and proximate result of the negligence and carelessness of Defendants, Plaintiff has suffered, and will continue to suffer, pain, suffering, and loss of enjoyment of life in an amount to be proven at trial.

76. As a direct and proximate result of the negligence and carelessness of Defendants, Plaintiff suffered and will suffer lost wages, in an amount to be proven at trial.

**FIFTH CLAIM FOR RELIEF**

**(Loss of Consortium)**

**Luther Eli Colburn's Claim Against All Defendants**

77. Plaintiff restate and reallege each and every allegation contained in the preceding paragraphs herein, and incorporate the same herein by reference.

78. Plaintiff, Diane Schwartz, is and at all times relevant herein, has been the spouse of Plaintiff Douglas R. Schwartz.

79. As a direct and proximate result of Defendants' negligence and carelessness, has lost and will continue to lose a degree of society, comfort and companionship of his spouse, all to her damage in an amount in excess of Ten Thousand Dollars ($10,000.00).

80. The actions of the Defendants have forced the Plaintiff to retain counsel to represent them in the prosecution of this action, and they are therefore entitled to an award of a reasonable amount as attorney fees and costs of suit.

81. As a direct and proximate result of the negligence and carelessness of Defendants, Plaintiff has suffered, and will continue to suffer, pain, suffering, and loss of enjoyment of life in an amount to be proven at trial.

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[15] Id.

82. As a direct and proximate result of the negligence and carelessness of Defendants, Plaintiff suffered and will suffer lost wages, in an amount to be proven at trial.

WHEREFORE, Plaintiff, DIANE SCHWARTZ, individually and as administrator of the Estate of DOUGLAS R. SCHWARTZ, deceased, expressly reserves her right to amend this Complaint at the time of trial, to include all items of damage not yet ascertained, demand judgment against Defendants, DAVID GARVEY, M.D., an individual; BARRY BARTLETT, an individual; CRUM, STEFANKO, & JONWA LTF dba RUBY CREST EMERGENCY MEDICINE; PHC-ELKO, INC., dba NORTHEASTERN NEVADA REGIONAL HOSPITAL, a domestic corporation duly authorized to conduct business in the State of Nevada; REACH AIR MEDICAL SERVICES, L.L.C.; DOES I through X; ROE BUSINESS ENTITIES XI through XX, inclusive and each of the defendants as follows:

1. For general damages, in an amount in excess of Ten Thousand Dollars ($10,000.00), to be set forth and proven at the time of trial;
2. For special damages in an amount in excess of Ten Thousand Dollars ($10,000.00), to be set forth and proven at the time of trial;
3. For reasonable attorney's fees;
4. For costs and disbursements of this suit; and
5. For such other relief as to the Court seems just and proper.

DATED this 21st day of August, 2017.

CLAGGETT & SYKES LAW FIRM

Sean K. Claggett, Esq.
Nevada Bar No. 008407
Jennifer Morales, Esq.
Nevada Bar No. 008829
Matthew S. Granda, Esq.
Nevada Bar No. 012753
4101 Meadows Lane, Suite 100
Las Vegas, Nevada 89107
(702) 655-2346 – Telephone
*Attorneys for Plaintiff*

Pursuant to FJDCR 19.1.A. DIANE SCHWARTZ, Plaintiff in this matter, is not in debt or bankruptcy.

**Pursuant to NRS 239.030, counsel hereby affirms that this document contains no social security numbers.**

Jennifer Morales, Esq., Attorney for Plaintiff

# Table of Exhibits

| | | |
|---|---|---|
| Exhibit "1" | Affidavit of Kenneth Scissors, M.D. – | 5 pages |

# Exhibit "1"

## AFFIDAVIT OF KENNETH N. SCISSORS, M.D.

I, Kenneth N. Scissors, MD, being duly sworn, under oath, state that the following assertions are true to the best of my personal knowledge training, experience and belief;

1) I am licensed by the Colorado Board of Medical Examiners to practice medicine in the State of Colorado.

2) My licenses are current with the appropriate State and Federal agencies.

3) My additional qualifications to serve as an expert are set forth in my Curriculum Vitae, attached as Exhibit 1.

4) Based on my training, background, knowledge and experience, I am familiar with the applicable standard of care for the treatment of the signs, symptoms, and condition presented by Mr. Schwartz in the emergency department. I am familiar with the team approach involved in the emergency room to include but not limited to transport teams and nursing care. The areas covered in this report overlap and based on my experience and training I am familiar and qualified in the areas addressed in this report to provide opinions.

5) I am qualified on the basis of my training background, knowledge, experience to offer an expert opinion regarding the accepted standard of medical care of the emergency room physician and the nurse who attempted to intubate Douglas Schwartz, the breaches thereof and the resulting injuries and damages arising therefrom.

### Documents Reviewed

1.) Northeaster Nevada Regional Hospital Medical Records
2.) Elko County Ambulance Medical Records
3.) Certificate of Death

4.) Autopsy Protocol
5.) NMS Lab Report
6.) Elko County Sheriff's Office Investigation Report
7.) Radiology Disc from Northeastern Nevada Regional Hospital

**Summary of Medical Care at Northern Nevada Regional Hospital Emergency Department on June 22, 2016**

On June 22, 2016 Mr. Douglas Schwartz was struck as a pedestrian by a moving vehicle. Paramedics were called at 8:17 p.m. and arrived at the scene within a few minutes. Mr. Schwartz was placed in full C-spine precautions. During his transport to the hospital his vitals were within normal limits, 4L of 02 was started routinely, a monitor was placed showing normal sinus rhythm. Mr. Schwartz was given 4 mg Zofran IVP followed by 100 mcg Fentanyl IVP which helped with his pain. He was transported by Elko County Ambulance to Northern Nevada Regional Hospital on a "non-emergent" transport mode arriving at 8:48 p.m.

Dr. David Garvey performed a physical evaluation of Douglas Schwartz upon arrival to the emergency department. He noted that Douglas Schwartz sustained mild abrasions to the forehead, injury to the right lateral posterior chest with moderate pain, and abrasions of the right bicep, elbow, and knee. Mr. Schwartz had a normal heart rate and rhythm. Mr. Schwartz did not display signs of respiratory distress; his respirations were normal with clear breath sounds throughout. Mr. Schwartz's neurological status was normal. His abdominal evaluation was also within normal limits. Mr. Schwartz's condition was stable.

At approximately 9:02 p.m. several diagnostic studies were ordered to further evaluate Mr. Schwartz's injuries including CT scans of the head, cervical and thoracic spine, chest, abdomen and pelvis.

Dr. Garvey contacted Dr. Ray at University of Utah trauma service who accepted the patient for transfer. According to Dr. Garvey's chart note, Dr. Ray requested that a chest tube be placed and possibly intubation prior to air medical transport.

Dr. Garvey elected to have the flight nurse, Barry, perform the intubation after Rocuronium and Ketamine administration at 0018 hours. The vital signs were stable up until this point. The intubation was first attempted at 0020 unsuccessfully, followed quickly by deterioration of oxygenation and vital signs. Intubation was again unsuccessful at 0033 and a large aspiration of gastric contents was noted. After the aspiration, the vital signs and oxygenation indicated cardiopulmonary arrest and CPR was administered. CPR continued and several subsequent intubation attempts were unsuccessful. At 0120 Mr. Schwartz had asystole (complete lack of heart beat) and he was pronounced dead at 0133

**Deviations from the Standard of Care.**

Northern Nevada Regional Hospital and Ruby Crest Emergency Medicine through its owners, officers, employees, agents and/or contractors, deviated from the applicable standard of care, through the actions of its employee, agent or contractor, Dr. David Garvey who provided medical care and treatment to Mr. Schwartz in the emergency room on June 22, 2016.

Northern Nevada Regional Hospital and Ruby Crest Emergency Medicine are required to properly hire, train, supervise and/or retain employees, including Dr. David Garvey to provide treatment within the appropriate standard of care to patients such as Douglas Schwartz in the emergency room on June 22, 2016.

Dr. David Garvey breached the standard of care in several ways:

1. Deciding to intubate Mr. Schwartz without clinical indications for intubation. Preventive intubation for air flight is not the standard of care. Intubation has inherent risks, especially in a patient who likely has food in the stomach. Intubation is reserved for patients who are unable to breath adequately on their own, yet Mr. Schwartz was breathing without difficulty and had adequate oxygen levels on simple oxygen supplementation.
2. Even if there was a pressing but non-emergent need to intubate Mr. Schwartz with likely food in the stomach, the standard of care would be to request an anesthesiologist to perform the intubation due to the high

risk of aspiration. It is a deviation from the standard of care for an emergency room physician to assign a RN to perform a high risk semi-elective intubation in a patient with likely gastric contents when highly skilled physicians are available.

3. Since this was a non-emergent and non-essential invasive procedure in an awake, cognitive patient, informed consent was required. That means more than just telling the patient what is to be done. The patient must be told the pros and cons of the procedure and that there are acceptable options, including not doing the procedure at all or having it done by an expert physician. Dr. Garvey deviated from the standard of care by not giving Mr. Schwartz the opportunity to decline this risky and unnecessary procedure.
4. Once the initial intubation was unsuccessful, Dr. Garvey elected to continue with the same plan of having a RN attempt intubation rather than trying it himself or supporting the patient with a bag-mask technique and calling in an anesthesiologist as the standard of care would require. This led to a large aspiration of gastric contents and a fatal cardiopulmonary arrest.

Reach Air Medical Services through its owners, officers, employees, agents and/or contractors, deviated from the applicable standard of care, through the actions of its employee, agent or contractor, identified as "Barry RN" who provided medical care and treatment to Mr. Schwartz in the emergency room on June 22, 2016.

Reach Air Medical Services is required to properly hire, train, supervise and/or retain employees, including "Barry RN" to provide treatment within the appropriate standard of care to patients such as Douglas Schwartz in the emergency room on June 22, 2016.

Nurse Barry violated the standard of care in two instances:

1. Nurse Barry should not have agreed to attempt to intubate Mr. Schwartz given that he did not have clear indications for intubation and had a high risk of aspiration of gastric contents. In this situation, a RN should defer to a qualified physician, preferably an anesthesiologist.

2. Nurse Barry should not have attempted a second intubation after the failed first attempt. At that point Mr. Schwartz was struggling, but still supportable with a bag-mask technique. Nurse Barry should have deferred to a qualified physician at this point rather than repeating the same mistake he made initially. The second failed attempt caused a fatal aspiration.

All of the aforementioned breaches of the standard of care caused or contributed to the death of Mr. Schwartz.

All of my opinions expressed herein are to a reasonable degree of medical certainty.

I reserve the right to amend, modify, and add to my opinions upon further review of any additional documents and/or information.

Further Affidant Sayeth Not.

Dated this 21 day of June, 2017

KENNETH N. SCISSORS, M.D.

State of Colorado
County of Mesa
On this 21 day of June, 2017 I, Kenneth Scissors, MD
personally appeared before me.
X who is personally known to me,
whose identity I verified on the basis of CO - DL.
whose identity I verified on the oath/affirmation of
a credible witness,
to be the signer of the foregoing document, and he she acknowledged that he she signed it.

Therese Luellen
Notary Public
My Commission Expires 4-5-2021

THERESE LUELLEN
NOTARY PUBLIC
STATE OF COLORADO
NOTARY ID 20014010801
MY COMMISSION EXPIRES 04/05/2021

# EXHIBIT M

KEITH A. WEAVER
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IN THE FOURTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF ELKO

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

Plaintiff,

vs.

DAVID GARVEY, M.D., an individual; BARRY BARTLETT, an individual (Formerly Identified as BARRY RN); CRUM, STEFANKO, & JONES LTD, dba Ruby Crest Emergency Medicine; PHC-ELKO INC. dba NORTHEASTERN NEVADA REGIONAL HOSPITAL, a domestic corporation duly authorized to conduct business in the State of Nevada; REACH AIR MEDICAL SERVICES, L.L.C.; DOES I through X; ROE BUSINESS ENTITIES XI through XX, inclusive,

Defendants.

CASE NO. CV-C-17-439
Dept. No.: 1

**NOTICE OF ENTRY OF ORDER DENYING PLAINTIFF'S MOTION FOR LEAVE TO AMEND COMPLAINT (ERRONEOUSLY TITLED ORDER DENYING PLAINTIFF'S MOTION TO DISMISS)**

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PLEASE TAKE NOTICE that the Order Denying Plaintiff's Motion for Leave to Amend Complaint (Erroneously Titled Order Denying Plaintiff's Motion to Dismiss) was entered on October 16, 2019, a true and correct copy of which is attached hereto.

**AFFIRMATION**

**PURSUANT TO NRS 239B.030**

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED this 21st day of October, 2019

LEWIS BRISBOIS BISGAARD & SMITH LLP

By Alli Bestick

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## CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of LEWIS BRISBOIS BISGAARD & SMITH LLP, and that on this 2nd day of October, 2019, I did cause a true and correct copy of **NOTICE OF ENTRY OF ORDER DENYING PLAINTIFF'S MOTION FOR LEAVE TO AMEND COMPLAINT (ERRONEOUSLY TITLED ORDER DENYING PLAINTIFF'S MOTION TO DISMISS)** to be placed in the United States Mail, with first class postage prepaid thereon, and addressed as follows:

I also hereby certify that on this the 2nd day of October, 2019, a true and correct copy of **NOTICE OF ENTRY OF ORDER DENYING PLAINTIFF'S MOTION FOR LEAVE TO AMEND COMPLAINT (ERRONEOUSLY TITLED ORDER DENYING PLAINTIFF'S MOTION TO DISMISS)** was sent via electronic mail to the following:

**PLEASE SEE ATTACHED SERVICE LIST**

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**SERVICE LIST**

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By _____
An Employee of LEWIS BRISBOIS BISGAARD & SMITH LLP

CASE NO. CV-C-17-439

DEPT. NO. 1

FILED

2018 OCT 15 P 2:22

IN THE FOURTH JUDICIAL DISTRICT COURT

OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF ELKO

DIANE SCHWARTZ, individually and as administrator of the Estate of DOUGLAS R. SCHWARTZ, deceased;

Plaintiff,

V.

DAVID GARVEY, M.D., an individual; TEAM HEALTH HOLDINGS, INC., dba RUBY CREST EMERGENCY MEDICINE, PHC-ELKO, INC., dba NORTHEASTERN NEVADA REGIONAL HOSPITAL, a domestic corporation duly authorized to conduct business in the State of Nevada; REACH MEDICAL SERVICES, L.L.C., DOES 1 through X; ROE BUSINESS ENTITIES XI through XX, inclusive,

Defendants.

/

**ORDER DENYING PLAINTIFF'S MOTION TO DISMISS**

This matter came before the Court on Plaintiff's Motion to Amend Complaint filed September 4, 2018. The proposed Third Amended Complaint is attached to the motion. On September 20, 2018, Defendant Garvey filed Defendant David Garvey M.D.'s Opposition to Plaintiff's Motion for Leave to Amend Complaint. On September 24, 2018, Defendant PHC filed Defendant PHC-ELKO, Inc. dba Northeastern Nevada Regional Hospital's Opposition to Plaintiff's Motion for Leave to Amend Complaint and Defendant PHC-ELKO, Inc. dba Northeastern Nevada Regional Hospital's Joinder to Defendant David Garvey, M.D.'s

Opposition to Plaintiff's Motion for Leave to Amend Complaint. On that same date, Defendant REACH Air filed REACH Air Medical Services, LLC's Memorandum in Opposition to Plaintiff's Motion for Leave to Amend Complaint. On September 28, 2018, Defendants Crum, Stefanko, & Jones Ltd filed Defendant, Crum, Stefanko, & Jones Ltd, d/b/a Ruby Crest Emergency Medicine's Joinder to Defendant PHC-ELKO, Inc. dba Northeastern Nevada Regional Hospital's Opposition to Plaintiff's Motion for Leave to Amend Complaint. On October 1, 2018, Defendant Garvey filed Defendant David Garvey, M.D.'s Joinder to Defendant REACH Air Medical Services, LLC's Memorandum in Opposition to Plaintiff's Motion for Leave to Amend Complaint. On October 2, 2018, Plaintiff filed Plaintiff's Reply to David Garvey, M.D.'s Opposition to Plaintiff's Motion for Leave to Amend Complaint; Plaintiff's Reply to Defendant PHC-ELKO Inc.. dba Northeastern Nevada Regional Hospital's Opposition to Plaintiff's Motion for Leave to Amend Complaint; and, Plaintiff's Reply to REACH Air Medical Services, LLC's Opposition to Plaintiff's Motion for Leave to Amend Complaint.

On October 4, 2018, Plaintiff filed a Request for Review. On October 5, 2018, Defendant PHC filed a Request for Submission of Defendant PHC-ELKO, Inc. dba Northeastern Nevada Regional Hospital's Joinder to Defendant David Garvey, M.D.'s Opposition to Plaintiff's Motion for Leave to Amend Complaint.

A hearing on this matter was held on June 5, 2019. None of the parties was present. Plaintiff was represented by Jennifer Morales, Esq. Defendant Garvey was represented by Alissa Bestick, Esq. Defendant PHC was represented by Zachary Thompson, Esq. Defendant REACH Air was represented by Austin Westergard, Esq. Defendants Crum, et.al. were represented by Gerald Tan, Esq. The Court, having considered the documents filed by the parties and the oral arguments, finds and orders as follows.

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Plaintiff seeks leave of the Court to file her Third Amended Complaint. All Defendants have opposed the amendment for several reasons. In Adamson v. Bowker, 85 Nev. 115, 121, 450 P.2d 796, ___ (1969), the Nevada Supreme Court quoted with approval Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 230, 9 L. Ed. 2d, 222, 226 (1962), wherein it was stated:

> If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendment previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be "freely given."

In the case at hand, the Complaint was filed June 22, 2017. The original Complaint included a claim for punitive damages in the Fifth Claim for Relief (Loss of Consortium). On July 20, 2017, Defendant PHC filed its Motion for Partial Dismissal of Plaintiff's Complaint. PHC sought dismissal of the first claim for relief and the punitive damages portion of the Fifth Claim for Relief. On August 3, 2017, Defendant Garvey filed a Motion to Dismiss Plaintiff's prayer for punitive damages. On August 28, 2017, Defendant REACH Air filed its Answer to Complaint as well as its Joinder in David Garvey, M.D.'s Motion to Dismiss Plaintiff's Request for Punitive Damages. On September 1, 2017, Defendant Garvey filed his Request for Submission of his Motion to Dismiss.

According to Defendant REACH Air, in its opposition to the motion to amend, on October 17, 2017, Plaintiff amended her complaint, omitting any claim for punitive damages. The court docket does not show an Amended Complaint filed on October 17, 2017. An Amended Complaint is loose in the court file with a notation, written in red ink, "REC'D 10/20/17." It does not have a certificate of service attached. The Amended Complaint was actually filed on February 5, 2018, but it, also, does not include a certificate of service, so the Court cannot tell when, or if, it was served on the parties. The Amended Complaint does not contain any claim for punitive damages and does not request punitive damages in the prayer.

Moreover, at page 13 of the Amended Complaint, under the Fifth Claim for Relief, the heading states, "Plaintiff Eli Colburn's Claim Against All Defendants." Eli Colburn is not a party to this action.

In any event, on October 12, 2017, Defendant PHC-ELKO, Inc. dba Northeastern Nevada Regional Hospital's Answer to Amended Complaint was filed. On November 13, 2017, REACH Air filed its Answer to Amended Complaint. On February 2, 2018, a Stipulation and Order to Amend the Amended Complaint was filed. On February 12, 2018, Plaintiff filed her Second Amended Complaint. It does not include a claim or prayer for punitive damages or a certificate of service. However, on April 23, 2018, Defendant David Garvey M.D.'s Answer to Plaintiff's Second Amended Complaint was filed. On May 25, 2018, an Order Setting Hearing on Pending Motions was filed. A hearing was scheduled for one-half day on September 6, 2018, on Defendant PHC's motion for partial dismissal; Defendant Garvey's motion to dismiss the request for punitive damages; and Defendant REACH Air's motion to dismiss the request for punitive damages. On June 21, 2018, Defendant, Crum, Stefanko, & Jones Ltd dba Ruby Crest Emergency Medicine's Answer to Plaintiff's Second Amended Complaint was filed.

On June 28, 2018, the Joint Case Conference Report was filed. All parties participated except Defendants Crum, et.al. The report was signed by the attorneys for the participating parties. The only mention of punitive damages is included in a recitation of Defendant REACH Air's Affirmative Defenses Twenty-Ninth through Thirty-Sixth.

The hearing on the various motions to dismiss went forward on September 6, 2018, with counsel appearing for all parties except Defendants Crum, et.al. At that hearing, counsel informed the Court that they would not be arguing the motions to dismiss the punitive damages request because punitive damages had been omitted from the Amended Complaint and Second Amended Complaint. Additionally, Plaintiff had filed her Motion to Amend Complaint two days before the hearing. Plaintiff's counsel told the Court that punitive damages had been unintentionally omitted by her office from the Amended Complaint and Second Amended

Complaint.

On September 10, 2018, Plaintiff filed her Errata to Plaintiff's Complaint, Amended Complaint and Second Amended Complaint. Exhibit 1 to the Errata is the *curriculum vitae* of Kenneth Scissors, M.D., the doctor who had authored the affidavit attached to the three complaints. At the September 6 hearing, the Court had informed Plaintiff's counsel that, although Dr. Scissors had referenced the *curriculum vitae* as an exhibit to his affidavit, it was not in fact attached. The Court, therefore, was unable to discern, on the basis of the affidavit, whether Dr. Scissors practiced in a field "substantially similar" to that involved in this case.

Concerning the motion presently before the Court, Plaintiff's proposed Third Amended Complaint contains the punitive damages request in the Fifth Claim for Relief that was in the original Complaint but omitted from the next two complaints. It also contains, for the first time, punitive damages allegations in the first four claims for relief.

In Defendant Garvey's opposition to the motion to amend, his counsel asserts that he sent an email to Plaintiff's counsel on April 10, 2018, five months before Plaintiff filed her Motion to Amend Complaint, stating that Defendant Garvey would be filing an answer to Plaintiff's Amended Complaint, given that the Amended Complaint no longer sought punitive damages. An email is attached to the opposition supporting this allegation. Plaintiff's counsel did not dispute this. In its opposition, PHC-ELKO states that Plaintiff delayed seeking leave to amend for seven months. At the September 6 hearing, Plaintiff's counsel had no explanation for the delay. She blamed her paralegal for removing the punitive damages language. The delay is too great, whether it was five months or seven months. Additionally, Plaintiff filed two amended complaints, both times omitting any allegations or prayer for punitive damages. In the meantime, several defendants filed answers, triggering the early case conference which occurred on May 9, 2018, and was attended by counsel for all parties except Defendants Crum et.al. The Joint Case Conference Report was filed on June 28, 2018, signed by counsel for all parties except Defendants Crum, et.al. Discovery then began. At the September 6, 2018, hearing, the three

appearing defendants did not argue their motions to dismiss because Plaintiff had filed her Motion to Amend Complaint two days before the hearing.

Although several defendants have alleged that they have been prejudiced by the delay, it is not necessary that this Court find any prejudice. The existence of prejudice is but one example cited by the Foman and Adamson courts of reasons for which a trial court may deny a motion to amend. Two of the other examples in those cases are "undue delay," and "repeated failure to cure deficiencies by amendment previously allowed . . . ." Id. Plaintiff delayed seeking leave to amend, after which she was or should have been aware of the problem, for at least five months, and for possibly as many as seven months. Plaintiff amended two times after her original complaint, both times excluding the issue of punitive damages. The amendment now sought by Plaintiff not only includes punitive damages as sought in the original complaint, it now adds the issue of punitive damages, where none existed before, to four claims for relief. Finally, the proposed Third Amended Complaint does not even contain a prayer for punitive damages. This is simply too much. The allegations made by Plaintiff are of the utmost seriousness. She alleges that the actions of these defendants led to the death of her husband. Surely, Plaintiff's counsel could have paid more attention to this case than she apparently has.

Plaintiff asks that any denial of her Motion to Amend be without prejudice so that she can seek to amend at a later date. A denial without prejudice will not cure the problems caused by Plaintiff's undue delay and previous failures to correct the deficiencies.

Therefore, IT IS HEREBY ORDERED that Plaintiff's Motion to Amend Complaint is **DENIED** with prejudice.

SO ORDERED this 15 day of October, 2019.

NANCY PORTER
DISTRICT JUDGE - DEPARTMENT 1

CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I hereby certify that I am an employee of the Fourth Judicial District Court, Department 1, and that on this 16th day of October, 2019, I deposited for mailing in the U.S. mail at Elko, Nevada, postage prepaid, a true file-stamped copy of the foregoing **ORDER DENYING PLAINTIFF'S MOTION TO AMEND COMPLAINT** addressed to:

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Julie Louise Gruenda

# EXHIBIT N

**EXHIBIT B**
**CUSTODIAN OF RECORDS AFFIDAVIT**

STATE OF Nevada )
) ss.
COUNTY OF Elko )

Affiant being first duly sworn deposes and says:

1. That the Affiant is the Custodian of Records for ELKO COUNTY CORONER-MEDICAL EXAMINERS.

2. That on the 30th day of July, 2018, the Affiant was served with a Subpoena Duces Tecum in connection with *Schwartz v. Garvey, et al* Case No. CC-C-17-439, calling for the production of all documents contained in ELKO COUNTY CORONER-MEDICAL EXAMINERS' file pertaining to Douglas Schwartz.

X That the Affiant has examined the original of the above-referenced documents and has made a true and exact copy of them except that all privileged, protected, and irrelevant materials have been withheld or redacted and that the reproduction of them attached hereto is true and complete. Note: EPD accident report with held.

OR

☐ That the Affiant has performed a thorough search of ELKO COUNTY CORONER-MEDICAL EXAMINERS' files and produced no records or documents responsive to this request. It is to be understood that this does not mean that records do not exist under another spelling, name or classification.

FURTHER AFFIANT SAYETH NAUGHT.

Dated this 30th day of July, 2018.

ELKO COUNTY CORONER-MEDICAL EXAMINERS

By: _____
Custodian of Records

Sgt. W.S. Czeglek
Chief Dep. Coroner

No Notary Required per NRS 53.04

# AUTOPSY PROTOCOL

SCHWARTZ, Douglas 16-01938A-ELK

DATE OF DEATH: ~~6/22/16 11:56 PM~~ @ 6/23/16 @ 01:33

DATE OF AUTOPSY: 6/24/16 8:45 AM

CONSENT GRANTED BY: Elko County Sheriff/Coroner

AUTOPSY PERFORMED AT: Washoe County Medical Examiner's Office

INVESTIGATOR: Michael Bergman

PATHOLOGIST: Katherine Raven, M.D.

## FINAL PATHOLOGICAL DIAGNOSES

I. Blunt force injury of head and torso:
   A. Cutaneous abrasion, right forehead.
   B. Multifocal areas of subgaleal hemorrhage.
   C. Acute rib fractures and focal subpleural hemorrhage of right lung, small pneumothorax (less than 10% per clinical record).
   D. Bumper injury left hip.
   E. Massive aspiration (per clinical report and residual at autopsy):
      1. Status post cricothyrotomy).
      2. Subcutaneous emphysema

II. Blunt force injury of extremities.
   a. Cutaneous abrasions.

III. Cardiomegaly, mild (410 grams) and atherosclerotic cardiovascular disease.

IV. Fatty liver, moderate

## OPINION

This 58-year-old man was reportedly hit by a motor vehicle. He was taken to the emergency room in Elko where several CT scans were done. He was noted to have right-sided rib fractures, however, he was stable and talking. According to the medical record, he began experiencing difficulty breathing and the decision to sedate and intubate him was made. During the procedure, he reportedly suffered a massive aspiration of gastric contents. The cause of death is attributed to aspiration of gastric contents due to blunt force injury. The manner of death resides with the Elko County Sheriff's Office.

Katherine Raven, M.D.
Medical Examiner

3-1-17
Date Signed

EXHIBIT O

IN THE FOURTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF ELKO

DIANE SCHWARTZ, individually and as Special Administrator of the Estate of DOUGLAS R. SCHWARTZ, deceased,
Plaintiff,
vs.
DAVID GARVEY, M.D., an individual; BARRY BARTLETT, an individual (Formerly Identified as BARRY RN); CRUM, STEFANKO & JONES LTD, dba RUBY CREST EMERGENCY MEDICINE; PHC-ELKO INC. dba NORTHEASTERN NEVADA REGIONAL HOSPITAL, etc., et al.,
Defendants.

NO. CV-C-17-439

# DEPOSITION OF DIANE SCHWARTZ

LAS VEGAS, NEVADA

VOLUME 1

REPORTED BY:
KENDALL D. HEATH
NEV. CCR NO. 475
CALIF. CSR NO. 11861
JOB NO.: 2959290
PAGES 1 - 163

issue?

MS. MORALES: Objection.

THE WITNESS: Really don't know what his reasoning was.

BY MS. WOODRUM:

Q Did he discuss any of the risks of intubation with you?

A No.

Q Did he discuss any alternatives?

A No.

Q Is it fair to say that at the time you left the room, you weren't sure whether or not Doug would be intubated or not, you were just aware it was a possibility?

A Yes.

Q Were you asked to leave the room before they started the chest tube?

A Yes, because they said they needed to sedate him to put the chest tube in. And they just told me to wait in the E.R. and they would let me know when he was on the flight.

Q Was he sedated at all when you were in the room?

A No.

Q So the sedation began after you left?

A Yes.
Q So since you weren't in the room, you have no knowledge whether or not Dr. Garvey further discussed intubation with Doug after you left the room?
A Correct.
Q And do you have any reason to believe that Doug would have said he didn't want to be intubated?
A I have no idea what he would have said to him, so I can't answer that.
Q In your opinion, at the time you left the room, Doug was lucid and would have been able to make his own medical decisions?
A Yes.
Q How long were you -- after you left for the chest tube and eventually intubation, how long were you waiting in the waiting room?
A Not even really sure. A good hour and a half I would say, or more.
Q Prior to leaving the room, were you given any estimate of time how long you should expect it to take?
A I thought they just said it would just take like 30 minutes or so.
Q When the 30 minutes came and gone, were you -- did you get nervous at all?

have any reason to understand that?

A I've never heard that before.

Q To your knowledge, your husband never drank alcohol before?

A Never. And Danny said he never witnessed him drink any alcohol that night. Never heard that before, but interesting.

Q With respect to the intubation, and I just want to make sure the record is clear, and I know you talked about it earlier, to your knowledge, you don't know one way or the other whether or not your husband consented to intubation?

A I do not know if he signed any papers or consented, no.

Q Do you know if there was ever a discussion between your husband and a medical professional about intubation?

A I do not know. If it took place, it was after I left the room.

Q Is your journal that you keep, you keep on a laptop at home?

A Yes.

Q Tell me what you did as you look through to find the entries that are relevant to this case?

A Tell you what I did? Like what do you mean?