

**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. Electronically Filed  
Sep 23 2021 09:22 a.m.  
District Court No. : Elizabeth A. Brown  
Clerk of Supreme Court

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**APPENDIX OF EXHIBITS TO PETITION FOR  
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8 IN THE FOURTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
9 IN AND FOR THE COUNTY OF ELKO  
10

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

13 Plaintiff,

14 vs.

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

22 Defendants.  
23

CASE NO. CV-C-17-439  
Dept. No.: 1

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

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1 Defendant, DAVID GARVEY, M.D., by and through his counsel of record, LEWIS  
2 BRISBOIS BISGAARD & SMITH LLP, hereby files his Response to Plaintiff's Surreply to  
3 the Partial Summary Judgment Motion and Requests that this Court Disregard Plaintiff's  
4 Misabeled and Untimely Motion for Reconsideration of this court's October 16, 2019  
5 Order Denying Leave to Amend *With Prejudice*.

6 Plaintiff submits an improper Surreply to a fully briefed summary judgment motion  
7 (the "Surreply"). The Surreply includes a mislabeled and untimely request for  
8 reconsideration of this Court's order last year, denying Plaintiff leave to amend to allege  
9 punitive damages. Without these allegations, Plaintiff cannot overcome the Trauma Cap  
10 statute. Leave to amend was denied with prejudice due to Plaintiff's lack of diligence. Her  
11 inattention to this case is underscored by her failure to file a writ or timely seek  
12 reconsideration of the 2019 order. Plaintiff knows that her emergency department expert  
13 Dr. Womack's opinion that Dr. Garvey rendered emergency care to her husband in bad  
14 faith currently rests on unpled claims. Plaintiff's Surreply improperly attempts to defeat  
15 summary judgment by reinserting those unpled claims into the Complaint, without ever  
16 addressing the untimeliness of her request. This Court already rejected these very same  
17 arguments, having found Plaintiff did not pursue her claims with diligence. Nothing has  
18 changed. This Court should strike this latest attempt to circumvent a prior ruling through a  
19 flagrant disregard of Nevada Civil Procedure.

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This reply is made and based on the pleadings and papers on file herein, the attached memorandum of points and authorities, and any oral argument permitted at the time of hearing on this matter.

DATED this 17<sup>th</sup> day of September, 2020.

LEWIS BRISBOIS BISGAARD & SMITH LLP

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION

3 Even though the parties have fully briefed Dr. Garvey's summary judgment motion,  
4 Plaintiff embarks on a briefing odyssey by submitting a Surreply—without leave of court—  
5 that attempts to reinsert punitive damages allegations she removed from her own  
6 Complaint several years ago. This Court denied further leave to amend with prejudice,  
7 citing Plaintiff's lack of diligence in 2019. The Surreply is an improper attempt to defeat  
8 summary judgment with a claim that cannot be inserted into the Complaint, and this Court  
9 should not tolerate such litigation by ambush.

10 Plaintiff's ninth inning attempt to revive her punitive damages claim should be  
11 denied *again*. Once this Court denied Plaintiff leave to amend nearly one year ago,  
12 Plaintiff's only remedy was to (1) seek writ relief or (2) bring a timely motion for  
13 reconsideration under NRCP Rule 60. She did neither. Her request "for leave to amend" is  
14 really an untimely request to overturn the denial of leave to amend with prejudice finding  
15 under Rule 60. This Court got it right the first time, since Plaintiff's inattention to this case  
16 has only continued. As if Nevada Civil Procedure does not apply to her, Plaintiff flaunts this  
17 court's "lack of diligence finding" by failing to explain her failure to seek writ review or bring  
18 a timely motion for reconsideration. The failure to comply with the time limits in Rule 60 are  
19 jurisdictional.

20 Even if the motion was timely, which it is not, leave to amend should be denied.  
21 Plaintiff fails to inform this Court when she obtained the newly discovered evidence, what  
22 the new evidence is, and why she waited to seek leave until *after* Dr. Garvey brought a  
23 summary judgment motion, when she intended to raise bad faith as an issue. Worse,  
24 Plaintiff waited until after she opposed the summary judgment motion to seek leave.  
25 Further, Plaintiff's arguments are all over the map. In her Opposition, Plaintiff tries to  
26 overcome summary judgment by simply asserting—not demonstrating—that further  
27 discovery is needed. The argument is seriously undercut by the 30-plus page affidavit  
28 submitted by Dr. Womack, who relies upon medical records to formulate his opinions. In

1 her Surreply, Plaintiff contends she has new evidence [undisclosed] that supports her  
2 punitive damages claim. Which is it?

3 Even worse, Plaintiff not only seeks to add a punitive damages claim, she wants to  
4 bolster her compliance with the affidavit requirement under NRS 41.071. This court issued  
5 an Order to Show Cause regarding dismissal because Plaintiff's Complaint failed to identify  
6 the qualifications of Dr. Scissors. Dr. Garvey saw no need to brief the issue because the  
7 Complaint included no punitive damages allegations, and the matter was dropped. Now,  
8 over three years later, Plaintiff wishes to include a second affidavit from another doctor. But  
9 nothing prevented her from obtaining Dr. Womack's affidavit in June of 2017 when this  
10 action was filed; Plaintiff certainly makes no such showing. If Plaintiff intends that Dr.  
11 Womack's affidavit—not Dr. Scissors's affidavit—is now the operative affidavit for purposes  
12 of the Complaint then the entire Complaint must be dismissed on the ground that the  
13 statute of limitation has long since passed (by years).

14 Plaintiff does not identify what she is adding to her Third Amended Complaint,  
15 leaving defense counsel and this Court to guess at what has been inserted or deleted. It is  
16 highly prejudicial to Dr. Garvey to allow Plaintiff to amend, not only her medical expert  
17 affidavit, but add punitive damages allegations at this late juncture, without showing the  
18 delay is justified. If Plaintiff has her way, trial in this matter will have to be continued to  
19 allow Dr. Garvey additional time to challenge the pleading and conduct further discovery.

20 The bad faith exception to the Trauma Cap statute is not automatic, as Plaintiff  
21 argues in her Surreply. The exception applies only if that issue is raised by the pleadings.  
22 Here, it was not. Plaintiff argues the Trauma Cap statute and punitive damages are  
23 mutually exclusive. But Dr. Womack, specifically equates "reckless conduct" under the  
24 Trauma Cap statute with "conscious disregard" for punitive damages in NRS 42.001(1),  
25 impairing her argument that no overlap exists. Plaintiff's desperate attempt to amend now  
26 exposes that even she is not convinced of her own position. Again, it is transparently clear  
27 that Plaintiff's desperate attempt to amend the Complaint to add punitive damages is solely  
28 in order to get around the Trauma Cap statute which so obviously applies to this case.

1 Plaintiff's fight then is with the Nevada legislature, not with Dr. Garvey. Dr. Garvey has the  
2 right to have the law applied fairly in this case.

3 A Surreply addressing the merits of a fully briefed motion is improper. The time to  
4 challenge the order denying leave to amend with prejudice is long gone. Plaintiff is the  
5 master of her own pleading and should be limited to her present Complaint, and this new  
6 roundelay should be stricken as improper.

7 **II. ARGUMENT**

8 **A. This Court Should Strike Plaintiff's Improper Surreply.**

9 Plaintiff's Surreply is improper and should be stricken. There is no provision in the  
10 Nevada Rules of Civil Procedure for a surreply, and Plaintiff should have sought leave of  
11 Court before filing another brief on the merits *after* full briefing of the motion. The party  
12 opposing summary judgment does not get two bites at the apple. When a "reply does not  
13 present new arguments nor new evidence," a surreply is improper and a Court should not  
14 grant leave to file one. *See Jordan v. Terhune*, 2009 U.S. Dist. LEXIS 8523, 2009 WL  
15 276764 at \*3 ["Defendants' reply does not present new arguments nor new evidence; they  
16 simply note the problems with Plaintiff's evidentiary support. The surreply is improper". As  
17 relevant here, "[e]vidence submitted in direct response to evidence raised in opposition . . .  
18 is not 'new.'" *In re ConAgra Foods, Inc.*, 302 F.R.D. 537, 559 (C.D. Cal. 2014) (citations  
19 omitted)); *see also Terrell v. Contra Costa County*, 232 Fed. Appx. 626, 629 n. 2 (9th Cir.  
20 Apr. 16, 2007) (Unpub. Disp.) [concluding that evidence adduced in reply was not new  
21 where "[t]he Reply Brief addressed the same set of facts supplied in Terrell's opposition to  
22 the motion but provides the full context to Terrell's selected recitation of facts"]; *Edwards v.*  
23 *Toys 'R' US*, 527 F.Supp.2d 1197, 1205 n. 31 (C.D. Cal. 2007) ["Evidence is not 'new,'  
24 however, if it is submitted in direct response to proof adduced in opposition to a motion"].

25 A surreply is potentially warranted if the Defendant raises new arguments or points  
26 to new evidence in the reply. That did not happen here. Dr. Garvey asserted no new  
27 arguments and relied on no new evidence. He responded to the arguments and facts  
28 raised in Plaintiff's Opposition. Plaintiff's Surreply is an attempt to demonize Dr. Garvey

1 based on an unpled claim of bad faith. She repeats, multiple times, large sections of Dr.  
2 Womack's improper affidavit to potentially prejudice this Court with a medical opinion that  
3 is beyond the scope of the pleadings. This Court should not consider any argument  
4 advanced in the Surreply that adds nothing to the Court's analysis—providing an additional  
5 reason summary judgment should be granted.

6       **B.       The Surreply Includes a Disguised and Untimely Move for Reconsideration of**  
7       **This Court's October 16, 2019 Order Denying Leave With Prejudice.**

8       Rather than properly noticing a motion for reconsideration of the 2019 order denying  
9 leave with prejudice, Plaintiff surreptitiously titles her motion as one seeking leave to  
10 amend—as if she still possesses that right. Dr. Garvey and the Court do not learn Plaintiff  
11 really seeks reconsideration of the 2019 order until page 16, where she states: “This court  
12 can reconsider its prior order pursuant to NRCP 60 because of new evidence in this case  
13 that justifies relief.”

14       Reconsideration of the 2019 order is untimely under NRCP Rule 60(c). The motion  
15 shall be made “no more than six months after the date of the proceeding or the date of  
16 service of the written notice of entry of judgment or order, whichever is later. The time for  
17 filing the motion cannot be extended under Rule 6(b).” This rule is jurisdictional. *Doan v.*  
18 *Wilkerson*, 130 Nev. Adv. Op. 48, 327 P.3d 498, 501 (2014) [District Court does not have  
19 jurisdiction to hear untimely motion for Rule60(b) relief].

20       Plaintiff dodges the issue. This Court's order denying leave to amend with  
21 prejudice—preventing Plaintiff from alleging punitive damages claim—was entered on  
22 October 16, 2019. See **Exhibit M** to Weaver Decl. in support of PMSJ “Weaver Decl.” The  
23 last day to move for relief under Rule 60(c) was on April 14, 2020. Plaintiff's request is  
24 untimely. The plain language of Rule 60(c) requires that her request for leave to amend—  
25 however styled—be denied on this basis.

26       Moreover, “leave [to amend] shall be freely given when justice so requires.” NRCP  
27 15(a) (2005). Sufficient reasons to deny leave include “undue delay, bad faith or dilatory  
28 motives on the part of the movant” or if prejudice to the opponent results. *Nutton v. Sunset*

1 *Station, Inc.*, 131 Nev. 279, 284, 357 P.3d 966, 970 (Ct. App. 2015) (internal quotation  
2 marks omitted). Each of those reasons are present here since Plaintiff did not timely move  
3 to amend, and did not timely seek writ relief or move for reconsideration.

4 **C. Even if Reconsideration Is Timely, There is No Newly Discovered Evidence.**

5 Even if Plaintiff filed a timely motion—which she did not—she did not meet her burden  
6 to show new evidence warrants reconsideration because she fails to address her own  
7 diligence or identify the new evidence. Rule 60(b)(2) permits a party to move for relief from  
8 an order based on “newly discovered evidence that, with reasonable diligence, could not  
9 have been discovered in time to move for a new trial.”

10 The standard for granting relief on the basis of newly discovered evidence is the  
11 same whether relief is sought under Rule 60(b)(2) or pursuant to a motion for a new trial.  
12 *Kille v. Poag*, 2017 Nev. Dist. LEXIS 1379 (2017); *see also Compass Technology, Inc. v.*  
13 *Tseng Labs., Inc.*, 71 F.3d 1125, 1130 (3d Cir. 1995) (discussing the relationship between  
14 Fed. R. Civ. P. 60(b)(2) and Fed. R. Civ. P. 59). Newly discovered evidence can justify a  
15 new trial only if such evidence (1) is material and not merely cumulative, (2) could not have  
16 been discovered prior to trial through the exercise of reasonable diligence, and (3) would  
17 probably have changed the outcome of the trial. The party seeking a new trial ‘bears a  
18 heavy burden’ since relief ‘should be granted only where extraordinary justifying  
19 circumstances are present.’” *Id.* at \*3.

20 Plaintiff cannot meet her burden under Rule 60(b)(2). Plaintiff states: “In the present  
21 case, new evidence justifies this Court granting Plaintiff relief from its prior order pursuant  
22 to NRCP 60(b)(6). Plaintiff last moved to amend in September 2018. Plaintiff sought this  
23 amendment based on the medical records and the affidavit of Dr. Scissors. Since that time,  
24 Plaintiff has conducted numerous depositions, including the depositions of Dr. Garvey and  
25 many of the attending nurses. Plaintiff has also received numerous documents supporting  
26 amendment. With this information, Plaintiff retained the services of Dr. Seth Womack. Dr.  
27 Womack has taken this information and offered expert opinions that such gross violations  
28 of the applicable standard of care rises to reckless, willful and wanton conduct.” *See*

1 Surreply 17. Plaintiff claims she is seeking relief for “any other reason that justifies relief”  
2 based on Rule 60(b)(6), but she is affirmatively states she is moving on the grounds of  
3 newly discovery evidence, which is governed by Rule 60(b)(2).

4 Plaintiff argues she took the depositions of Dr. Garvey, various nurses, and other  
5 witnesses after she last moved to amend the Complaint (*see* Surreply p. 17), but she fails  
6 to point out that these depositions were taken *before* this court denied leave to amend  
7 without prejudice.<sup>1</sup> Dr. Womack’s later reliance on some of this testimony to opine on bad  
8 faith does not make the evidence newly discovered, because it was already in existence at  
9 the time of the court’s order. Plaintiff cannot meet her burden under Rule 60(b).

10 **D. Plaintiff’s Expert Equates the Trauma Cap Statute’s Recklessness With**  
11 **Conscious Disregard Necessary for Punitive Damages.**

12 Plaintiff’s contention that punitive damages requires more than mere recklessness is  
13 not well taken. Contrary to Plaintiff’s assertion that punitive damages have nothing to do  
14 with the Trauma Cap statute, Dr. Womack actually equates the two standards in his  
15 affidavit by defining “recklessness” to include conscious disregard under NRS 42.001(1).  
16 Plaintiff quotes Dr. Womack extensively in her Surreply. Dr. Womack actually defines the  
17 “reckless conduct” he believes Dr. Garvey is guilty of when he states the following: “Dr.  
18 Garvey acted with reckless conduct. It is my understanding that reckless conduct is  
19 deemed to be that conduct in which the person knew or should have known at the time that  
20 the person rendered care or assistance would be likely to result in injury so as to affect the  
21 life or health of another person.” See Opp. p. 17 (emphasis added). Compare Dr.  
22 Womack’s definition of “reckless conduct” with the Legislature’s definition of “conscious  
23 disregard” in NRS 42.001(1): “‘Conscious disregard’ means the knowledge of the probable  
24 harmful consequences of a wrongful act and a willful and deliberate failure to act to avoid  
25

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26 <sup>1</sup> Plaintiff was deposed on January 23, 2019; Donna Kevitt was deposed on March 4, 2019, Susan Olson was  
27 deposed on March 4, 2019, and Dr. Garvey was deposed on June 25, 2019. The Court’s order was filed on  
28 October 16, 2019.



1 those consequences.” (Emphasis added). The overlapping element in both statutes is the  
2 Defendant’s knowledge and conduct—which includes a failure to act—that leads to harmful  
3 consequences. There is no real difference between recklessness and malice under the law  
4 (*see Nevada Cement Company v. Lemler*, 89 Nev. 447, 514 P.2d 1180 (1973) [punitive  
5 damages contemplate willful and intentional conduct done in reckless disregard of possible  
6 results]; *Schwartz v. Estate of Greenspun*, 110 Nev. 1042, 1053 (1994) [reckless disregard  
7 relevant in proving malice]), and if there was, Plaintiff would not be campaigning so hard to  
8 overturn this court’s “with prejudice” order. In fact, her Surreply specifically states Dr.  
9 Garvey was “grossly negligent, reckless, willful and wanton,” in reliance on Dr. Womack’s  
10 affidavit. *See* Surreply pp. 22-23. There can be no question Plaintiff is using Dr. Womack’s  
11 declaration to assert a punitive damages claim. Moreover, by opining Dr. Garvey acted with  
12 recklessness and in bad faith, Dr. Womack is offering a legal opinion on an ultimate issue—  
13 albeit, an unpled one.

14       **E.       It Would be Fundamentally Unfair to Dr. Garvey to Allow Retroactive**  
15       **Amendment With a Totally Different Expert Affidavit.**

16       This Court may recall that on January 30, 2019, it issued an order to show cause  
17 why the Complaint should not be dismissed due to Plaintiff’s failure to provide a description  
18 as to Dr. Scissors’ qualifications, whose affidavit was attached to the Complaint. Based on  
19 the fact Dr. Scissors was not opining that Dr. Garvey acted in bad faith, and the absence of  
20 punitive damages allegations in the Complaint, Dr. Garvey did not see the need to address  
21 the issue, and the OSC was dismissed. Plaintiff finally did submit a copy of Dr. Scissor’s  
22 CV. It would be manifestly unfair to permit Plaintiff at this late stage to add a 30-plus page  
23 affidavit from Dr. Womack opining Dr. Garvey acted in bad faith. Plaintiff does not even  
24 address what prevented her from relying on Dr. Womack’s affidavit in 2017 when she filed  
25 her action. Moreover, if Plaintiff is now saying Dr. Womack’s affidavit is the operative  
26 affidavit attached to the Complaint then the entire Complaint must be dismissed because  
27 by definition the initial affidavit attached to the Complaint—Dr. Scissors’s—is defective.

28       The Supreme Court’s recent remarks on similar improper maneuvering at the

1 summary judgment state are insightful here: “It is clearly established that a nonmoving  
2 Plaintiff may not raise new legal claims for the first time in response to a summary  
3 judgment motion by a defendant. *See Wasco Prods., Inc. v. Southwall Techs., Inc.*, 435  
4 F.3d 989, 992 (9th Cir. 2006) (stating ‘summary judgment is not a procedural second  
5 chance to flesh out inadequate pleadings’ (internal quotation omitted)); *Tucker v. Union of*  
6 *Needletrades, Indus., & Textile Emps.*, 407 F.3d 784, 788 (6th Cir. 2005) (clarifying that  
7 once a case has progressed to the summary judgment stage, liberal pleadings standards  
8 that permit leave to amend freely no longer apply). Permitting a Plaintiff to do otherwise  
9 raises concerns of efficiency and judicial economy, *see Gilmour v. Gates, McDonald & Co.*,  
10 382 F.3d 1312, 1315 (11th Cir. 2004), as well as concerns of unfair surprise to the  
11 defendant. *Tucker*, 407 F.3d at 788.” The same improper maneuvering applies here, and  
12 Dr. Garvey should not be subject to last minute bait and switch tactics before the summary  
13 judgment hearing.

14 **F. Plaintiff Unfairly Places the Burden of Identifying Changes to Her Complaint**  
15 **Upon Defense Counsel and This Court.**

16 In all fairness, Plaintiff should have submitted an interlineated Third Amended  
17 Complaint. Without identifying every insertion and deletion in her proposed pleading,  
18 Plaintiff unfairly shifts the burden of making that determination upon this Court and defense  
19 counsel.

20 **G. Plaintiff's False Representation That Leave Was Denied *Without Prejudice***  
21 **Was Not Merely a Typographical Error.**

22 Plaintiff claims she made a typographical error when she referred to this Court's  
23 order denying leave to amend without prejudice. She claims “Defendant attempts to  
24 confuse the issue contained in Plaintiff's Opposition by pointing to the typographical error.  
25 But at the end of the day, Plaintiff only mentioned this Court's prior ruling for procedural  
26 history.” *See Blazich Aff.* ¶ 7. Her Opposition tells a different story: “Plaintiff later moved to  
27 Amend to claim Punitive Damages. The Court denied Plaintiff's Motion, but notes the denial  
28 was without prejudice.” (Opp. p. 3.) Elsewhere, she states: “Defendant Garvey argues that

1 Plaintiff's have moved for punitive damages, and such request was denied by this Court.  
2 But Defendant ignores that Plaintiff's Motion was denied without prejudice. Moreover, that  
3 was prior to the discovery period. Plaintiffs now believe they have more than sufficient  
4 evidence obtained and forthcoming that will more than support an amendment on a  
5 punitive damages claim." See Opp. p. 18. Certainly, these are statements of fact, not  
6 typographical errors. At least for the sake of maintaining credibility with the Court, Plaintiff  
7 should have "come clean" and issued a retraction for misspeaking.

8 **H. A Continuance Would Vacate the Trial Date.**

9 Plaintiff has not shown good cause why an amendment to her Complaint should be  
10 allowed. However, if this Court were to grant leave to amend, the current trial date of May  
11 4, 2021, would need to be continued in order to afford Dr. Garvey a reasonable opportunity  
12 to challenge the pleading and bring additional discovery.

13 **I. By Opposing the Motion Without First Seeking Leave to Amend, Plaintiff**  
14 **Forfeited the Right to Seek Leave, and Her Dilatory Request Prejudices the**  
**Defendant.**

15 Plaintiff forfeited the right to seek leave to amend because she did not timely seek  
16 leave before opposing the summary judgment on the merits. It was improper for Plaintiff to  
17 submit a "countermotion" for leave to amend after all briefing has been completed. Plaintiff  
18 provided insufficient notice of her intent to seek leave to amend and forfeited the right to do  
19 so by opposing the motion based on unpled claims. Plaintiff should have first asked this  
20 Court to stay the motion so she could seek leave before her Opposition was due. Having  
21 failed to do so, she forfeited any right to seek leave now.

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1     III.     CONCLUSION

2             Plaintiff wanted to have the last word. She was not up front about her mistaken  
3 representations or the untimeliness of her motion. This Court's order denying leave to  
4 amend with prejudice has been final for some time, and there is no reason to overturn it,  
5 based on law or fact. Defendant Dr. Garvey respectfully requests that this Court disregard  
6 Plaintiff's Surreply in its entirety.

7             DATED this 17<sup>th</sup> day of September, 2020

8                             LEWIS BRISBOIS BISGAARD & SMITH LLP

9  
10                             By /s/ Alissa N. Bestick  
11                                 KEITH A. WEAVER  
12                                 Nevada Bar No. 10271  
13                                 ALISSA BESTICK  
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**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 17<sup>th</sup> day of September, 2020

LEWIS BRISBOIS BISGAARD & SMITH LLP

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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

**DEFENDANT DAVID GARVEY, M.D.'S  
ERRATA TO MOTION FOR PARTIAL  
SUMMARY JUDGMENT**

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Defendant David Garvey M.D., by and through his counsel or record, LEWIS BRISBOIS BISGAARD & SMITH LLP, hereby provides notice of an errata to Dr. Garvey's Motion for Partial Summary Judgment to include the reply and corresponding exhibits. The reference in the Motion for Partial Summary Judgment and Declaration of David Barcay, M.D. to "bilateral" flail segment was an inadvertent error that should have read right flail segment or flail segment.

DATED this 16th day of April, 2021.

LEWIS BRISBOIS BISGAARD & SMITH LLP

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**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.

By /s/ Emma L. Gonzales  
An Employee of  
LEWIS BRISBOIS BISGAARD & SMITH LLP

**CERTIFICATE OF SERVICE**

I hereby certify that on this the 16th day of April, 2021, a true and correct copy of  
**DEFENDANT DAVID GARVEY, M.D.'S ERRATA TO MOTION FOR PARTIAL  
SUMMARY JUDGMENT** was sent via electronic mail to the following:

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10 IN THE FOURTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
11 IN AND FOR THE COUNTY OF ELKO

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

14 Plaintiff,

15 vs.

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

23 Defendants.  
24

CASE NO. CV-C-17-439  
Dept. No.: 1

DEFENDANT DAVID GARVEY, M.D.'S  
ANSWER TO PLAINTIFFS' SECOND  
AMENDED COMPLAINT

25  
26 Defendant, DAVID GARVEY, M.D. (hereinafter referred to as "Defendant" or  
27 "Answering Defendant"), by and through his counsel of record, LEWIS BRISBOIS  
28 BISGAARD & SMITH LLP, answers Plaintiffs' Second Amended Complaint as follows:

1. This Answering Defendant is without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations contained in Paragraphs 1 and 2, and therefore denies such allegations.

2. Answering Paragraph 3, this Answering Defendant admits that at all times relevant, he was and is a medical doctor licensed in the State of Nevada.

3. This Answering Defendant is without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations contained in Paragraph 4, and therefore denies such allegations.

4. The allegations in Paragraphs 5 through 8 contain legal conclusions that do not call for a response from this Answering Defendant. To the extent that the allegations in Paragraphs 5 through 8 call for a response from this Answering Defendant, this Answering Defendant is without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations in Paragraphs 5 through 8, and therefore denies such allegations.

5. This Answering Defendant is without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations contained in Paragraphs 9 and 10, and therefore denies such allegations.

6. The allegations in Paragraph 11 contain legal conclusions that do not call for a response from this Answering Defendant. To the extent that the allegations in Paragraph 11 call for a response from this Answering Defendant, this Answering Defendant is without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations in Paragraph 11, and therefore denies such allegations.

## GENERAL ALLEGATIONS

1. Answering Paragraph 1 of the General Allegations, this Answering Defendant repeats and realleges his responses to the preceding paragraphs and incorporates the same by reference as though fully set forth therein.

2. This Answering Defendant is without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations contained in Paragraphs 2 through

22 of the General Allegations, and therefore denies such allegations.

FIRST CLAIM FOR RELIEF

(PROFESSIONAL NEGLIGENCE/WRONGFUL DEATH)

DR. DAVID GARVEY, BARRY BARTLETT, RUBY CREST, REACH AIR, AND NNRH

3. Answering Paragraph 23, this Answering Defendant repeats and realleges his responses to the preceding paragraphs and incorporates the same by reference as though fully set forth therein.

4. The allegations in Paragraph 24 contain legal conclusions that do not call for a response from this Answering Defendant.

5. This Answering Defendant denies the allegations contained in Paragraphs 25 through 30.

6. The allegations in Paragraph 31 contain legal conclusions that do not call for a response from this Answering Defendant. To the extent that the allegations in Paragraph 31 call for a response from this Answering Defendant, this Answering Defendant is without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations in Paragraph 31, and therefore denies such allegations.

7. This Answering Defendant denies the allegations contained in Paragraphs 32 through 35.

8. The allegations in Paragraphs 36 through 38 contain legal conclusions that do not call for a response from this Answering Defendant. To the extent that the allegations in Paragraphs 36 through 38 call for a response from this Answering Defendant, this Answering Defendant is without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations in Paragraphs 36 through 38, and therefore denies such allegations.

9. This Answering Defendant denies the allegations contained in Paragraphs 39 through 45.

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1 **FOURTH CLAIM FOR RELIEF**

2 (Lack of Informed Consent)

3 Against Defendant DAVID GARVEY, M.D.

4 18. Answering Paragraph 68, this Answering Defendant repeats and realleges  
5 his responses to the preceding paragraphs and incorporates the same by reference as  
6 though fully set forth therein.

7 19. The allegations in Paragraph 69 contain legal conclusions that do not call  
8 for a response from this Answering Defendant. To the extent that the allegations in  
9 Paragraph 69 call for a response from this Answering Defendant, this Answering  
10 Defendant denies the allegations contained in Paragraph 69.

11 20. This Answering Defendant denies the allegations contained in Paragraphs  
12 70 through 76.

13 **FIFTH CLAIM FOR RELIEF**

14 (Loss of Consortium)

15 DIANE SCHWARTZ's Claim Against All Defendants

16 21. Answering Paragraph 77, this Answering Defendant repeats and realleges  
17 his responses to the preceding paragraphs and incorporates the same by reference as  
18 though fully set forth therein.

19 22. This Answering Defendant is without sufficient knowledge or information to  
20 form a belief as to the truth or falsity of the allegations contained in Paragraph 78, and  
21 therefore denies such allegations.

22 23. This Answering Defendant denies the allegations contained in Paragraphs  
23 79 through 82.

24 **AFFIRMATIVE DEFENSES**

25 **FIRST AFFIRMATIVE DEFENSE**

26 Plaintiff's Second Amended Complaint fails to state a claim on which relief may be  
27 granted.

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SECOND AFFIRMATIVE DEFENSE

Plaintiff's damages, if any, were not proximately caused by this Answering Defendant's conduct.

THIRD AFFIRMATIVE DEFENSE

Plaintiff is comparatively at fault; Plaintiff's recovery, if any, should be reduced in proportion to Plaintiff's fault, or in the event Plaintiff's fault exceeds that of this Answering Defendant, Plaintiff is not entitled to any recovery.

FOURTH AFFIRMATIVE DEFENSE

Plaintiff's injuries and damages, if any, are the result of forces of nature over which this Answering Defendant has no control or responsibility.

FIFTH AFFIRMATIVE DEFENSE

Plaintiff is barred from asserting any claims against this Answering Defendant because the alleged damages were the result of one or more unforeseeable intervening and superseding causes.

SIXTH AFFIRMATIVE DEFENSE

Plaintiff is barred from bringing this action for failure to comply with applicable contractual remedies and requirements, including arbitration, if applicable. Plaintiff's failure to comply with the contractual remedies and requirements notwithstanding, this Answering Defendant reserves his right to enforce any applicable arbitration provision.

SEVENTH AFFIRMATIVE DEFENSE

The damages, if any, incurred by Plaintiff were not attributable to any act, conduct, or omission on the part of this Answering Defendant. This Answering Defendant denies that he was culpable in any matter or in any degree with respect to the matters set forth in Plaintiff's Second Amended Complaint.

EIGHTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred due to the applicable statute of limitations applicable to each cause of action, and/or the doctrines of estoppel, laches and/or unclean hands.

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NINTH AFFIRMATIVE DEFENSE

Plaintiff's damages, if any, were caused in whole or part by the negligence of third parties over which this Answering Defendant had no control.

TENTH AFFIRMATIVE DEFENSE

Plaintiff failed to take reasonable efforts to mitigate his or her damages, if any, and is therefore barred from recovering any damages from this Answering Defendant.

ELEVENTH AFFIRMATIVE DEFENSE

Plaintiff's maladies and injuries, if any, were caused by inevitable disease processes and not by any act of this Answering Defendant.

TWELFTH AFFIRMATIVE DEFENSE

This Answering Defendant is entitled to all limitations, protections, and other provisions contained within NRS Chapter 41A and/or NRS 42.021.

THIRTEENTH AFFIRMATIVE DEFENSE

This Answering Defendant denies each and every allegation of Plaintiff's Second Amended Complaint not specifically admitted or otherwise pled herein.

FOURTEENTH AFFIRMATIVE DEFENSE

Plaintiff has failed to comply with NRS 41A.071.

FIFTEENTH AFFIRMATIVE DEFENSE

Plaintiff's non-economic damages, if any, may not exceed \$350,000, pursuant to NRS 41A.035.

SIXTEENTH AFFIRMATIVE DEFENSE

To the extent Plaintiff is entitled to recover any damages from this Answering Defendant, this Answering Defendant may be held severally liable only for that portion of any judgment which represents the percentage of negligence attributable this Answering Defendant, pursuant to NRS 41A.045 and NRS 41.141.

SEVENTEENTH AFFIRMATIVE DEFENSE

To the extent Plaintiff is entitled to recover any future damages from this Answering Defendant, this Answering Defendant may satisfy that amount through

1 periodic payments pursuant to NRS 42.021.

2 EIGHTEENTH AFFIRMATIVE DEFENSE

3 Plaintiff has failed to name an indispensable party whose presence is  
4 indispensable to full relief.

5 NINETEENTH AFFIRMATIVE DEFENSE

6 Pursuant to N.R.C.P. 11, as amended, all affirmative defenses have not been  
7 alleged herein insofar as sufficient facts are not available after reasonable inquiry upon  
8 the filing of this Answering Defendant's Answer. This Answering Defendant reserves the  
9 right to allege additional affirmative defenses subsequently, if investigation so warrants.

10 TWENTIETH AFFIRMATIVE DEFENSE

11 This Answering Defendant alleges that the injuries and damages, if any, suffered  
12 by Plaintiff can and do occur in the absence of negligence.

13 TWENTY-FIRST AFFIRMATIVE DEFENSE

14 This Answering Defendant hereby incorporates by reference those affirmative  
15 defenses enumerated in Rule 8 of the Nevada Rules of Civil Procedure as if fully set forth  
16 herein, for the specific purpose of not waiving any such defenses. In the event further  
17 investigation or discovery reveals the applicability of any such defenses, or any other  
18 affirmative defenses, this Answering Defendant reserves the right to seek leave of court  
19 to amend this Answer to specifically assert any such defense.

20 WHEREFORE, this Answering Defendant prays for judgment as follows:

- 21 1. That Plaintiff take nothing by reason of her Second Amended Complaint on  
22 file herein;
- 23 2. For all attorneys' fees incurred in the defense of this action;
- 24 3. For costs and disbursements incurred herein; and
- 25 4. For such other and further relief as the court may deem just and proper in  
26 these premises.

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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 17<sup>th</sup> day of April, 2018

LEWIS BRISBOIS BISGAARD & SMITH LLP

By   
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Tel. 702.893.3383  
*Attorneys for Defendant David Garvey, M.D.*

1 CERTIFICATE OF SERVICE

2 Pursuant to NRCP 5(b), I certify that I am an employee of LEWIS BRISBOIS  
3 BISGAARD & SMITH LLP, and that on this 17<sup>th</sup> day of April, 2018, I did cause a true and  
4 correct copy of DEFENDANT DAVID GARVEY, M.D.'S ANSWER TO PLAINTIFFS'  
5 SECOND AMENDED COMPLAINT to be placed in the United States Mail, with first class  
6 postage prepaid thereon, and addressed as follows:

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Jennifer Morales, Esq.  
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*Attorneys for Defendant, Reach Air Medical  
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named employees*

21 By /s/ Johana Whitbeck  
22 An Employee of  
23 LEWIS BRISBOIS BISGAARD & SMITH LLP  
24  
25  
26  
27  
28

1 CASE NO.: CV-C-17-439

2 DEPT. NO.: 1

FILED

2021 MAY -6 PM 1:38  
ELKO CO DISTRICT COURT

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5  
6 **IN THE FOURTH JUDICIAL DISTRICT COURT**  
7 **OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF ELKO**  
8

9 DIANE SCHWARTZ, individually and as  
10 administrator of the Estate of DOUGLAS R.  
SCHWARTZ, deceased;

11 Plaintiff,

12 V.

**ORDER GRANTING PLAINTIFF'S  
MOTION FOR LEAVE TO AMEND  
COMPLAINT**

13 DAVID GARVEY, M.D., an individual;  
14 TEAM HEALTH HOLDINGS, INC., dba  
RUBY CREST EMERGENCY MEDICINE,  
15 PHC-ELKO, INC., dba NORTHEASTERN  
NEVADA REGIONAL HOSPITAL, a  
16 domestic corporation duly authorized to  
conduct business in the State of Nevada;  
17 REACH MEDICAL SERVICES, L.L.C.,  
DOES 1 through X; ROE BUSINESS  
ENTITIES XI through XX, inclusive,

18 Defendants.  
19 \_\_\_\_\_ /

20 Plaintiff seeks to amend her pleadings as to Defendant REACH Air Medical Services, LLC  
21 ("REACH"), adding claims of false imprisonment, assault, and battery, along with punitive damages for  
22 all three counts. Defendants David Garvey, MD, and PHC-Elko, Inc. dba Northeastern Nevada Regional  
23 Hospital joined REACH in opposing this motion. For the reasons stated below, Plaintiff's motion is  
24 GRANTED.

25 The facts giving rise to Plaintiff's proposed new tort and punitive damages claims against REACH  
26 stem from REACH's own expert report, prepared by Dr. Lesley Osborn, MD; the deposition of REACH

1 Flight Nurse Ronnie Lyons; and the deposition of REACH's NRCP 30(b)(6) expert witness, Dr. Gary  
2 McCalla, MD. All three indicate that REACH did not believe that Mr. Schwartz was their patient at the  
3 time REACH's flight crew began working on him. These depositions and report are dated from June  
4 through November 2020. Plaintiff's motion to amend as to Defendant REACH was dated December 2020.  
5 This differs from Plaintiff's previous claims for punitive damages against REACH, which were based on  
6 an alleged failure by REACH to properly train its staff in correct intubation procedure.

7 Leave to amend should be freely given except where there is undue delay, bad faith, repeated failure  
8 to cure deficiencies by previous amendments, undue prejudice to the opposing party, futility of the  
9 amendment, or any other apparent or declared reason. *Foman v. Davis*, 371 US 178, 182 (1962). Here,  
10 Plaintiff did not unduly delay in between finding out that REACH did not consider Mr. Schwartz to have  
11 been their patient and attempting to amend her complaint to address this new information. Further, as the  
12 facts giving rise to Plaintiff's motion to amend are new, Plaintiff's previous failures to cure deficiencies  
13 in previous amendments do not act as a barrier to prevent these new claims coming in now. Yet further,  
14 Plaintiff amending to add these new counts does not unduly prejudice REACH, as it was REACH itself that  
15 raised the question of unconsented-to touching when its employees and expert stated that Mr. Schwartz was  
16 never their patient.

17 THEREFORE, Plaintiff's Motion to Amend as to Defendant REACH Air is GRANTED.

18 IT IS SO ORDERED this 28<sup>th</sup> day of April, 2021.

19  
20  
21   
KRISTON N. HILL  
District Judge - Dept. 1  
22  
23  
24  
25  
26

**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 6<sup>th</sup> day of April, 2021, I deposited for mailing in the U.S. mail at Elko, Nevada, postage prepaid, a true file-stamped copy of the foregoing order addressed to:

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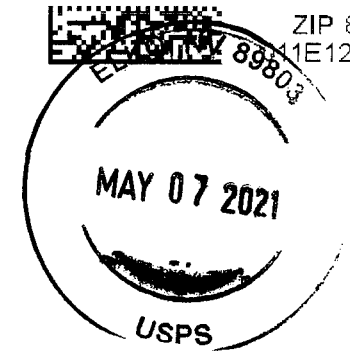
Honorable Kriston N. Hill  
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1 CASE NO.: CV-C-17-439

2 DEPT. NO.: 1

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2021 JUN -3 PM 3:49

ELKO CO DISTRICT COURT

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3  
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6 **IN THE FOURTH JUDICIAL DISTRICT COURT**  
7 **OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF ELKO**  
8

9 DIANE SCHWARTZ, individually and as  
10 administrator of the Estate of DOUGLAS R.  
SCHWARTZ, deceased;

11 Plaintiff,

12 V.

13 DAVID GARVEY, M.D., an individual; TEAM  
14 HEALTHHOLDINGS, INC., dba RUBY CREST  
EMERGENCY MEDICINE, PHC-ELKO, INC.,  
15 dba NORTHEASTERN NEVADA REGIONAL  
HOSPITAL, a domestic corporation duly  
16 authorized to conduct business in the State of  
Nevada; REACH MEDICAL SERVICES, L.L.C.,  
17 DOES 1 through X; ROE BUSINESS ENTITIES  
XI through XX, inclusive.

18 Defendants.  
19  
20

**ORDER DENYING:**

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) (filed July 6, 2020);
2. DEFENDANT DAVID GARVEY, M.D.'S MOTION FOR PARTIAL SUMMARY JUDGMENT TO STATUTORILY LIMIT DAMAGES (filed July 27, 2021);
3. DEFENDANT DAVID GARVEY, M.D.'S MOTION TO STRIKE THE DECLARATION OF SETH WOMACK, M.D.; and
4. DEFENDANT DAVID GARVEY, M.D.'S MOTION TO STRIKE THE DECLARATION OF SHIRLEY BLAZICH, ESQ.

21 This is a civil action in which Plaintiff Diane Schwartz has brought a claim arising from an  
22 allegation of professional negligence occurring on June 22, 2016, at Northeastern Nevada Regional Hospital  
23 in Elko, Nevada.

24 **I. Facts**

25 Douglas Schwartz ("Schwartz"), a 58-year-old man, was struck by a vehicle as he left a local Elko  
26 dining establishment. Schwartz was transported to Northeastern Nevada Regional Hospital via ambulance

1 where he was treated by Defendant David Garvey, MD (hereinafter “Garvey”). Schwartz passed away in  
2 the process of being prepared for transportation to the University of Utah Hospital via air ambulance. This  
3 suit followed.

## 4 **II. Procedural Background**

5 On July 6, 2020, Defendant PHC-Elko, Inc. dba Northeastern Nevada Regional Hospital (“NNRH”)  
6 filed its motion asking the Court to find that the cap on traumatic damages (“trauma cap”) created in NRS  
7 41.503 applies to Plaintiff’s claims in this case. Defendants REACH Air Medical Services, LLC.  
8 (“REACH”), Team Health Holdings, Inc., dba Ruby Crest Emergency Medicine (“Ruby Crest”), and  
9 Garvey joined NNRH’s motion. Plaintiff opposed NNRH’s motion on July 14, 2020. NNRH replied to the  
10 opposition on July 22, 2020. Defendants REACH and Ruby Crest then joined NNRH’s reply.

11 On July 27, 2020, Garvey then filed a motion for partial summary judgment; that motion was later  
12 joined by Ruby Crest, NNRH, and REACH. Garvey then filed an errata to the motion for partial summary  
13 judgment on August 3, 2020; that errata was joined by Ruby Crest. Plaintiff opposed the motion and errata  
14 on August 18, 2020. Garvey replied to the opposition on September 8, 2020. That same date, Garvey filed  
15 two additional motions to strike the declarations of Shirley Blazich and Seth Womack which had been  
16 attached to Plaintiff’s opposition. REACH and NNRH joined Garvey’s reply; REACH also separately  
17 joined both of Garvey’s motions to strike. Oral argument was heard on March 5 and 18, 2021.

## 18 **IV. Legal Analysis**

19 Under Nevada Rule of Civil Procedure 56, the Court shall grant summary judgment when there are  
20 no genuine issues of material fact as to a given claim or defense. NRCP 56. A party moving for summary  
21 judgment must support its assertion that there are no genuine issues of material fact by referring to  
22 particular materials in the record, or by showing that the materials cited by an opposing party do not  
23 establish the presence or absence of a genuine issue. NRCP 56(c). When ruling on a motion for summary  
24 judgment, the Court may consider all materials in the record, not just those cited in the parties’ briefs.  
25 NRCP 56(c)(3). Although the Court reviews the pleadings and other proof in the light most favorable to  
26 the nonmoving party, the nonmoving party must still show “by affidavit or otherwise [...] specific facts

1 demonstrating the existence of a genuine issue for trial or have summary judgment entered against him.”  
2 Wood v. Safeway, Inc., 121 Nev 724, 729-731 (2005).

3 In this Motion, Defendants claim that there is no genuine issue of material fact as to the applicability  
4 of the “trauma cap” statute, NRS 41.503. The “trauma cap” statute states that a covered hospital, hospital  
5 employee, physician, or dentist (“medical professional”) as defined under NRS 41.503(1) who

6 in good faith renders care or assistance necessitated by a traumatic injury demanding  
7 immediate medical attention, for which the patient enters the hospital through its emergency  
8 room or trauma center, may not be held liable for more than \$50,000 in civil damages,  
9 exclusive of interest computed from the date of judgment, to or for the benefit of any  
claimant arising out of any act or omission in rendering that care or assistance if the care or  
assistance is rendered in good faith and in a manner not amounting to gross negligence or  
reckless, willful or wanton conduct.

10 NRS 41.503(1).

11 This limitation on liability does not apply to any act or omission by the medical professional which  
12 occurs after the patient is stabilized and capable of receiving treatment as a non-emergency patient, nor does  
13 it apply if the act or omission by the medical professional is unrelated to the original traumatic injury. NRS  
14 41.503(2).

15 For purposes of the statute, a traumatic injury is defined as “any acute injury which, according to  
16 standardized criteria for triage in the field, involves a significant risk of death or the precipitation of  
17 complications or disabilities.” NRS 41.503(4)(b). All parties agree that the decedent in this case, Douglas  
18 Schwartz, was hit by a car on June 22, 2016, which led to him being brought via ambulance to NNRH.  
19 Defendants contend that Schwartz suffered a traumatic injury from this car accident, to wit: a bilateral flail  
20 chest injury. Plaintiff contends that Schwartz did not have a flail chest injury. All parties agree that a  
21 bilateral flail chest injury is life-threatening. Both Plaintiff and Defendants cite to various doctors’ affidavits  
22 and medical opinions as to whether Schwartz had a flail chest injury or not.

23 In support of her assertion that Schwartz did not suffer a traumatic injury or that he was otherwise  
24 stabilized before Garvey attended to him, Plaintiff cites to observations made by herself and hospital staff  
25 that Schwartz was alert and oriented to person, place, and time after being admitted to the hospital; the fact  
26 that the ambulance taking Schwartz to the hospital did not have its emergency lights on and was driving

1 at or below the speed limit; and that, prior to Schwartz meeting with Garvey, NNRH's patient record for  
2 Schwartz indicated that his vital signs, airway, heart rate, and breathing were all within normal limits.

3 Defendants cite to Schwartz's radiology findings, to his low oxygen saturations, to Garvey's own  
4 observations of Schwartz's breathing pattern, and to Garvey's decision to send Schwartz to the University  
5 of Utah's trauma center via air ambulance to support their assertion that Schwartz had suffered a life-  
6 threatening, and therefore traumatic, injury from the car accident.

7 There are even contradictory statements as to whether Schwartz was talking and laughing after being  
8 admitted to the hospital: Plaintiff contends that she and some members of NNRH hospital staff saw and  
9 heard him doing so, while Defendants' expert, Dr. David Barcay, opines that Schwartz could not possibly  
10 have been doing so while wearing a full-face mask and struggling to breathe from the flail chest injury.

11 As Defendants and Plaintiff have both supported their versions of the state of Schwartz's injuries  
12 at the time he was brought to NNRH with reference to materials in the record, the Court finds that a genuine  
13 issue of material fact exists as to whether the decedent suffered a traumatic injury, and thus there is also  
14 a genuine issue of material fact as to whether the trauma cap applies.

15 THEREFORE, the Motion for Partial Summary Judgment is DENIED. Further, as there remains  
16 a genuine question as to whether the trauma cap statute applies, NNRH's Motion that all of Plaintiff's  
17 Claims against Northeastern Nevada Regional Hospital are Subject to the Requirements and Limitations  
18 of NRS 41.503 (the "Trauma" Statute), is also DENIED. As the Court is denying Defendants' partial  
19 summary judgment motion on grounds unrelated to Plaintiff's two attached declarations, Defendants'  
20 motions to strike those declarations are also DENIED as moot.

21 DATED this 2nd day of June, 2021.

22  
23 KRISTON N. HILL  
24 District Judge - Dept. 1  
25  
26

**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 3<sup>rd</sup> day of June, 2021, I deposited for mailing in the U.S. mail at Elko, Nevada, postage prepaid, a true file-stamped copy of the foregoing order to:

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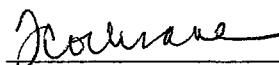
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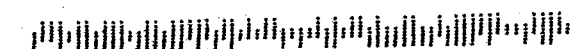
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89118-320150



FILED

Case No.: CV-C-17-439

2021 JUN -3 PM 3:48

Dept. No.: 1

ELKO CO DISTRICT COURT

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IN THE FOURTH JUDICIAL DISTRICT COURT  
IN AND FOR THE COUNTY OF ELKO, STATE OF NEVADA

DIANE SCHWARTZ, individually and as  
administrator of the Estate of DOUGLAS R.  
SCHWARTZ, deceased;

**ORDER DENYING PLAINTIFF'S  
COUNTERMOTION FOR LEAVE  
TO AMEND COMPLAINT**

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.

This is a civil action in which Plaintiff Diane Schwartz has brought a claim arising from an allegation of professional negligence occurring on June 22, 2016, at Northeastern Nevada Regional Hospital in Elko, Nevada.

///



1   **I.     Facts**

2           Douglas Schwartz (“Schwartz”), a 58-year-old man, was struck by a vehicle as he left a local  
3   Elko dining establishment. Schwartz was transported to Northeastern Nevada Regional Hospital via  
4   ambulance where he was treated by Defendant David Garvey, MD (hereinafter “Garvey”). Schwartz  
5   passed away in the process of being prepared for transportation to the University of Utah Hospital  
6   via air ambulance. This suit followed.

7   **II.    Procedural Background**

8           Schwartz filed the original Complaint on June 22, 2017, alleging the following claims for  
9   relief: professional negligence; vicarious liability, corporate negligence, and ostensible agency;  
10   negligent hiring, training, and supervision; lack of informed consent; and loss of consortium.  
11   Plaintiff filed an Amended Complaint on February 5, 2018, and the Second Amended Complaint on  
12   February 12, 2018. The Amended Complaint and the Second Amended Complaint allege mere  
13   negligence. On September 4, 2018, Plaintiff sought leave to amend her Second Amended  
14   Complaint; this motion was denied by the Court on October 16, 2019. On September 11, 2020,  
15   Plaintiff moved the Court for leave to amend her Second Amended Complaint. On September 30,  
16   2020, Defendant PHC-Elko, Inc., dba Northeastern Nevada Regional Hospital (“NNRH”) opposed  
17   Plaintiff’s motion. Defendants Garvey and Team Health Holdings, Inc., dba Ruby Crest Emergency  
18   Medicine (“Ruby Crest”) and REACH Air Medical Services, LLC (“REACH”) joined NNRH’s  
19   opposition to the motion. Oral argument was heard on March 5 and 18, 2021.

20   **IV.   Legal Analysis**

21           Plaintiff moves the Court for leave to amend her Second Amended Complaint to introduce  
22   punitive damages against Defendants NNRH, and Garvey. Plaintiff cites both the Nevada rule of  
23   civil procedure governing motions for leave to amend, NRCP 15, as well as the Nevada rule of civil  
24   procedure governing motions for relief from a judgment or order, NRCP 60. The Court considers  
25   each in turn.

26   ///

1           **1. Motion for Relief from Judgment or Order**

2           Under NRCP 60, the Court may relieve a party from a final order for:

- 3           (1) mistake, inadvertence, surprise, or excusable neglect;  
4           (2) newly discovered evidence that, with reasonable diligence, could not have been  
5           discovered in time to move for a new trial under Rule 59(b);  
6           (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or  
7           misconduct by an opposing party;  
8           (4) the judgment is void;  
9           (5) the judgment has been satisfied, released, or discharged; it is based on an  
10          earlier judgment that has been reversed or vacated; or applying it prospectively is  
11          no longer equitable; or  
12          (6) any other reason that justifies relief.

13          NRCP 60(b).

14          A motion under NRCP 60(b)(1-3) must be made within 6 months of the date of the  
15          proceeding or order the Court is being asked to reconsider, whichever is later. NRCP 60(c)(1). A  
16          motion under NRCP 60(b)(4-6) only needs to be made within a reasonable time. Id.

17          Plaintiff asks for relief under NRCP 60(b)(6), however, the reason she describes for  
18          requesting relief is the finding of new evidence which was not available when the Court issued its  
19          Order denying her last motion to amend. Newly discovered evidence is covered under NRCP  
20          60(b)(2), and so a motion for relief on this ground must have been filed within 6 months of the order  
21          to be reconsidered. The order denying leave to amend was filed in 2019; Plaintiff's instant motion  
22          was filed in 2020. As more than 6 months have passed, the motion for relief must be DENIED.

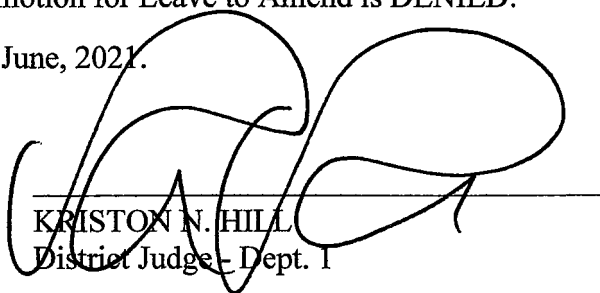
23           **2. Motion for Leave to Amend**

24          Even treating this motion as a motion to amend, the Court still cannot grant the relief  
25          requested. Leave to amend should be freely given except where there is undue delay, bad faith,  
26          repeated failure to cure deficiencies by previous amendments, undue prejudice to the opposing party,  
27          futility of the amendment, or any other apparent or declared reason. Foman v. Davis, 371 US 178,  
28          182 (1962). Bringing those punitive claims back now would be unduly prejudicial to Defendants  
29          Garvey and NNRH, who have not only *not* been put on notice that punitive damages might be an

1 issue in this case but would be excused for being under the natural belief that punitive damages could  
2 no longer be raised against them on these grounds as Plaintiff's last motion to amend was denied  
3 with prejudice more than two years ago. Plaintiff's motion for relief from the Court's order denying  
4 motion to amend must therefore still be DENIED under this analytic framework.

5 THEREFORE, Plaintiff's Countermotion for Leave to Amend is DENIED.

6 DATED this 2<sup>nd</sup> day of June, 2021.

7  
8   
9 KRISTON N. HILL  
District Judge - Dept. I

**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 30 day of June, 2021, I deposited for mailing in the U.S. mail at Elko, Nevada, postage prepaid, a true file-stamped copy of the foregoing order to:

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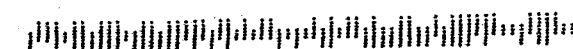
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9 Case No.: CV-C-17-439  
10 Dept. No: 1

11 **AFFIRMATION**

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

14 IN THE FOURTH JUDICIAL DISTRICT COURT OF THE  
15 STATE OF NEVADA, IN AND FOR THE COUNTY OF ELKO

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

18 Plaintiff,

19 vs.

20 DAVID GARVEY, M.D., an individual;  
CRUM, STEFANKO, & JONES LTD, dba  
21 Ruby Crest Emergency Medicine; PHC-  
ELKO INC. dba NORTHEASTERN  
22 NEVADA REGIONAL HOSPITAL, a  
domestic corporation duly authorized to  
23 conduct business in the State of Nevada;  
REACH AIR MEDICAL SERVICES,  
24

FILED

2021 JUN 28 PM 3:39

ELKO CO DISTRICT COURT

CLERK \_\_\_\_\_ DEPUTY lf

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

L.L.C.; DOES I through X; ROE  
BUSINESS ENTITIES XI through XX,  
inclusive,

Defendants.

Plaintiff, DIANE SCHWARTZ, individually 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; 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. 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.

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. 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 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 DOES I through X when the same have been ascertained and to join such Defendants in this action.

9. 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.

10. 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.

23. Barry Bartlett was an employee of Reach Air, and Reach Air has stipulated that Mr. Bartlett was acting in the course and scope of his employment at the time of the Subject Incident.

24. According to Reach Air, Mr. Schwartz was never its patient.

25. According to Reach Flight Nurse Ronnie Lyons, Mr. Schwartz was never Reach's patient.

26. According to Reach's expert, Lesley Osborne, M.D., Mr. Schwartz was never Reach's patient.

27. However, on or about June 23, 2016, Defendant Reach Air, through its Flight Nurse Ronnie Lyons, administered Rocuronium and Ketamine to Mr. Schwartz without his express or implied consent.

28. Defendant REACH AIR made repeated intubation attempts upon Mr. Schwartz without his express or implied consent.

29. It was the standard of care for REACH AIR staff to obtain express or implied consent for the treatment of Mr. Schwartz.<sup>1</sup>

30. Defendant REACH AIR, through its employees Barry Bartlett and Ronnie Lyons, intended to, and did, make contact with Mr. Schwartz's body which was harmful to him.

31. It was the intention of Defendant REACH AIR to administer Rocuronium and Ketamine to Mr. Schwartz.

32. It was the intention of Defendant REACH AIR to perform the intubation of Mr. Schwartz.

33. Prior to Defendant REACH AIR administering the paralytics, Mr. Schwartz was awake and aware of his surroundings.

34. After administering paralytics, Mr. Schwartz was paralyzed and sedated and unable to move, speak or breath on his own.

<sup>1</sup> John Everlove Expert Report, p. 12, attached hereto as **Ex. "2."**

35. As a result of the unconsented to procedure, Mr. Schwartz experienced immediate anxiety, apprehension, and fear.

36. The actions of Defendant Reach Air, through its employees Barry Bartlett and Ronnie Lyons, were undertaken knowingly, recklessly, wantonly, willfully, and/or maliciously.

37. Defendant Reach Air ratified the conduct of its employees when it frauduently billed Mr. Schwartz's family \$18,200 despite their claim that Mr. Schwartz was never their patient.

### **FIRST CLAIM FOR RELIEF**

#### **(PROFESSIONAL NEGLIGENCE/WRONGFUL DEATH)**

#### **DR. DAVID GARVEY, RUBY CREST, REACH AIR, AND NNRH**

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

39. 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.

40. Defendant Dr. GARVEY fell below the standard of care by deciding to intubate Mr. Schwartz without clinical indications for intubation.<sup>2</sup>

41. 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.<sup>3</sup>

<sup>2</sup> See Affidavit of Kenneth N. Scissors, M.D., attached hereto as “**Ex. 3**”; Dr. Womack Declaration, p. 22-23, attached hereto as **Ex. “1.”**

<sup>3</sup> Id.

42. 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.<sup>4</sup>

43. 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).<sup>5</sup>

44. 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 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.<sup>6</sup>

45. Defendant Dr. GARVEY thereby caused Mr. Schwartz to suffer severe complications including a large aspiration of gastric contents and a fatal cardiopulmonary arrest.<sup>6</sup>

46. Defendant REACH AIR through its employee 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.<sup>7</sup>

47. Defendant REACH AIR through its employee BARRY BARTLETT, fell below the standard of care by agreeing to attempt an intubation of Mr. Schwartz when

<sup>4</sup> Id.

<sup>5</sup> Id.

<sup>6</sup> Id.

<sup>7</sup> Id.

he did not have clear indications for intubation and had a high risk of aspiration of gastric contents.<sup>8</sup>

48. Defendant REACH AIR through its employee BARRY BARTLETT, fell below the standard of care by not deferring to a qualified anesthesiologist.<sup>9</sup>

49. Defendant REACH AIR through its employee 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.<sup>10</sup>

50. Defendant REACH AIR through its employee BARRY BARTLETT, thereby caused Mr. Schwartz to suffer severe complications including a large aspiration of gastric contents and a fatal cardiopulmonary arrest.<sup>11</sup>

51. Defendant NNRH's and REACH AIR'S 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.

52. 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 learning possessed by competent medical

<sup>8</sup> Id.

<sup>9</sup> Id.

<sup>10</sup> Id.

<sup>11</sup> Id.



personnel practicing in the United States of America under the same or similar circumstances.

53. 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.

54. 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 Declarations of Dr. Kenneth N. Scissors and Dr. Seth Womack, which are both attached hereto and incorporated herein by this reference.<sup>12</sup>

55. Mr. Schwartz thereby experienced great pain, suffering, and anxiety to his body and mind, with said injuries ultimately leading to death and damages in the sum in excess of Fifteen Thousand Dollars (\$15,000.00).

56. 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.

57. 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

<sup>12</sup>Id.

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 Fifteen Thousand Dollars (\$15,000.00).

58. Pursuant to NRS 42.007, Defendant Reach Air is vicariously liable for punitive damages arising from the outrageous and unconscionable conduct of its employees, agents, and/or servants, as set forth herein.

59. 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.

60. 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.

61. 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**

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

63. 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.

64. 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.<sup>13</sup>

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

66. 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 Fifteen Thousand Dollars (\$15,000.00).

67. 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.

68. 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

<sup>13</sup> Id.

unknown at this present time, but Plaintiff alleges that she has suffered special damages in excess of Fifteen Thousand Dollars (\$15,000.00).

69. Pursuant to NRS 42.007, Defendant Reach Air is vicariously liable for punitive damages arising from the outrageous and unconscionable conduct of its employees, agents, and/or servants, as set forth herein.

70. 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.

71. 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.

72. 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.

73. 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.

### **THIRD CLAIM FOR RELIEF**

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

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

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

75. 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.

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

77. 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.

78. Defendants' breach of the applicable standard of care directly resulted in Plaintiff sustaining significant injuries that ultimately lead to his untimely death.<sup>14</sup>

79. Plaintiff thereby experienced great pain, suffering, and anxiety to his body and mind, sustaining injuries and damages in the sum in excess of Fifteen Thousand Dollars (\$15,000.00).

80. Pursuant to NRS 42.007, Defendant Reach Air is vicariously liable for punitive damages arising from the outrageous and unconscionable conduct of its employees, agents, and/or servants, as set forth herein.

<sup>14</sup> Id.

81. 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.

82. 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 Fifteen Thousand Dollars (\$15,000.00).

83. 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.

84. 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.

85. 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.**

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

87. 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.<sup>15</sup>

88. 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.

89. 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.

90. 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.

91. As a result of Dr. Garvey's lack of informed consent, Mr. Schwartz experienced great pain, discomfort and ultimately suffered death.<sup>16</sup>

92. 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.

<sup>15</sup> See Affidavit of Kenneth N. Scissors, M.D. attached hereto as “**Ex. 3**”

<sup>16</sup> Id.

93. 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.

94. 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**

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

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

97. 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 Fifteen Thousand Dollars (\$15,000.00).

98. Pursuant to NRS 42.007, Defendant Reach Air is vicariously liable for punitive damages arising from the outrageous and unconscionable conduct of its employees, agents, and/or servants, as set forth herein.

99. 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.



100. 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.

101. 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.

### **SIXTH CLAIM FOR RELIEF**

#### **(Medical Battery/ Battery)**

#### **Against REACH AIR**

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

103. According to Reach Air, Mr. Schwartz was never its patient.

104. According to Reach Flight Nurse Ronnie Lyons, Mr. Schwartz was never Reach's patient.

105. According to Reach's expert, Lesley Osborne, M.D., Mr. Schwartz was never Reach's patient.

106. However, on or about June 23, 2016, Defendant Reach Air, through its Flight Nurse Ronnie Lyons, administered Rocuronium and Ketamine to Mr. Schwartz without his express or implied consent.

107. Defendant REACH AIR made repeated intubation attempts upon Mr. Schwartz without his express or implied consent.

108. It was the standard of care for REACH AIR staff to obtain express or implied consent for the treatment of Mr. Schwartz.<sup>17</sup>

109. Defendant REACH AIR, through its employees Barry Bartlett and Ronnie Lyons, intended to, and did, make contact with Mr. Schwartz's body which was harmful to him.

110. It was the intention of Defendant REACH AIR to administer Rocuronium and Ketamine to Mr. Schwartz.

111. It was the intention of Defendant REACH AIR to perform the intubation of Mr. Schwartz.

112. Prior to Defendant REACH AIR administering the paralytics, Mr. Schwartz was awake and aware of his surroundings.

113. After administering paralytics, Mr. Schwartz was paralyzed and sedated and unable to move, speak or breath on his own.

114. As a result of the unconsented to procedure, Mr. Schwartz thereby experienced great pain, suffering, and anxiety to his body and mind, with said injuries ultimately leading to death and damages in the sum in excess of Fifteen Thousand Dollars (\$15,000.00).

115. 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 treatment of Mr. Schwartz's injuries and funeral expenses.

<sup>17</sup> John Everlove Expert Report, p. 12, attached hereto as **Ex. "2."**

116. 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 Fifteen Thousand Dollars (\$15,000.00).

117. The actions of Defendant Reach Air, through its employees Barry Bartlett and Ronnie Lyons, as complained of in this claim for relief was undertaken knowingly, recklessly, wantonly, willfully, and/or maliciously.

118. Defendant Reach Air ratified the conduct of its employees when it fraudulently billed Mr. Schwartz's family \$18,200 despite their claim that Mr. Schwartz was never their patient.

119. Defendant Reach Air's conduct was despicable and so contemptible that it would be looked down upon and despised by ordinary decent people, and was carried on by Defendant Reach Air with willful and conscious disregard for the safety of Plaintiff.

120. Defendant Reach Air, through its employees Barry Bartlett and Ronnie Lyons, outrageous and unconscionable conduct warrants an award of exemplary and punitive damages pursuant to NRS 42.005, in an amount appropriate to punish and make an example of these Defendants, and to deter similar conduct in the future.

121. Pursuant to NRS 42.007, Defendant Reach Air is vicariously liable for punitive damages arising from the outrageous and unconscionable conduct of its employees, agents, and/or servants, as set forth herein.

122. 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.

123. 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.

124. 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.

### **SEVENTH CLAIM FOR RELIEF**

#### **(Assault)**

#### **Against REACH AIR**

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

126. According to Reach Air, Mr. Schwartz was never its patient.

127. According to Reach Flight Nurse Ronnie Lyons, Mr. Schwartz was never Reach's patient.

128. According to Reach's expert, Lesley Osborne, M.D., Mr. Schwartz was never Reach's patient.

129. However, on or about June 23, 2016, Defendant Reach Air, through its Flight Nurse Ronnie Lyons, administered Rocuronium and Ketamine to Mr. Schwartz without his express or implied consent.

130. Defendant REACH AIR made repeated intubation attempts upon Mr. Schwartz without his express or implied consent.

131. It was the intention of Defendant REACH AIR to administer Rocuronium and Ketamine to Mr. Schwartz.

132. It was the intention of Defendant REACH AIR to perform the intubation of Mr. Schwartz.

133. As a result of the unconsented to procedure, Mr. Schwartz experienced immediate anxiety, apprehension, and fear.

134. Prior to Defendant REACH AIR administering the paralytics, Mr. Schwartz was awake and aware of his surroundings.

135. After administering paralytics, Mr. Schwartz was paralyzed and sedated and unable to move, speak or breath on his own.

136. As a result of the unconsented to procedure, Mr. Schwartz thereby experienced great pain, suffering, and anxiety to his body and mind, with said injuries ultimately leading to death and damages in the sum in excess of Fifteen Thousand Dollars (\$15,000.00).

137. 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 treatment of Mr. Schwartz's injuries and funeral expenses.

138. 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 Fifteen Thousand Dollars (\$15,000.00).

139. The actions of Defendant Reach Air, through its employees Barry Bartlett and Ronnie Lyons, as complained of in this claim for relief was undertaken knowingly, recklessly, wantonly, willfully, and/or maliciously.

140. Defendant Reach Air ratified the conduct of its employees when it fraudulently billed Mr. Schwartz's family \$18,200 despite their claim that Mr. Schwartz was never their patient.

141. Defendant Reach Air's conduct was despicable and so contemptible that it would be looked down upon and despised by ordinary decent people, and was carried on by Defendant Reach Air with willful and conscious disregard for the safety of Plaintiff.

142. Defendant Reach Air, through its employees Barry Bartlett and Ronnie Lyons, outrageous and unconscionable conduct warrants an award of exemplary and punitive damages pursuant to NRS 42.005, in an amount appropriate to punish and make an example of these Defendants, and to deter similar conduct in the future.

143. Pursuant to NRS 42.007, Defendant Reach Air is vicariously liable for punitive damages arising from the outrageous and unconscionable conduct of its employees, agents, and/or servants, as set forth herein.

144. 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.

145. 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.

146. 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.

### **EIGHTH CLAIM FOR RELIEF**

#### **(False Imprisonment)**

#### **Against REACH AIR**

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

148. According to Reach Air, Mr. Schwartz was never its patient.

149. According to Reach Flight Nurse Ronnie Lyons, Mr. Schwartz was never Reach's patient.

150. According to Reach's expert, Lesley Osborne, M.D., Mr. Schwartz was never Reach's patient.

151. However, on or about June 23, 2016, Defendant Reach Air, through its Flight Nurse Ronnie Lyons, administered Rocuronium and Ketamine to Mr. Schwartz without his express or implied consent.

152. Defendant REACH AIR made repeated intubation attempts upon Mr. Schwartz without his express or implied consent.

153. It was the intention of Defendant REACH AIR to administer Rocuronium and Ketamine to Mr. Schwartz.

154. Prior to Defendant REACH AIR administering the paralytics, Mr. Schwartz was awake and aware of his surroundings.

155. After administering paralytics, Mr. Schwartz was paralyzed and sedated and unable to move, speak or breath on his own.

156. As a result of the unconsented to procedure, 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 Fifteen Thousand Dollars (\$15,000.00).

157. 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 treatment of Mr. Schwartz's injuries and funeral expenses.

158. 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 Fifteen Thousand Dollars (\$15,000.00).

159. The actions of Defendant Reach Air, through its employees Barry Bartlett and Ronnie Lyons, as complained of in this claim for relief was undertaken knowingly, recklessly, wantonly, willfully, and/or maliciously.



160. Defendant Reach Air ratified the conduct of its employees when it frauduently billed Mr. Schwartz's family \$18,200 despite their claim that Mr. Schwartz was never their patient.

161. Defendant Reach Air's conduct was despicable and so contemptible that it would be looked down upon and despised by ordinary decent people, and was carried on by Defendant Reach Air with willful and conscious disregard for the safety of Plaintiff.

162. Defendant Reach Air, through its employees Barry Bartlett and Ronnie Lyons, outrageous and unconscionable conduct warrants an award of exemplary and punitive damages pursuant to NRS 42.005, in an amount appropriate to punish and make an example of these Defendants, and to deter similar conduct in the future.

163. Pursuant to NRS 42.007, Defendant Reach Air is vicariously liable for punitive damages arising from the outrageous and unconscionable conduct of its employees, agents, and/or servants, as set forth herein.

164. 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.

165. 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.

166. 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.

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; 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 Fifteen Thousand Dollars (\$15,000.00), to be set forth and proven at the time of trial;
2. For special damages in an amount in excess of Fifteen Thousand Dollars (\$15,000.00), to be set forth and proven at the time of trial;
3. For punitive damages against Reach Air;
4. For reasonable attorney's fees;
5. For costs and disbursements of this suit; and
6. For such other relief as to the Court deems just and proper.

DATED this 28<sup>th</sup> day of June, 2021.

CLAGGETT & SYKES LAW FIRM

/s/ Shirley Blazic  
Shirley Blazich, Esq.  
Nevada Bar No. 008378  
*Attorneys for Plaintiff*

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

/s/ Shirley Blazich

Shirley Blazich, Esq., Attorney for Plaintiff

### Table of Exhibits

Exhibit "1"	Declaration of Dr. Womack	31 pages
Exhibit "2"	Expert Report of John Everlove	13 pages
Exhibit "3"	Affidavit of Dr. Scissors	5 pages

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 28<sup>th</sup> day of June, 2021, I caused to be served a true and correct copy of the foregoing **THIRD AMENDED COMPLAINT (MEDICAL MALPRACTICE) AND WRONGFUL DEATH** on the following parties via e-mail only:

Tyson J. Dobbs, Esq. Richard De Jong, Esq. HALL PRANGE & SCHOOVELD, LLC 1140 North Town Center Drive, Suite 350 Las Vegas, NV 89144 <i>Attorneys for Defendant, PHC-Elko, Inc. dba Northeastern Nevada Regional Hospital</i>	Keith A. Weaver, Esq. Alissa Bestick, Esq. LEWIS BRISBOIS BISGAARD & SMITH, LLP 6385 S. Rainbow Blvd., Suite 600 Las Vegas, NV 89118 <i>Attorneys for Defendant, David Garvey, M.D.</i>
Todd L. Moody, Esq. HUTCHISON & STEFFEN, PLLC. 10080 West Alta Drive, Suite 200 Las Vegas, NV 89145  James T. Burton, Esq. Austin Westerberg, Esq. KIRTON MCCONKIE 36 S. State Street, Suite 1900 Salt Lake City, UT 84111 <i>Attorneys for Defendant, Reach Air Medical Services, LLC and for its individually named employees</i>	Robert C. McBride, Esq. Chelsea R. Hueth, Esq. MCBRIDE HALL 8329 W. Sunset Road, Suite 260 Las Vegas, NV 89113 <i>Attorneys for Defendant, Crum, Stefanko, &amp; Jones, LTD dba Ruby Crest Emergency Medicine</i>

/s/ Jackie Abrego  
An Employee of  
CLAGGETT & SYKES LAW FIRM

# **EXHIBIT 1**

Seth P. Womack, MD FAAEM  
2115 Dueling Oaks Drive  
Tyler, Texas 75703  
[Womack@erdoctor.com](mailto:Womack@erdoctor.com)

Claggett & Sykes Law Firm  
4101 Meadows Lane, Suite 100  
Las Vegas, Nevada 89107

Re: Douglas Schwartz

### **Introduction and Qualifications**

I, Seth P. Womack, MD am a licensed physician. You have asked me to render an opinion concerning the standard of care performed by Dr. David James Garvey regarding the care of Douglas Schwartz on June 22, 2016 in the emergency room of Northeastern Nevada Regional Hospital (NNRH). I am board certified in emergency medicine by the American Board of Emergency Medicine (ABEM). I completed a residency in emergency medicine at the Medical College of Wisconsin in Milwaukee, Wisconsin. During residency I was a flight physician. I have treated patients before, during, and after flight transport from the scene and from hospital to hospital. I have made decisions as to intubate or not intubate patients prior to flight transport. I have worked in emergency rooms and on flights that transferred trauma patients to trauma centers for injuries similar to Mr. Schwartz. I have been working as a full time emergency physician in a level one trauma center for over ten years. I am certified in Advance Trauma Life Support (ATLS), and I am an ATLS instructor. I have intubated hundreds of emergency room patients. I have given presentations on difficult patient airways and airway management. I have completed the Difficult Airway Course specific to the specialty of emergency medicine. I currently work approximately 12 -15 shifts in the emergency department where I work with flight nurses and flight paramedics. When I was a flight physician, I would manage and transport patients with a flight nurse or flight paramedic. I am familiar with the standard of care in this case by virtue of my knowledge, education, experience, training, and skill.

## Records Reviewed

I have reviewed the records, case related documents, and definitions regarding the case of Douglas Schwartz that you have provided to me. These consist of the following:

1. Reach Air Medical Records (9pages)
2. Northeastern Nevada Regional Hospital (157 pages)
3. Police Report and Autopsy (30 pages)
4. Elk Count Ambulance Record (18 pages)
5. Elite Investigations Norther Nevada (19 pages)
6. Certificate of Death (1 page)
7. Workman's Compensation (4 pages)
8. Billing Statements from Northeastern Nevada Regional Hospital (7 pages)
9. Posts about Douglas Schwartz (4 pages)
10. 2013-2017 Tax Returns (59 pages)
11. Douglas Schwartz Work Contract (7 pages)
12. Costs for Funeral (3 pages)
13. 2013-2016 Paystubs (89 pages)
14. Plaintiff's First Supplement (8 pages)
15. Elko Police Report (8 pages)
16. Affidavit of Kenneth N. Scissors, M.D. (5 pages)
17. Schwartz Report from Elite Investigations (18 pages)
18. Complaint (Medical Malpractice and Wrongful Death) (24 pages)
19. Errata to Plaintiff's Complaint, Amended Complaint and Second Amended Complaint (12 pages)
20. Second Amended Complaint (Medical Malpractice and Wrongful Death) (22 pages)
21. Amended Complaint (Medical Malpractice and Wrongful Death) (22 pages)
22. Deposition of David James Garvey, M.D. (166 pages)
  - i. June 25, 2019
23. Deposition of Carmen Gonzalez (26 pages)



- i. March 4, 2019
- 24. Deposition of Susan Olson, R.N. (78 pages)
  - i. March 4, 2019
- 25. Deposition of Dr. John Patrick Patton (67 pages)
  - i. May 31, 2019
- 26. Deposition of Donna Kevitt, R.N. (111 pages)
  - i. March 4, 2019
- 27. Deposition of Diane Schwartz (163 pages)
  - i. January 23, 2019
- 28. Deposition of Kathleen Jane Dunn (176 pages)
  - i. June 8, 2020
- 29. Deposition of Gary McCalla, MD (194 pages)
  - i. June 8, 2020
- 30. Exhibits 1-4 of the Deposition of Gary McCalla, MD (656 pages)
- 31. Deposition of Tom Evers, RRT (84 pages)
  - i. June 17, 2020
- 32. Exhibits 1-5 of the Deposition of Tom Evers, RRT (108 pages)
- 33. Deposition of Barry Bartlett with Exhibits 1-5 (154 pages)
- 34. Responses to Plaintiff's First Set of Request for Production of Documents (7 pages)
- 35. Answers to Plaintiff's First Set of Interrogatories (10 pages)
- 36. Plaintiff's Responses to Defendant David Garvey's First Set of Requests for Production (26 pages)
- 37. Plaintiff's Answers to Defendant David Garvey's First Set of Interrogatories (19 pages)
- 38. Plaintiff's Responses to Defendant Reach Air Medical Services' First Set of Interrogatories, Requests for Production and Requests for Admissions (22 pages)
- 39. Reach and Summit Documents (263 pages)
- 40. Reach Air Medical Services, LLC's Responses and Objections to First Set of Interrogatories, Requests for Admission, and Requests for Production to Plaintiff (54 pages)

41. Dr. Whimple's Clinic Notes on Douglas Schwartz (20 pages)
42. Dr. Garvey's Partial Motion for Summary Judgement (290 pages)
43. Dr. Garvey's Errata to Motion for Partial Summary Judgement (10 pages)
44. Mr. Schwartz's radiographic imaging studies (June 22, 2016)
  - i. CT Brain without contrast
  - ii. CT C-Spine without contrast
  - iii. CT T-Spine without contrast
  - iv. CT Chest with IV contrast
  - v. CT Abdomen and Pelvis with IV contrast
45. Northeastern Nevada Regional Hospital Patient Safety Plan
46. Northeastern Nevada Regional Hospital Code Blue Procedure & Crash Cart Maintenance (14 pages)
47. Nevada Trauma Statute (NRS 41.503)
48. Northeastern Nevada Regional Hospital Provision of Care Event for the Unexpected Death of Douglas Schwartz (5 pages) (Evers Exhibit 5)

### **Facts**

Douglas Schwartz was 58 years old on the night of June 22, 2016 when he was struck by a car while walking out of a restaurant. The Elko County ambulance arrived on the scene at approximately 8:19 pm. Mr. Schwartz complained of right sided body pain. Mr. Schwartz was thrown upon the hood and onto the roof before falling to the ground. Mr. Schwartz had pain to his right ribs. He had diminished lung sounds due to not wanting to take a deep breath. The ambulance crew started an IV, placed Mr. Schwartz in c-spine precautions, and placed oxygen at 4 liters (L) just for precaution. The ambulance crew administered 4 mg of Zofran and 100 mcg of Fentanyl which helped with Mr. Schwartz's pain. At 8:41 pm, the ambulance transported Mr. Schwartz three miles to the emergency room of Northeastern Nevada Regional Hospital without lights and sirens. Mr. Schwartz arrived in the emergency room at 8:51 pm.

Upon arrival to the emergency room, Mr. Schwartz's presenting complaints were right sided rib pain, right knee pain, and right shoulder pain. Mr. Schwartz's pulse ox was 94% on 4 liters of oxygen via nasal cannula<sup>1</sup> (NC).

Donna Kevitt, RN was Mr. Schwartz's nurse. Nurse Kevitt documented that Mr. Schwartz's airway was patent with good air movement, and he was breathing without difficulty. Nurse Kevitt documented that Mr. Schwartz complained of pain in his right supraclavicular area, diaphragm, and right breast. Mr. Schwartz appeared uncomfortable and had diminished breath sounds in his right posterior middle and lower lung lobes. Nurse Kevitt documented that Mr. Schwartz possibly experienced a loss of consciousness. Mr. Schwartz was awake, alert, and oriented to person, place, and time. Nurse Kevitt noted some abrasions to his right scalp, right outer arm, right elbow, and right knee.

Dr. David Garvey was Mr. Schwartz's emergency physician. Dr. Garvey documented<sup>2</sup> that Mr. Schwartz sustained injury to his head, chest, right bicep, right elbow, and right knee. Dr. Garvey noted that Mr. Schwartz had pain with breathing and movement. Dr. Garvey documented that Mr. Schwartz experienced a brief loss of consciousness. Dr. Garvey documented that Mr. Schwartz's symptoms, at their worst, were moderate and unchanged in the emergency department. Mr. Schwartz had a past medical history of hypertension. On Dr. Garvey's review of systems, Mr. Schwartz was positive for chest pain, back pain, and abrasions; he was negative for shortness of breath, nausea, and vomiting. On physical examination, Dr. Garvey documented the following:

1. Appears awake, in obvious pain, uncomfortable
2. Abrasions that are mild to the forehead
3. Moderate chest tenderness to palpation of the right lateral posterior chest
4. Moderate back pain that is moderate of the left scapular and subscapular area

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<sup>1</sup> Oxygen tubing with two soft prongs that are inserted into the openings of the patient's nostrils. The oxygen concentration delivered varies from 25 to 40 percent depending on the patient's rate of breathing, volume of air breathed in, and extent of mouth breathing. The flow rates are typically 2-4 L/minute.

<sup>2</sup> A scribe transcribed Dr. Garvey's note. Dr. Garvey reviewed and agreed with the scribe's documentation on Dr. Garvey's behalf.

5. Abrasion to the right knee, elbow, and bicep
6. Normal external neck
7. No cervical midline tenderness, not intoxicated, normal mental status, no focal neurological deficits, and no painful distracting injuries are present
8. Normal heart rate and regular rhythm
9. Does not display signs of respiratory distress; normal respirations, breath sounds are normal and clear throughout
10. Normal appearance of abdomen, normal bowel sounds, abdomen is soft and nontender in all quadrants
11. Normal appearance of skin except for affected areas
12. Normal orientation to person, place, and time; immediate and remote memory is intact; recent memory is impaired
13. Behavior/mood is pleasant and cooperative

Dr. Garvey ordered CT scans on Mr. Schwartz.

At 9:33 pm or 9:40 pm, Mr. Schwartz was moved to CT scan.

At 10:33 pm, Nurse Kevitt administered Dilaudid 1 mg IV and Zofran 4 mg IV to Mr. Schwartz.

At 11:00 pm, Mr. Schwartz was moved back from CT scan to room 12.

At 11:07 pm, the radiologist verified receipt of Mr. Schwartz's CT abdomen and pelvis with Cheryl in the ER for Dr. Garvey.

The radiology report of Mr. Schwartz's CT abdomen and pelvic contained the following:

1. Trace hyperdense fluid just below the right liver lobe as well as next to the left colon.  
No clear CT evidence for spleen or liver contusion or laceration, however finding should

be considered to reflect trace hemoperitoneum in the setting of significant trauma. Low grade solid organ injury is not excluded.

2. No free air to suggest bowel perforation.

At 11:17 pm, Mr. Schwartz's pulse ox was 91%.

At 11:19 pm, Nurse Kevitt administered Zofran 4 mg IV to Mr. Schwartz.

At 11:27 pm, Mr. Schwartz's pulse ox was 91%.

At 11:30 pm, Mr. Schwartz's pulse ox was 92%.

At 11:36 pm, REACH Air Medical Service's dispatch was notified.

At 11:37 pm, respiratory placed Mr. Schwartz on a Venti (Venturi<sup>3</sup>) mask. Mr. Schwartz's oxygen saturations were 92% and 93%.

At 11:41 pm, REACH Air Medical Service crew was dispatched.

At 11:45 pm, REACH Air Medical Service crew was enroute.

At 11:45 pm, Mr. Schwartz's pulse ox was 91%.

At 11:47 pm, the radiologist verified receipt of Mr. Schwartz's CT chest, CT head, and CT T-spine with Dr. Garvey.

The radiology report of Mr. Schwartz's CT chest contained the following:

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<sup>3</sup> Simple mask that fits loosely over the nose and mouth. The mask can provide oxygen concentrations of 35 and 50 percent depending on the rate of breathing, volume of air breathed in, and mask fit. The flow rates are typically 6 – 10 L/minute.

1. Small right anterior pneumothorax (less than 10%).
2. Acute fractures of the 4<sup>th</sup> through 7<sup>th</sup> ribs as described. There are acute anterolateral fractures of the right 4<sup>th</sup> through 7<sup>th</sup> ribs with the 4<sup>th</sup> and 6<sup>th</sup> ribs fractured in 2 places (nondisplaced fractures also noted). Comminution and displacement of the 7<sup>th</sup> fracture is present.
3. Dependent bibasilar opacities and right perihilar opacity may reflect atelectasis, pulmonary contusion, and/or sequela of aspiration.

The radiology report of Mr. Schwartz's CT head contained the following:

1. Symmetrical hyperdensity along the bilateral tentorium likely reflects hemoconcentration/dehydration. Trace subdural blood products would be considered much less likely. If indicated, follow up head CT could be performed to assess for stability.

The radiology report of Mr. Schwartz's CT C-spine contained the following:

1. No CT evidence of acute cervical fracture or traumatic subluxation.

The radiology report of Mr. Schwartz's CT T-spine contained the following:

1. Irregularity of the right T10 and T11 pedicles may reflect chronic fracture deformity. Acute nondisplaced pedicle fractures not entirely excluded. Correlate for tenderness to palpation at this level. MRI could further evaluate as indicated.

Dr. Garvey discussed Mr. Schwartz with Dr. Ray at University of Utah who accepted Mr. Schwartz in transfer. Dr. Ray requested that a chest tube be placed and possible intubation<sup>4</sup> prior to air medical transport due to flail segment, pulmonary contusions, low oxygen saturations, and a traumatic right pneumothorax. At 11:57 pm, the REACH team arrived at Mr. Schwartz's bedside to find Mr. Schwartz talking to his family as Dr. Garvey assembled his team

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<sup>4</sup> Dr. Garvey testified that he had already planned to intubate, and that Dr. Ray did not tell him to conclusively intubate Mr. Schwartz; leaving that decision up to Dr. Garvey. (Deposition of Dr. Garvey; Page 113, Lines 2-16)

and equipment. Dr. Garvey's plan was place the chest tube while the Reach crew (Barry Bartlett, EMT-Paramedic) performed the intubation. Mr. Schwartz vomited and aspirated a large amount of gastric contents. Suctioning was difficult due to large food particles occluding the suction. Multiple suction machines were used to no avail. Multiple attempts at intubation were made. Intubation was without success. Vomitus in the airway could not be completely cleared. Mr. Schwartz went into cardiac arrest (coded). ER staff tried to suction copious amounts of vomit throughout the code. From the time the first drug was given for rapid sequence intubation (RSI) until Dr. Garvey pronounced Mr. Schwartz deceased was 1 hour and 15 minutes. Mr. Schwartz would regain his pulse at times but would go back into cardiac arrest. During this time, Dr. Garvey nor Barry Bartlett were able to establish a definitive airway for Mr. Schwartz. Once, they were able to increase Mr. Schwartz's pulse ox to 79%-82% with a King airway, but Mr. Schwartz deteriorated again, and his oxygen saturation started dropping<sup>5</sup>. Approximately 46 minutes after the first intubation attempt, Dr. Garvey performed a cricothyrotomy (cric) and placed a trach tube in the correct location (the trachea). The procedure was complicated by vomit. Initially the trach tube was placed but quickly became occluded with gastric contents. The trach tube became dislodged while attempting to clear the vomit. Ultimately, Mr. Schwartz was bagged through his cricothyrotomy via a 5-0 endotracheal tube (ETT) but most of the bagged air expelled from the mouth. Mr. Schwartz's oxygen saturations did not improve, and he went into cardiac arrest, again.

According to the REACH Air Medical Service record, multiple operators attempted to intubate Mr. Schwartz at least 9 times over the time span of approximately 48 minutes. The documentation of the REACH record contained the following:

- 0020 – Once the drugs took effect, Paramedic Bartlett opens the airway and places the C-Mac device resulting in copious amounts of emesis and large food chunks fulminating from the mouth and nose. Intubation is immediately stopped, and the airway is suctioned, which promptly plugs the suction tubing and yankauer tip.

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<sup>5</sup> Deposition of Dr. Garvey; Page 153, Lines 5-8

- Over the course of the next 13 minutes, Mr. Schwartz vomits several more times and numerous attempts are made a clearing/maintaining his airway and reoxygenating him with BVM on high flow oxygen.
- 0023 – ETT placement attempt unsuccessful
- 0033 – ETT placement attempt unsuccessful
- In addition to the factors that are making this procedure very difficult (airway contamination, difficulty in keeping the suction devices flowing, difficulty in getting a good facial seal and very stiff bagging effort) his airway is reportedly very inferior/anterior making it a challenge to visualize.
- Paramedic Bartlett attempts several tooled and digital<sup>6</sup> intubations, all of which are unsuccessful.
- 0035 – Mr. Schwartz loses pulses and CPR is initiated for approximately one minute and pulse is restored.
- The airway is again suctioned and a king airway<sup>7</sup> is placed. Bag valve mask (BVM) bagging remains very difficult and shortly afterward the king is removed after becoming plugged by emesis and food particles.
- A 3<sup>rd</sup> suction unit is placed in play and Mr. Schwartz's oxygen saturation is 47% on high flow oxygen.
- 0040, 0044, and 0047 – Intubation attempts continue with various size ETTs, stylets, bougie introducers, and airway adjuncts. The emesis is almost continuous and proving very difficult to get cleared.
- 0050 – Mr. Schwartz's oxygen saturation is approximately 50%.
- 0052 -- ETT placement attempt unsuccessful; airway suctioned and oxygen is at 55%
- 0053 – ETT placement attempt unsuccessful; several operator changes
- 0054 – Mr. Schwartz's oxygen saturation is 42% with bagging and suctioning at every opportunity. A cricothyrotomy is discussed and the kit prepared.

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<sup>6</sup> Attempting intubation with fingers without visualization of the airway

<sup>7</sup> Dr. Garvey testified that he did not have a King airway in the ER. He used the EMS crew's King airway. (page 151; Line 9-14)



- Mr. Schwartz is becoming abdominally distended and a nasal-gastric (NG) tube is attempted in each nostril. The NG tube will not pass, and Mr. Schwartz's nose starts bleeding.
- Facial seal remains a challenge due to vomit and wet face.
- An oral-gastric (OG) tube placement attempt is also unsuccessful and abandoned.
- 0058 – Mr. Schwartz's oxygen saturation is 68% and the third operator is again in place as efforts to reoxygenate are minimally effective and bagging effort is very high.
- Cric airway kit is being prepared.
- 0102 – Mr. Schwartz's oxygen saturation is 75%.
- Another intubation attempt is unsuccessful.
- 0106 -- The cric is initiated by Dr. Garvey and paramedic Bartlett. The tube is very difficult to advance into the trachea. The tube begins to fill up with vomit. The tube is pulled and replaced two additional times with the same results.
- 0117 – Pulses are lost and CPR resumes.
- Emesis continues and additional suction units and methods of airway clearance are discussed.
- 0120 – The monitor is displaying asystole (flat line, no heartbeat). CPR is ongoing.
- 0122 – A pulse of 52 is noted on the monitor.
- CPR continues. Gastric distention is increasing and cannot be evacuated.
- 0125 – CPR ongoing by ER staff
- 0128 – We note an oxygen saturation reading of 64% on the monitor.
- 0129 – Bilateral needle thoracostomy is performed with no results and no air escape.
- 0133 – CPR is stopped, and Mr. Schwartz is pronounced deceased.

Dr. Garvey documented that Mr. Schwartz's cardiac arrest was due to asphyxiation<sup>8</sup>.

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<sup>8</sup> Act of causing asphyxia: a state of asphyxia: suffocation (Merriam-Webster Unabridged)

## Opinion

It is my professional opinion that Dr. David James Garvey breached the applicable standard of care for Mr. Schwartz on June 22, 2016 in the emergency room of Northeastern Nevada Regional Hospital. Dr. Garvey fell below the applicable standard of care by attempting to intubate Mr. Schwartz. Dr. Garvey fell below the applicable standard of care by not performing a cricothyrotomy on Mr. Schwartz sooner. Mr. Schwartz was a stable patient before Dr. Garvey attempted to intubate him. Mr. Schwartz could protect his own airway. Mr. Schwartz was not in respiratory distress. Mr. Schwartz did not have a flail chest. Dr. Garvey should have removed Mr. Schwartz from the hard backboard as well as the cervical collar. Dr. Garvey should have placed a chest tube after numbing up Mr. Schwartz's chest wall with local lidocaine. Dr. Garvey should have transferred Mr. Schwartz to a higher level of care on oxygen delivered via a simple face mask (Venturi). Instead, Dr. Garvey breached the standard of care by attempting to intubate Mr. Schwartz. Dr. Garvey not only breached the standard of care, Dr. Garvey acted with reckless conduct, in bad faith, and was grossly negligent.

It is my professional opinion that Northeastern Nevada Regional Hospital breached the applicable standard of care by not completely stocking the trauma cart that was used in the care of Mr. Schwartz. By not completely stocking the trauma cart, Northeastern Nevada Regional Hospital acted with reckless conduct.

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**Mr. Schwartz was a stable patient before Dr. Garvey attempted to intubate him.** The fact that Mr. Schwartz was stable before Dr. Garvey's attempt to intubate is supported by the following:

1. The ambulance that transported Mr. Schwartz to NNRH did not use lights and sirens.
2. The ambulance that transported Mr. Schwartz to NNRH placed him on oxygen via NC at 4L/min as a precaution.
3. When Mr. Schwartz arrived, he was breathing without difficulty.

4. Nurse Kevitt evaluated Mr. Schwartz on multiple occasions, before and after CT scan, never noting any sign of being unstable.
  - i. 9:31 pm: visited this patient and evaluated for pain, information, needs, and comfort
  - ii. 11:00 pm: Mr. Schwartz moved back to room 12 from CT
  - iii. 11:17 pm: visited this patient and evaluated for pain, information, needs, and comfort
  - iv. 11:27 pm: visited this patient and evaluated for pain, information, needs, and comfort
  - v. 11:31 pm: visited this patient and evaluated for pain, information, needs, and comfort
5. Mr. Schwartz's pulse (P), respiratory rate (RR), and blood pressure (BP) were stable and within normal limits (WNL). Mr. Schwartz's pulse ox readings were stable and within normal limits of what is expected in a trauma patient with rib fractures and a pneumothorax, especially a patient with inadequate pain control. Patients with these injuries have severe pain when they expand their chest wall on the effected side when they breath. This pain makes them not want to take a deep breath that expands the effected side. This is called splinting. The cornerstone of rib fracture management is pain control. Early and adequate pain relief is essential to avoid complications from splinting and not completely filling a lung with air (atelectasis). Dr. Garvey had only given Mr. Schwartz one dose of pain medicine approximately 1 hour and 45 minutes prior to attempting intubation. Mr. Schwartz's recorded vital signs prior to intubation attempt were as follows:
  - i. 11:17 pm: BP 116/75, P 67, RR 16, pulse ox 91%
  - ii. 11:27 pm: BP 115/74, P 67, RR 17, pulse ox 91%
  - iii. 11:30 pm: BP 120/78, P 67, RR 18, pulse ox 92%
  - iv. 11:45 pm: BP 114/73, P 68, RR 18, pulse ox 91%
  - v. 12:10 am: P 66, RR 17, pulse ox 97% on nonrebreather mask

vi. 12:15 am: P 73, RR 19, pulse ox 99% on nonrebreather mask

Mr. Schwartz's vital signs did not become unstable until the time of the intubation attempt at 0020.

6. Multiple witnesses gave testimony that describes Mr. Schwartz in stable condition.
- i. Regarding the time around Mr. Schwartz's initial evaluation, Diane Schwartz testified<sup>9</sup> that Mr. Schwartz did not complain of any difficulty breathing.
  - ii. Diane Schwartz testified<sup>10</sup> that Mr. Garvey did not have any difficulty breathing while he was in the ER nor did he have on a nasal cannula or oxygen mask.

Q – Did Doug have any difficulty Breathing while he was in the ER?

A – No

Q – Do you remember him receiving any type of oxygen while he was in the ER?

A – No

Q – Did he have anything up his nose?

A – No

Q – Did he ever have a facemask on?

A – No

- iii. Diane Schwartz testified<sup>11</sup> that when she left Mr. Schwartz; he was fine.
- iv. Diane Schwartz testified<sup>12</sup> that she couldn't understand why they intubated him in the first place that night given the condition he was in and the fact that he was breathing fine and he was okay.
- v. Dr. John Patton (a friend) testified<sup>13</sup> that Mr. Schwartz was stable and doing fine. Dr. Patton was with Mr. Schwartz and Mrs. Schwartz during the CT scan until

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<sup>9</sup> Deposition of Diane Schwartz, Page 49; Lines 23-24

<sup>10</sup> Deposition of Diane Garvey; Page 62, Line 19 – Page 63, Line 3

<sup>11</sup> Deposition of Diane Garvey; Page 70, Lines 13-15

<sup>12</sup> Deposition of Diane Garvey; Page 136, Lines 8-12

<sup>13</sup> Deposition of Dr. John Patton; Page 13, Line 11 – Page 14

about 45 minutes afterwards. Their conversation with Mr. Schwartz was an interesting conversation as Mr. Schwartz was in a lot of pain.

- vi. Dr. John Patton testified<sup>14</sup> that when he and Diane left Mr. Schwartz, Mr. Schwartz was speaking, talking, joking, and laughing. It was uncomfortable for Mr. Schwartz to laugh.
- vii. Dr. John Patton testified<sup>15</sup> that he was critical of Dr. Garvey's decision to intubate.

Q – And is it fair to say that if you don't have an opinion on what happened there, are you – do you have an – are you critical of the decision to intubate?

A – I am critical of that decision, yes.

Q – On what grounds?

A – Because he was stable, laughing, and communicative when we left him.

- viii. Dr. John Patton testified<sup>16</sup> that he never noticed Mr. Schwartz gasping for breath and; in general, Mr. Schwartz had conversational breathing.
  - ix. Carmen Gonzalez (admitting and discharge clerk) testified<sup>17</sup> that Mr. Schwartz seemed normal and that he was laughey and smiley when she went to put his wristband on.
7. According to the Provision of Care Event, Mr. Schwartz was "stable and ready for transfer."

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**Mr. Schwartz did not have injuries that were an immediate or imminent<sup>18</sup> threat to life. Mr. Schwartz had rib fractures. Mr. Schwartz's rib fractures were not an immediate or imminent**

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<sup>14</sup> Deposition of Dr. John Patton; Page 15, Lines 9-12

<sup>15</sup> Deposition of Dr. John Patton; Page 32, Lines 6-12

<sup>16</sup> Deposition of Dr. John Patton; Page 60, Lines 21-25

<sup>17</sup> Deposition of Carmen Gonzalez; Page 9, Lines 23-25

<sup>18</sup> Ready to take place, happening or likely to happen very soon, impending (Merriam-Webster Unabridged)

threat to his life. Mr. Schwartz was stable and maintaining an oxygen saturation greater than 91% with a simple oxygen mask -- even with inadequately treated pain. Radiology could not declare with certainty whether he had lung contusions or areas of the lungs not filling completely with air. CT images of lungs that have pulmonary contusions that are an immediate or imminent threat to life can be declared with certainty. I reviewed Mr. Schwartz's images and did not see any pulmonary contusions that were an immediate or imminent threat to life. Radiology could not declare with certainty whether he had trace subdural brain blood or if he was just dehydrated. A subdural brain bleed that exists and is an immediate and imminent threat to life can be declared with certainty. I reviewed Mr. Schwartz's images and did not see any subdural blood. Mr. Schwartz's CT T-spine contained possible acute injury to his lower thoracic spine that was not an immediate or imminent threat to life. Radiology declared that there was no clear CT evidence for spleen or liver damage and only trace fluid that could be blood was seen in the abdomen. Radiology indicated that if there were abdominal organ injury; it was low grade. Mr. Schwartz's CT C-spine did not show any acute injuries.

Mr. Schwartz had a pneumothorax that was not an immediate or imminent threat to life. Mr. Schwartz's pneumothorax occupied less than 10% of his right lung cavity. The standard of care required Dr. Garvey to place a right chest tube as a preventative measure because Mr. Schwartz was to go on an air flight. With changes in atmospheric pressure, a pneumothorax can get bigger; and a chest tube prevents such from happening.

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**Dr. Garvey fell below the applicable standard of care by attempting to intubate Mr. Schwartz.**

Dr. Garvey should not have attempted to intubate Mr. Schwartz for the following reasons:

1. Mr. Schwartz had just eaten a full meal which Dr. Garvey knew<sup>19</sup>. It is a known principle of emergency medicine that patients who have stomachs full of food and liquid are at

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<sup>19</sup> Deposition of Dr. Garvey; Page 107, Line 25 – Page 108, Line 3

risk of aspiration<sup>20</sup> and airway complications. When a paralytic drug (Rocuronium was administered) is given, the drug paralyzes the muscles that keep stomach contents from coming back up into the esophagus and airway. The drug also takes away the body's ability to protect its own airway and lungs by taking away the gag reflex. Most anything that gets around the opening of the trachea (windpipe) or vocal cords will trigger the gag reflex to prevent aspiration. The fact that Mr. Schwartz had just eaten increased his risk for complications during a rapid sequence intubation (RSI) and made him a difficult airway. Dr. Garvey knew that the attempt at intubation was high risk. Dr. Garvey testified the following<sup>21</sup>:

Q – Did you consider this specific intubation high risk?

A – Oh, yes.

Q – And why is that?

A – Because we have a patient that had just finished a large meal. He was on a backboard in a C collar, and his body habitus all lend to a difficult intubation.

2. Dr. Garvey thought Mr. Schwartz had a flail chest which is one of the reasons Dr. Garvey attempted to intubate him. Mr. Schwartz did not have a flail chest. A flail chest is when at least two or more adjacent (consecutive) ribs are fractured at two points allowing a freely moving segment of chest wall to move in paradoxical motion. Paradoxical motion describes the segment of chest wall that moves inward when the rest of the chest moves outward with a deep breath and vice versa. Mr. Schwartz had a fracture of his fourth rib in two places and sixth rib in two places. The fourth and sixth rib are not adjacent to one another. Mr. Schwartz did not have rib fractures consistent with a flail chest. Dr. Garvey testified that he knew what a flail chest was in the following testimony:

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

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<sup>20</sup> Sucking gastric contents (vomit or emesis) into the trachea and lungs

<sup>21</sup> Deposition of Dr. Garvey; Page 128, Lines 16-23

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 – So 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.

Despite Dr. Garvey knowing what ribs fractures are consistent with a flail chest, he still misdiagnosed Mr. Schwartz with a flail chest and based his decision to intubate Mr. Schwartz from an incorrect diagnosis.

Even if Mr. Schwartz did have a flail chest, it was below the standard of care to immediately intubate him. The authors of Rosen's Emergency Medicine Concepts and Clinical Practice, 8<sup>th</sup> edition write the following:

The outcome of flail chest injury is a function of associated injuries. Because many different physiologic mechanisms have been implicated in flail chest, there is no consensus about hospital treatment. The cornerstones of therapy include aggressive pulmonary physiotherapy, effective analgesia<sup>22</sup>, selective use of endotracheal intubation and mechanical ventilation, and close observation for respiratory compromise. Respiratory decompensation is the primary indication for endotracheal intubation and mechanical ventilation for patients with flail chest. Obvious problems, such as hemopneumothorax or severe pain, should be corrected before intubation and ventilation are presumed necessary. In fact, in the awake and cooperative patient, noninvasive continuous positive airway

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<sup>22</sup> Pain control



pressure (CPAP) by mask may obviate the need for intubation. In general, the most conservative methods for maintaining adequate oxygenation and preventing complications should be used. Adequate analgesia is of paramount importance in patient recovery and may contribute to the return of normal respiratory mechanics. Patients without respiratory compromise generally do well without ventilatory assistance. Several studies have found that patients treated with intercostal nerve blocks or high segmental epidural analgesia, oxygen, intensive chest physiotherapy, careful fluid management, and CPAP, with intubation reserved for patients in whom this therapy fails, have shorter hospital courses, fewer complications, and lower mortality rates. Avoidance of endotracheal intubation, particularly prolonged intubation, is important in preventing pulmonary morbidity because intubation increases the risk of pneumonia.

Mr. Schwartz did not have respiratory decompensation or compromise; he was talking, laughing, and joking. His oxygen saturations were above 90% on a simple oxygen mask and 99% on a nonrebreather.

3. Dr. Garvey should not have intubated Mr. Schwartz based on a risk of aspiration from being on a rigid backboard and wearing a c-collar. Dr. Garvey and staff should have logrolled Mr. Schwartz off of the rigid backboard onto a regular stretcher or ER bed with a soft mattress. Dr. Garvey should have removed Mr. Schwartz's c-collar. Mr. Schwartz could have laid on his side or at 30 degrees head of the bed elevation to protect his own airway if he needed to vomit. More anti-nausea medicines could have been given. Excluding Mr. Schwartz's initial ambulance transport to the emergency room, he had no reason to be on a rigid backboard. Mr. Schwartz's exam was not consistent with any spinal cord injury (SCI). Even in patients with a spinal cord injury, backboards should be removed as soon as possible in the emergency room. In a systemic review of the literature and evidence-based guidelines: Henry Ahn, et al, in the Journal of Neurotrauma (2011) write the following:

What is the optimal type and duration of pre-hospital spinal immobilization in patients with acute SCI?

- Patients should be transferred off the hardboard on admission to a facility as soon as is feasible to minimize time on the hard board. If patients are awaiting transfer to another institution, they should be taken off the hardboard while awaiting transfer.

In addition, Mr. Schwartz did not clinically correlate with an acute spine fracture. He was not tender and did not complain of pain in the area of the irregularity mentioned on his CT T-spine. Mr. Schwartz had pain and tenderness at his scapular and subscapular level. The area mentioned on CT (T10 and T11) are at the level just above the umbilicus (belly button).

After Mr. Schwartz's initial evaluation by Dr. Garvey and Mr. Schwartz's negative CT C-spine, Dr. Garvey should have removed Mr. Schwartz's c-collar. Mr. Schwartz did not complain of any pain in his neck and had a negative physical exam of his neck by Dr. Garvey. Dr. Garvey documented that Mr. Schwartz satisfied all of the Nexus Criteria for not having a c-spine injury. The Nexus Criteria decision instrument stipulates that imaging is not necessary if patients younger than 60 years satisfy all of the following criteria:

- i. Absence of posterior midline cervical tenderness
- ii. Normal level of alertness
- iii. No evidence of intoxication
- iv. No abnormal neurologic findings
- v. No painful distracting injuries

The sensitivity and negative predictive value of the Nexus Criteria is 99.6% and 99.9%, respectively in patients not receiving imaging such a CT of the c-spine. This is the sensitivity and negative predictive value without a negative CT of the c-spine, as the

Nexus Criteria are mainly used to rule out injury and decide which patients not to image. Adding a negative CT of the c-spine and satisfying all of the nexus criteria even further pushed the chance of Mr. Schwartz not having a c-spine injury towards 100%; more than adequately ruling out any c-spine injury in Mr. Schwartz. Mr. Schwartz had no reason to be in a c-collar.

Dr. Garvey should have performed a cricothyrotomy upon Mr. Schwartz sooner. The situation turned into a failed airway early in the process of trying to intubate. According to the REACH record, Mr. Schwartz began to vomit on the first attempt to intubate by Barry Bartlett at 12:20 am. Copious amounts of emesis and large food chunks began fulminating<sup>23</sup> from the mouth and nose. Intubation was immediately stopped. The airway could not be cleared or suctioned. The vomit clogged both the suction tubing and the yankauer which have inner diameters of only approximately 5 mm and 4 mm, respectively. Over the course of the next 13 minutes, Mr. Schwartz vomited several more times and numerous attempts were made at clearing/maintaining his airway and reoxygenating him with BVM on high flow oxygen. Mr. Schwartz could not be intubated and could not be oxygenated. In emergency medicine, this is called, “can’t intubate, can’t oxygenate” (CICO). Authors from the Manual of Emergency Airway Management, 3<sup>rd</sup> Edition write the following:

The definition of a failed airway is based on one of two criteria being satisfied: (a) a failure of an intubation attempt in a patient for whom oxygenation cannot be adequately maintained with a bag and mask [BVM], or (b) three unsuccessful intubation attempts by an experienced operator and adequate oxygenation. Unlike the difficult airway, where the standard of care dictates the placement of a cuffed endotracheal tube in the trachea providing a definitive, protected airway, the failed airway calls for action to provide emergency oxygenation sufficient to prevent patient morbidity (especially hypoxic brain injury) by whatever means possible until a definitive airway can be secured.

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<sup>23</sup> To come on suddenly and intensely (Merriam-Webster Unabridged)

Barry Bartlett attempted to intubate Mr. Schwartz again at 12:23 am, leaving Mr. Schwartz in a CICO situation for 10 minutes before Barry Bartlett's third failed attempt at 12:33. During this time, Dr. Garvey was making not taking any action to provide emergency oxygenation to Mr. Schwartz. The standard of care required Dr. Garvey to perform a cricothyrotomy immediately after Barry Bartlett's failed intubation attempt at 12:23 am. Authors from the Manual of Emergency Airway Management, 3<sup>rd</sup> Edition write the following:

If, however, the failed airway is because of a CICO situation, then there is little time left before cerebral hypoxia will result in permanent deficit, and immediate cricothyrotomy is indicated.

As a result of Dr. Garvey not performing a cricothyrotomy in timely manner, Mr. Schwartz remained a failed airway in a CICO situation for over an hour before he was pronounced deceased. At 12:25 am, Mr. Schwartz's pulse ox was 76%. Barry Bartlett had failed a second attempt at intubation at 12:23 am. Mr. Schwartz's airway could not be cleared, and he could not be oxygenated. At least over thirty minutes passed with Mr. Schwartz being a failed airway in a CICO situation before Dr. Garvey initiated a cricothyrotomy at 1:06 am. By this time, countless attempts of using BVM had pushed copious amounts of vomit into Mr. Schwartz's trachea and bronchi (passage that air travels to the lungs). Mr. Schwartz's trachea and bronchi were so clogged with vomit; Dr. Garvey's late cricothyrotomy could not oxygenate Mr. Schwartz's lungs.

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**Dr. Garvey's omission to perform a cricothyrotomy on Mr. Schwartz in a timely manner was gross negligence.** Dr. Garvey not performing a cricothyrotomy while Mr. Schwartz was suffocating on his own vomit was negligence significantly greater in magnitude than ordinary

negligence. It was extraordinary negligence to a high degree. Dr. Garvey failed to exercise even a slight degree of care by omitting to establish emergency oxygenation to Mr. Schwartz with a cricothyrotomy in a timely manner. Mr. Schwartz was in a CICO situation at approximately 12:23 am with a failed second attempt at intubation in the setting of not being able to oxygenate due to airway obstruction from fulminating emesis. The standard of care required that Dr. Garvey perform a cricothyrotomy on Mr. Schwartz immediately after Barry Bartlett's failed attempt at 12:23 am. After 12:23 am, there were no reasonable attempts that met the standard of care to establish emergency oxygenation to Mr. Schwartz. Dr. Garvey was doing nothing within the standard of care to establish emergency oxygenation to Mr. Schwartz. According to the testimony<sup>24</sup> of Barry Bartlett, Dr. Garvey was on the right side of Mr. Schwartz prepping for chest tube insertion until at least 12:33 am – ten minutes after Barry Bartlett's second failed attempt.

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**Dr. Garvey acted with reckless conduct.** It is my understanding that reckless conduct is deemed to be that conduct in which the person knew or should have known at the time the person rendered care or assistance would be likely to result in injury so as to affect the life or health of another person. Dr. Garvey made the decision for two separate very serious and meticulous procedures (intubation and chest tube insertion) to be performed upon Mr. Schwartz simultaneously. Dr. Garvey should have known at the time that his conduct would likely result in injury that would affect the life or health of Mr. Schwartz. Dr. Garvey's decision was for Barry Bartlett to intubate Mr. Schwartz, who Dr. Garvey identified as having a high risk difficult airway<sup>25</sup>, while Dr. Garvey cut a hole in Mr. Schwartz's chest for a chest tube to be placed in Mr. Schwartz's chest cavity (chest tube thoracostomy). Dr. Garvey had never talked to Barry Bartlett about Barry's education, training, or experience<sup>26</sup>. Barry Bartlett was still in his internship with REACH<sup>27</sup>. Each of these procedures performed in the proper sequence one at a

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<sup>24</sup> Deposition of Barry Bartlett; Page 78, Line 1 – Page 79, Line 8

<sup>25</sup> Deposition of Dr. Garvey; Page 128, Lines 16-23

<sup>26</sup> Deposition of Dr. Garvey; Page 30, Line 22 – Page 31, Line 1

<sup>27</sup> Deposition of Barry Bartlett; Page 19, Lines 18-20

time have life threatening consequences if something goes wrong. In emergency medicine, first and foremost, a patient's airway comes before most any of the other problems that they could have. It is the ABC's of emergency medicine (A=Airway, B=Breathing, C=Circulation). Airway issues are to be managed before breathing issues; breathing issues are to be managed before circulation issues; and Circulation issues are to be managed before other issues such as disability (neurologic). Once an emergency medicine physician decides to intubate, the airway must be secure and protected before anything else happens including chest tube placement in Mr. Schwartz's situation. Once an ETT is correctly placed, placement is confirmed by direct visualization, end tidal CO2 detection, listening for breath sounds, and performing a chest x-ray. Mr. Schwartz's should not have been intubated. To place the chest tube, rather than sedation and paralysis of a patient with a high risk difficult airway, Dr. Garvey simply needed to numb Mr. Schwartz's chest wall with lidocaine. Instead, Dr. Garvey proceeded with reckless conduct.

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**Dr. Garvey acted in bad faith.** Dr. Garvey acted in bad faith by not reasonably explaining the risks of intubation to Mr. and Mrs. Schwartz that could occur by intubating Mr. Schwartz for the flight. Dr. Garvey mainly explained the risks of not intubating. By not reasonably explaining the risks of intubation, Dr. Garvey was unreasonable and unfair. By not reasonably explaining the risks of intubation, Dr. Garvey infringed upon Mr. Schwartz's right to know his risks of the procedure as a patient. Dr. Garvey testified<sup>28</sup> the following:

Q – 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.

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<sup>28</sup> Deposition of Dr. Garvey; Page 119, Line 4 – Page 120, Line 10

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 – Okay. So, you explained the risks of not intubating, but you did not explain that by intubating Mr. Schwartz, he could aspirate.

MR. WEAVER: Object as to form.

Q – Correct?

MR. BURTON: And join. Also, mischaracterizes the testimony.

THE WITNESS: Yes. There is always a risk of aspiration, but that risk is low. There's a much greater risk of aspiration if he remained on a backboard in an airplane trying to transport him for two hours to the trauma center.

Dr. Garvey acted in bad faith by not reasonably explaining the alternative treatments to Mr. and Mrs. Schwartz, regarding intubation. Dr. Garvey did not explain alternative treatments. By not explaining alternative treatments, Dr. Garvey was unreasonable and unfair. By not explaining alternative treatments, Dr. Garvey infringed upon Mr. Schwartz's right to know his alternative treatment options as a patient. Dr. Garvey testified<sup>29</sup> the following:

Q – Okay. And I appreciate your answer, but I want to make sure it's clear. You did not explain the risks or alternative treatments to Mr. and Mrs. Schwartz besides intubating for transfer, correct?

MR. WEAVER: Object – sorry. Object as to form. It's been asked and answered.

MS. MORALES: No, he didn't—

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<sup>29</sup> Deposition of Dr. Garvey; Page 121, Line 3 – Line 18

MR. BURTON: Several times.

MS. MORALES: -- directly answer

MR. BURTON: Several times. And I join the objection.

THE WITNESS: I said that I -- there were no alternative treatments. So no, I did not explain alternative treatments because there were no alternative treatments. He had to be intubated.

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**Northeastern Nevada Regional Hospital's conduct was reckless.** It is my understanding that reckless conduct is deemed to be that conduct in which a hospital knew or should have known at the time the hospital rendered care or assistance would be likely to result in injury so as to affect the life or health of another person. Northeastern Nevada Regional Hospital's conduct of not completely stocking the trauma cart that was being used in the care of Mr. Schwartz was reckless.

According to the hospital's provision of care event, inadequate equipment availability was a contributing factor<sup>30</sup> to Mr. Schwartz's unexpected death. The brief factual description contains the following:

Pt was prepared for transfer to University of Utah for a higher level of care. 2 REACH RN's present as well as 2 Elko EMS. EMS student also present. Pt was stable and ready for transfer. Decision was made to intubate and insert chest tube made by U of U and given to Dr. Garvey. All equipment was prepared prior to the start of the procedure. See code sheet for further documentation on code. There were complications with intubation which resulted in patient death. The only staff members present from NNRH were Dr. Garvey, myself, Nancy A, ER tech, Tom E, RT, Cindy F, RN (Travel ICU float), and Sue O, RN, house sup. Trauma cart open, not fully stocked -- Supplies had to be

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<sup>30</sup> Other contributing factors reported were (1) staff -- use of float staff (2) staffing issue (3) task -- training issue



obtained from 2 other rooms and storeroom. Privacy issues with other patients in the ER (Room 11 – verbal witness to trauma).

Northeastern Nevada Regional Hospital should have known that not completely stocking a trauma cart would likely result in injury so as to affect the life or health of another person and is a direct violation of their policy<sup>31</sup>.

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#### **Rebuttal to the Opinion of Dr. Barclay**

1. Dr. Barclay opined that Mr. Schwartz sustained a bilateral flail chest injury.
  - i. Dr. Barclay's opinion is based on an incorrect interpretation of the definition of a flail chest. Mr. Schwartz did not have a flail chest on his autopsy or his CT scan. There were not two or more adjacent ribs fractured in two or more places. The definition of flail chest is discussed in my opinion.
  - ii. Dr. Barclay's opinion concerning fractures of Mr. Schwartz's left ribs is based on a failure to consider relevant information. Mr. Schwartz did not have fractures of his left ribs on CT scan. The fractures of Mr. Schwartz's left ribs found on autopsy were likely from the CPR performed on Mr. Schwartz.
2. Dr. Barclay opined that Mr. Schwartz could not be stabilized until conservative management by a trauma surgeon ruled out impending respiratory failure, the need for mechanical respiration, and the need for surgical rib fracture fixation.
  - i. Mr. Schwartz was stable and remained stabilized until Dr. Garvey's attempt to intubate him.
  - ii. The reasons why Mr. Schwartz was stable are discussed in my opinion.

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<sup>31</sup> Assuming the trauma cart and crash cart are the same

3. Dr. Barclay opined that Mr. Schwartz had clinical indications for intubation, including risk of aspiration, low oxygenation, and anticipation of a deteriorating course that leads to respiratory failure.
  - i. Dr. Barclay's opinion is based on failure to consider relevant information specific to Mr. Schwartz that is discussed in my opinion. Mr. Schwartz was able to protect his own airway and not aspirate if Dr. Garvey would have removed Mr. Schwartz from the hard backboard. Mr. Schwartz's oxygenation readings were stable and within normal limits of what is expected in a trauma patient with rib fractures and a pneumothorax, especially a patient with inadequate pain control. It was unlikely that Mr. Schwartz was going to have a deteriorating course that lead to respiratory failure.
  - ii. The reasons why Mr. Schwartz should not have been intubated are discussed in my opinion.
4. Dr. Barclay opined that it was entirely appropriate to have a highly qualified flight paramedic perform rapid sequence intubation while Dr. Garvey performed the thoracotomy.
  - i. Dr. Barclay's opinion is based on an outright mistake. Dr. Garvey was to perform a chest tube thoracostomy. Dr. Garvey was not to perform a thoracotomy, which is an incision into the pleural space of the chest to gain access to thoracic organs.
  - ii. Assuming Dr. Barclay meant chest tube thoracostomy, Dr. Barclay's opinion is unreasonable and fails to recognize that Dr. Garvey made the decision for these two separate very serious and meticulous procedures to be performed upon Mr. Schwartz simultaneously. Emergency physicians are the most qualified to perform rapid sequence intubation.
  - iii. The reasons why this was inappropriate and reckless are discussed in my opinion.

5. Dr. Barclay opined that since Mr. Schwartz needed a thoracostomy and intubation on an emergent basis, the disclosure Dr. Garvey provided to Mr. Schwartz and his wife, advising them of the serious nature of his injuries and the risk of not intubating is what a reasonable emergency physician would disclose under the circumstances.
  - i. Dr. Barclay's opinion is based on the incorrect assumption that Mr. Schwartz needed these procedures emergently, thereby exonerating Dr. Garvey of his duty to explain the risks of these procedures to Mr. Schwartz. Mr. Schwartz did not need a chest tube thoracostomy or an intubation on an emergent basis. Mr. Schwartz needed a chest tube as a preventative measure before flight, and Mr. Schwartz did not need intubation. Further reasoning is discussed in my opinion.
6. Dr. Barclay opined that Dr. Garvey's emergency care and treatment of Mr. Schwartz was within the standard of care.
  - i. I respectfully disagree for reasons discussed in my opinion.
7. Dr. Barclay opined that nothing that Dr. Garvey did or failed to do caused or contributed to Mr. Schwartz's injuries.
  - i. I respectfully disagree for reasons discussed in my opinions.
8. Dr. Barclay opined that multiple attempts to intubate are within the standard of care.
  - i. Dr. Barclay's opinion is based on failure to consider relevant information specific to Mr. Schwartz's situation. Specifically, Mr. Schwartz's was in a "can't intubate, can't oxygenate" situation.
  - ii. The reasons that the multiple attempts to intubate Mr. Schwartz are not the standard of care are discussed in my opinions.

Based upon a reasonable degree of medical certainty, it is my opinion that Dr. Garvey did not use such care as reasonably prudent healthcare practitioners practicing in the same field would

have provided under similar circumstances. It is my opinion that the negligence of Dr. Garvey was the direct and proximate cause of Mr. Schwartz's death.

My opinions are based upon my knowledge, education, experience, skills, and training developed as an emergency medicine physician. All opinions are expressed to a reasonable degree of medical certainty. I specifically reserve the right to add to, amend, or subtract from this report as new evidence comes into discovery or as new opinions are formulated. I declare under penalty of perjury, under the Law of the State of Nevada, that the foregoing is true and correct.

Respectfully,



Seth P. Womack, MD FAEEM

Date: August 17, 2020

## References

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# **EXHIBIT 2**

**Acclaim Consulting & Educational Services, Inc.**

**Expert Report**

**Schwartz v. REACH Air Medical Systems et al.**

CASE NO: CV-C-17-439

IN THE FOURTH JUDICIAL DISTRICT COURT OF THE STATE OF  
NEVADA, IN AND FOR THE COUNTY OF ELKO

**Prepared for:**

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**Prepared by:**

John B. Everlove, Paramedic, B.A.

October 25, 2020

## **Introduction**

The following is an expert report regarding the litigation between Douglas Schwartz v. REACH Air Medical Services et al. The opinions herein are based on my own knowledge. If called as a witness, I would and could competently testify to the following.

## **Qualifications**

I am submitting this written report expressing my opinions and/or conclusions in the above-referenced matter. My comments and opinions are based upon the specifics of this case and my knowledge and abilities in this domain. I hold a national Paramedic license, Paramedic licenses in Michigan and Florida, as well as a State of California license where I am currently employed as a Paramedic, Allied Health Coordinator and EMT Program Director. During the past 30 years, I have treated and transported thousands of patients in various states of distress with emergent and non-emergent conditions during 911 calls for service and Inter-Facility Transfers (IFT). Serving as an Emergency Medical Technician (EMT), Paramedic, Paramedic Preceptor and Field Training Officer, I have trained and instructed prehospital caregiver personnel. As an EMT Program Director and Principal Instructor, I have educated, trained and evaluated EMT students regarding the standard of care and transportation of patients in accordance with the Department of Transportation (DOT) and National Highway Traffic Safety Administration (NHTSA) guidelines for Emergency Medical Services personnel. While in the position of Paramedic Associate Supervisor and Paramedic Operations Supervisor, my primary responsibilities included responding to emergency calls for service, as well as the supervision of all employees related to prehospital services and the implementation of training standards related to assessment, treatment and patient transportation. As a Clinical Manager, my duties included investigation of all incidents related to patient care and transportation, as well as the oversight and management of the Clinical Quality Assurance (CQA) and Clinical Quality Improvement (CQI) programs relevant to the



1 standard of care for EMTs and Paramedics during emergency medical responses and prehospital  
2 emergency care. I have personally responded to thousands of emergency and non-emergency calls  
3 for service and provided medical treatment and transportation involving IFT calls for service and  
4 emergency calls for service.

5 As an expert, I have been retained by attorneys representing both plaintiffs and defendants  
6 and have offered opinions on said topics in litigation and pre-litigation matters. I estimate my  
7 caseload to date has been approximately 60/40 between plaintiff and defense work. Attached  
8 hereto is a copy of my current curriculum vitae.

#### 9 **Limitation Statement**

10 My opinions are based on the information available to me as of the date of this report. I  
11 reserve the right to supplement, amend and/or modify this report and my opinions in light of any  
12 additional information hereafter.

#### 13 **Materials Submitted for Review**

- 14 1. Elko County Ambulance Medical and Billing Records: Douglas Schwartz- DOS  
15 06/22/2016
- 16 2. Elko County Sheriff's Department
- 17 3. Northeastern Nevada Regional Hospital: Douglas Schwartz- DOS 06/22/2016
- 18 4. REACH Air Medical Services Medical and Billing Records: Douglas Schwartz- DOS  
19 06/22/2016
- 20 5. Plaintiff's Amended Complaint: 10/20/2017
- 21 6. Plaintiff's Second Amended Notice of Taking the Videotaped Deposition of REACH Air  
22 Medical Services, L.L.C.'S N.R.C.P. 30(b)(6) Witnesses: 06/08/2020
- 23 7. Deposition Transcript of Ronnie Jay Lyons: 08/19/2020

- 1 8. Supplemental Document Production: 05/20/2020
- 2 9. Deposition Transcript of Barry Amos Ray Bartlett: 12/20/2019
- 3 10. Deposition Transcript of Dr. David Garvey: 06/25/2019
- 4 11. Deposition Transcript of Kathleen Jane Dunn: 06/08/2020
- 5 12. State of Nevada Emergency Medical Systems Program Policies and Procedures Manual;
- 6 Division of Public and Behavioral Health
- 7 13. Expert Report of Dr. Seth P. Womack: 08/17/2020
- 8 14. REACH Air Medical Services Training Records for Barry Bartlett: 06/03/2016-
- 9 06/04/2016
- 10 15. REACH Air Medical Services Policies and Procedures Records
- 11 16. Deposition Transcript of Dr. Gary McCalla: 06/08/2020
- 12 17. REACH Air Medical Services Liability Insurance Policy: 04/28/2016
- 13 18. REACH Air Medical Services Clinical Protocols
- 14 19. REACH Air Medical Services Run Reports: 271SM/REACH 58-06/22/2016
- 15 20. REACH Air Medical Services Flight Log: 01/23/2016-10/29/2016
- 16 21. State of Nevada Air Ambulance Attendant License: Barry Bartlett 03/31/2018
- 17 22. REACH Air Medical Services Email Communication: Barry Bartlett 05/09/2016-
- 18 07/20/2016
- 19 23. REACH Air Medical Services Personnel Records: Barry Bartlett 10/20/2015
- 20 24. REACH Air Medical Services Personnel Records: Ronnie Lyons 10/20/2015-04/25/2018
- 21 25. REACH Air Medical Services Clinical Department Quality Improvement Plan
- 22 01/19/2016

26. National Highway Traffic Safety Administration. (2009). National Emergency Medical Services Education Standards.

27. Paramedic National Emergency Medical Services Education Standards. (2009). *Paramedic Instructional Guidelines*.

28. Sanders, M. J. (2012). *Mosby's Paramedic Textbook* (4<sup>th</sup> ed., Vol. 5). Jones & Bartlett Learning.

29. Limmer, D., & O'Keefe, M. (2016). *Emergency Care* (13th ed.). Pearson.

30. Bledsoe, B., Cherry, R., & Porter, R. (2017). *Paramedic care: principles & practice* 5, (5<sup>th</sup> ed.). Pearson.

31. National Registry of Emergency Medical Technicians Advanced Psychomotor Examination Sheets

## **Summary of Events**

On June 22nd 2016 at approximately 2015 hours, Douglas and Diane Schwartz were leaving a restaurant in the City of Elko, Nevada, when Douglas Schwartz was struck by a vehicle traveling approximately 35 to 40 miles an hour on the roadway in front of the restaurant. A 911 call was placed for Mr Schwartz, a 58-year-old man, who was treated by a paramedic and an advanced emergency medical technician (AEMT) from the Elko County Ambulance Company. The prehospital care report (PCR) reveals details to Mr Schwartz's condition at the time he was assessed by the Elko County Ambulance Paramedic. The PCR states Mr. Schwartz was lying on his right side in the street at the time of the ambulance arrival, with a complaint of pain to his right shoulder, upper right portion of his chest and his right knee. Mr. Schwartz was having difficulty taking a deep breath due to the pain in his chest coming from his ribs. The Paramedic found Mr. Schwartz was alert and oriented to the questions asked by the Paramedic regarding the collision, although the record reveals that Mr. Schwartz was "a little fuzzy" about some details of the

1 collision. The primary assessment and secondary assessment performed by the Elko County  
2 Ambulance Paramedic did not reveal any other significant findings of traumatic injury on Mr.  
3 Schwartz. In addition to the pain described by Mr. Schwartz that was isolated mostly to the right  
4 side of his body, Mr. Schwartz had some minor abrasions, but otherwise was did not suffer critical  
5 injuries from the event. In fact, the PCR notes the treatment provided to Mr. Schwartz was an IV  
6 (Intravenous) saline lock without continuous fluids, pain medication, full spinal immobilization  
7 precautions, and medication to prevent nausea. The Paramedic who was treating Mr. Schwartz  
8 put Mr. Schwartz on a low dose of oxygen. Based on the Paramedic's PCR, Mr. Schwartz's  
9 condition was stable; and his injuries were considered non-life threatening for the duration of the  
10 patient care that was provided.

11 From the initial time of patient contact with Mr. Schwartz by the ambulance personnel to  
12 the time of arrival at the Northeast Nevada Regional Hospital, Mr Schwartz's condition did not  
13 deteriorate. Mr. Schwartz's vital signs were stable and within normal limits. In fact, the  
14 transportation of Mr. Schwartz from the scene of the initial incident to the Northeast Nevada  
15 Regional Hospital Emergency Department was provided without the Elko County Ambulance  
16 personnel activating their emergency lights and siren during the transport process. The ambulance  
17 transportation to the hospital was "non-emergency", according to the PCR completed by the Elko  
18 County Ambulance Paramedic.

19 Upon arrival at the Northeast Nevada Regional Hospital Center Emergency Department,  
20 Mr. Schwartz's care was turned over from the Elko County Ambulance Paramedic and AEMT to  
21 the emergency department nurse, Dona Kevitt. According to the nursing records, Mr. Schwartz  
22 complained of pain in his right supraclavicular area, his diaphragm area, and the right upper chest.  
23 Mr. Schwartz appeared to have diminished breath sounds in the right posterior middle and lower

lobes of his right lung. According to Nurse Kevitt's records, Mr. Schwartz's presentation was consistent with the PCR completed by Elko County Ambulance personnel. Mr. Schwartz was awake, alert, speaking in complete sentences and not confused at the time of his arrival at the emergency department.

The attending physician in the emergency department at Northeast Nevada Regional Hospital that evening was Doctor David Garvey, who was also an associate medical director for REACH Air Medical Services. The complaints Dr. Garvey noted in his charting for Mr. Schwartz were chest pain, back pain, and abrasions with pertinent negatives regarding any other traumatic injuries from the collision. The assessment by Dr. Garvey of Mr. Schwartz is noteworthy, based on the recorded findings that Mr. Schwartz had normal respirations, breath sounds that were clear and normal throughout and no signs or symptoms of respiratory distress. Moreover, Mr. Schwartz was pleasant, laughing, and cooperative throughout his contact with Dr. Garvey. At the conclusion of the assessment of Mr. Schwartz, Doctor Garvey noted, "At their worst, the symptoms were moderate." Mr. Schwartz's condition remained unchanged while in the emergency department. Upon completion of the assessment in the emergency department, Dr. Garvey ordered several radiological exams of Mr. Schwartz and pain medication, as well as another dose of medication to prevent nausea.

At 2336 hours, REACH Air Medical Services (REACH) dispatch was notified of a request to transfer Mr. Schwartz by air from Northeast Nevada Regional Hospital to the University of Utah Medical Center. At 2345 hours REACH was enroute to Northeast Nevada Regional Hospital. They arrived at the hospital at 2355 hours, and the REACH Air Medical Services Prehospital Care Report (REACH PCR) shows they were at Mr. Schwartz's bedside at 2357 hours. The next

1 timestamp is at 0139 hours on 06/23/2016 when REACH left the hospital, approximately 1 hour  
2 and 42 minutes from the time they arrived.

3         Once at the emergency department, REACH Paramedic Barry Bartlett, a new REACH  
4 Paramedic and the trainee of REACH Nurse Ronnie Lyons, entered the patient room where Mr.  
5 Schwartz had been receiving treatment in the emergency department. REACH Nurse Lyons  
6 contacted the nurses who oversaw Mr Schwartz's care and according to the testimony and records,  
7 REACH Nurse Lyons received the transfer of care report, including the charting paperwork for  
8 Mr. Schwartz. REACH Paramedic Bartlett introduced himself to Mr. Schwartz as the transporting  
9 Paramedic with REACH; and REACH Nurse Lyons entered the room and testified, he saw  
10 REACH Paramedic Bartlett speaking with Mr. Schwartz. According to REACH Paramedic  
11 Bartlett, the assessment by REACH personnel of Mr. Schwartz consisted of an assessment for Mr.  
12 Schwartz's level of consciousness and his lung sounds. The testimony of REACH Nurse Ronnie  
13 Lyons revealed that this was the beginning of patient relationship between Mr. Schwartz and  
14 REACH personnel.

15         During that interaction between Mr. Schwartz and REACH Paramedic Bartlett, the patient  
16 was being prepared for transport by REACH personnel and Elko Ambulance personnel, was placed  
17 on the transport monitor and moved to the transportation gurney from Elko County Ambulance.  
18 The transport gurney from the Elko County Ambulance would be used to facilitate the transfer of  
19 Mr. Schwartz to the awaiting aircraft.

20         Prior to the transfer request being made by NNVH to REACH, Doctor Garvey spoke with  
21 a physician at the University of Utah regarding Mr. Schwartz's condition and received approval to  
22 transfer Mr. Schwartz to the specialized facility. Upon completion of that phone call, Doctor

1 Garvey entered Mr. Schwartz's room and advised Mr. Schwartz, the Schwartz family, and the  
2 REACH crew of the intention to intubate Mr. Schwartz prior to the departure from the emergency  
3 department. Doctor Garvey also advises his intent to place a chest tube prior to Mr. Schwartz's is  
4 departure. According to the REACH PCR completed by REACH Nurse Lyons, Mr. Schwartz was  
5 on the transport gurney, on the transport monitor, and all the equipment used on Mr. Schwartz in  
6 regard to intubation and airway management belonged to REACH.

7 According to REACH Paramedic Bartlett, he had no conversation with Doctor Garvey  
8 regarding who was going to perform the intubation of Mr. Schwartz. Instead, REACH Paramedic  
9 Bartlett initiated the intubation preparation with REACH Nurse Lyons because REACH Paramedic  
10 Bartlett stated in his deposition that it is customary for the transport Paramedic to intubate patients.  
11 According to the testimony of both REACH Paramedic Bartlett and REACH Nurse Lyons, no  
12 information was exchanged with Mr. Schwartz or the Schwartz family regarding REACH  
13 personnel intubating Mr. Schwartz, no consent was ever received for the intubation procedure by  
14 REACH personnel, and no consent was ever received from the Mr. Schwartz regarding the  
15 administration of medications that would temporarily paralyze Mr. Schwartz to intubate him.

16 As Doctor Garvey completed the preparation for placing a chest tube in Mr. Schwartz,  
17 REACH Paramedic Bartlett and REACH Nurse Lyons initiated the rapid sequence induction (RSI)  
18 intubation of Mr Schwartz that included the administration of Ketamine by REACH Nurse Lyons.  
19 Prior to the administration of the sedative medication and initiation of the intubation procedure,  
20 neither REACH Paramedic Bartlett nor REACH Nurse Lyons performed an assessment of Mr  
21 Schwartz's airway or ever performed a comprehensive primary and secondary assessment of Mr.  
22 Schwartz's condition. The medications REACH Nurse Lyons used on Mr. Schwartz came from  
23 the REACH Air Medical Services equipment bag that was brought into the hospital for the

1 interfacility transfer (IFT). The airway management equipment for the intubation of Mr. Schwartz,  
2 provided by REACH Air Medical Services, included a video airway visualization device and  
3 multiple advanced airway devices.

4 REACH Nurse Lyons administered the dose of Ketamine to Mr. Schwartz at 0018 hours,  
5 21 minutes after the arrival at the emergency department. Immediately after the medication was  
6 administered, REACH Paramedic Bartlett initiated the intubation of Mr. Schwartz by placing the  
7 video airway visualization device in Mr. Schwartz's mouth. Although REACH has a policy to  
8 record the intubation attempts on all patients, in this case REACH Paramedic Bartlett did not  
9 record the procedure. Immediately after insertion of the airway visualization device, Mr. Schwartz  
10 began to vomit profusely and requires extensive suctioning.

11 According to multiple records and accounts of the subject event, multiple intubation  
12 attempts, surgical airway procedures and advanced airway placement procedures continued for  
13 another 1 hour and 5 minutes. During this time, REACH Paramedic Bartlett and Doctor Garvey  
14 performed an estimated 11 intubation attempts on Mr. Schwartz, without success. It is documented  
15 that REACH Paramedic Bartlett utilized airway visualization devices in his attempts to intubate  
16 Mr. Schwartz, as well as "digital intubation techniques."

17 After numerous failures to properly secure the airway of Mr. Schwartz, at 0102 hours  
18 Doctor Garvey and REACH Paramedic Bartlett attempted a surgical airway on Mr. Schwartz. They  
19 were unable to secure an airway in Mr. Schwartz. After a second attempt at 0106 hours, the  
20 surgical airway procedure was again unsuccessful. At this point, approximately 48 minutes had  
21 passed since Mr Schwartz received medications to inhibit movement and muscular control of his  
22 breathing. Mr. Schwartz was now presenting with signs of severe hypoxemia, decreasing vital



1 signs and system failure. The next time that is documented on the REACH PCR is 0117 hours, 59  
2 minutes from the initial intubation attempt by REACH Paramedic Bartlett and REACH Nurse  
3 Lyons, when Mr. Schwartz heart stops beating, and CPR was initiated. The CPR was unsuccessful  
4 in resuscitating Mr. Schwartz. Mr. Schwartz was pronounced dead at 0133 hours on June 23,  
5 2016.

6 Shortly after the death of Mr. Schwartz, REACH Air Medical Services issued a bill for  
7 services to Mrs. Schwartz in the amount of \$18,200 for a "Base Rate Fixed Wing" fee. According  
8 to REACH Air Medical Services the charges regarding Mr. Schwartz were unknown with no  
9 explanation for what services were provided.

#### 10 **Opinions**

11 1) Mr. Schwartz was a patient in the care of Northeast Nevada Regional Hospital staff and  
12 REACH Air Medical Services personnel at the time of the subject event. REACH Air  
13 Medical Services personnel made patient contact with Mr. Schwartz, established a patient-  
14 caregiver relationship with Mr. Schwartz, utilized REACH Air Medical Services  
15 equipment during the care of Mr. Schwartz, and performed portions of a patient assessment  
16 of Mr. Schwartz's condition. The care initiated by REACH Air Medical Services  
17 Paramedic Bartlett was based on the establishment of the relationship in which REACH  
18 Air Medical Services personnel were also direct healthcare providers of Mr. Schwartz.  
19 Moreover, REACH Air Medical Services personnel completed a Prehospital Care Report  
20 documenting their care of Mr. Schwartz throughout the subject event and although REACH  
21 Air Medical Services personnel claim that Mr. Schwartz was never their patient, REACH

1 Air Medical Services billed the Schwartz family. The process of submitting a bill to a  
2 patient for transportation services that were never provided, is considered fraudulent.

3 2) It was a gross deviation from the standard of care for prehospital emergency medical  
4 services personnel when REACH Air Medical Services personnel failed to obtain  
5 expressed and informed consent for care from Douglas Schwartz. Mr. Schwartz was a  
6 competent adult with capacity to consent to, or withhold consent for, emergency medical  
7 assessment, treatment, and transportation. REACH Air Medical Services personnel made  
8 patient contact with Mr. Schwartz, established a patient-caregiver relationship with Mr.  
9 Schwartz, utilized REACH Air Medical Services equipment during the care of Mr.  
10 Schwartz, and performed portions of a patient assessment of Mr. Schwartz's condition. At  
11 no time did REACH Air Medical Services Paramedic Bartlett or Nurse Lyons receive  
12 informed and expressed consent from Mr. Schwartz or the Schwartz family for any care,  
13 including the Rapid Sequence Intubation of Mr. Schwartz. Therefore, Mr. Schwartz could  
14 not have been aware of the potential risks and complications of the procedure, considering  
15 his status as a high-risk patient. Paramedics who fail to obtain consent for treatment from  
16 a patient prior to initiating such care may be liable for false imprisonment, assault and/or  
17 battery.

18 3) It was a gross deviation from the standard of care for prehospital emergency medical  
19 services personnel when REACH Air Medical Services personnel failed to assess Mr.  
20 Schwartz's airway anatomy prior to initiating the high-risk procedure of oral endotracheal  
21 intubation. After repeated failed attempts at oral endotracheal intubation by the REACH  
22 Air Medical Services personnel, they determined that Mr. Schwartz's airway anatomy  
23 made it difficult to properly place an advanced airway device. The preassessment process

1 is required, specifically for this reason, to prevent negative patient outcomes regarding  
2 advanced airway management. In this case, REACH Paramedic Bartlett performed  
3 multiple intubation attempts, on Mr. Schwartz outside of applicable protocols, policies, and  
4 procedures in gross deviation from the clinical standard of care.

- 5 4) It was a gross deviation from the standard of care for prehospital emergency medical  
6 services personnel to follow any instructions from other healthcare providers that directly  
7 violates patient clinical care treatment guidelines, policies, procedures, and protocols. Mr.  
8 Schwartz was stable, at low risk for deterioration based on his condition, and did not meet  
9 criteria for Rapid Sequence Intubation based on his condition. In fact, Mr. Schwartz's  
10 presentation was not discussed between Dr. Garvey and REACH Paramedic Bartlett prior  
11 to the intubation, based on the deposition testimony. Additionally, based on his testimony,  
12 REACH Paramedic Bartlett initiated the Rapid Sequence Induction and intubation of Mr.  
13 Schwartz, without any discussion related to the indications, complications,  
14 contraindications, side effects and risks associated with the procedures related to Mr.  
15 Schwartz's presentation. As identified above, there were numerous failed advanced airway  
16 placement attempts by REACH Paramedic Bartlett on Mr. Schwartz, who needed a secure  
17 airway and was hypoxic during the subject event.

18 Based upon my review and analysis of the facts outlined supra, my cumulative knowledge,  
19 training and experience, and based on a reasonable degree of medical certainty regarding the  
20 standard of care for emergency medical services personnel, it is my professional opinion REACH  
21 Air Medical Services and REACH Air Medical Services Paramedic Barry Bartlett grossly deviated  
22 from the standard of care ordinarily required of emergency medical services personnel and the acts  
23 and omissions represented a reckless disregard for Mr. Schwartz.

# **EXHIBIT 3**

**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 O2 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

[Signature]

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,  
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.  
[Signature]  
Notary Public  
My Commission Expires 4-5-2021

**THERESE LUELLEN**  
NOTARY PUBLIC  
STATE OF COLORADO  
NOTARY ID 20014010801  
MY COMMISSION EXPIRES 04/05/2021

FILED

2021 JUL 16 AM 9:29

CLERK CO DISTRICT COURT

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7

8 IN THE FOURTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

9 IN AND FOR THE COUNTY OF ELKO

10

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

13 Plaintiff,

14 vs.

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

22 Defendants.

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CASE NO. CV-C-17-439  
Dept. No.: 1

**DEFENDANT DAVID GARVEY, M.D.'S  
ANSWER TO THIRD AMENDED  
COMPLAINT**

Defendant, DAVID GARVEY, M.D. (hereinafter referred to as “Defendant” or “Answering Defendant”), by and through his counsel of record, LEWIS BRISBOIS BISGAARD & SMITH LLP, answers Plaintiff’s THIRD Amended Complaint as follows:

1. This Answering Defendant is without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations contained in Paragraphs 1 and 2, and therefore denies such allegations.

2. Answering Paragraph 3, this Answering Defendant admits that at all times relevant, David Garvey, M.D. was and is a medical doctor licensed in the State of Nevada.

3. The allegations in Paragraphs 4 through 7 contain allegations that are not directed to this Answering Defendant. To the extent that the allegations in Paragraphs 4 through 7 call for a response from this Answering Defendant, this Answering Defendant is without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations in Paragraphs 4 through 7, and therefore denies such allegations.

4. This Answering Defendant is without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations contained in Paragraphs 8 and 9, and therefore denies such allegations.

5. The allegations in Paragraph 10 contain legal conclusions that do not call for a response from this Answering Defendant. To the extent that the allegations in Paragraph 10 calls for a response from this Answering Defendant, this Answering Defendant is without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations in Paragraph 10, and therefore denies such allegations.

#### **GENERAL ALLEGATIONS**

1. Answering Paragraph 1 of the General Allegations, this Answering Defendant repeats and realleges his responses to the preceding paragraphs and incorporates the same by reference as though fully set forth therein.

2. This Answering Defendant admits the allegations contained in Paragraphs 2 through 3 of the General Allegations.

3. This Answering Defendant denies the allegations contained in Paragraph 4 of the General Allegations, as phrased.

4. Answering Paragraph 5 of the General Allegations, this Answering Defendant admits that Mr. Schwartz's transfer by Elko County Ambulance to Northeastern Nevada Regional Hospital was documented as non-emergent.

5. This Answering Defendant admits the allegations contained in Paragraph 6 of the General Allegations.

6. Answering Paragraph 7 of the General Allegations, this Answering Defendant admits that it is documented that his assessment revealed "mild abrasions to the forehead, injury to the right lateral posterior chest with moderate pain, and abrasions to the right bicep, elbow and knee," among other complications.

7. Answering Paragraph 8 of the General Allegations, this Answering Defendant admits that it is documented that Mr. Schwartz's heart rate was within normal limits.

8. This Answering Defendant denies the allegations contained in Paragraph 9 of the General Allegations.

9. Answering Paragraphs 10 and 11 of the General Allegations, this Answering Defendant admits Paragraphs 10 and 11 of the General Allegations to the extent it is documented in the medical record.

10. This Answering Defendant Admits the allegations contained in Paragraphs 12 through 14 of the General Allegations.

11. This Answering Defendant denies the allegations contained in Paragraph 15 of the General Allegations, as phrased.

12. Answering Paragraph 16 of the General Allegations, this Answering Defendant admits the allegations contained in Paragraph 16 to the extent it is documented in the medical record.

13. This Answering Defendant denies the allegations contained in Paragraph 17 of the General Allegations.

14. This Answering Defendant denies the allegations contained in Paragraph 18 of the General Allegations, as phrased.

15. This Answering Defendant admits the allegations that it is documented that an intubation at 12:33 a.m. was unsuccessful and a large aspiration of gastric contents was noted in Paragraph 19 of the General Allegations.

16. This Answering Defendant admits the allegations contained in Paragraphs 20 through 22 of the General Allegations to the extent that it is documented in the medical record.

17. The allegations in Paragraphs 23 through 37 of the General Allegations contain allegations that are not directed to this Answering Defendant. To the extent that the allegations in Paragraphs 23 through 37 of the General Allegations call for a response from this Answering Defendant, this Answering Defendant is without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations in Paragraphs 23 through 37, and therefore denies such allegations.

#### **FIRST CLAIM FOR RELIEF**

##### **(PROFESSIONAL NEGLIGENCE/WRONGFUL DEATH)**

**DR. DAVID GARVEY, BARRY BARTLETT, RUBY CREST, REACH AIR, AND NNRH**

18. Answering Paragraph 38, this Answering Defendant repeats and realleges his responses to the preceding paragraphs and incorporates the same by reference as though fully set forth therein.

19. The allegations in Paragraph 39 call for legal conclusions that do not call for a response from this Answering Defendant. To the extent the allegations in Paragraph 39 call for a response from this Answering Defendant, this Answering Defendant admits that he owed a duty to Mr. Schwartz.

20. This Answering Defendant denies the allegations contained in Paragraphs 40 through 45.

21. The allegations in Paragraphs 46 through 52 contain allegations that are not directed to this Answering Defendant. To the extent that the allegations in Paragraphs 46

through 52 call for a response from this Answering Defendant, this Answering Defendant is without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations in Paragraphs 46 through 52, and therefore denies such allegations.

22. This Answering Defendant denies the allegations contained in Paragraphs 53 through 57.

23. The allegations in Paragraph 58 contain allegations that are not directed to this Answering Defendant. To the extent that the allegations in Paragraph 58 call for a response from this Answering Defendant, this Answering Defendant is without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations in Paragraph 58, and therefore denies such allegations.

24. This Answering Defendant denies the allegations contained in Paragraphs 59 through 61.

## **SECOND CLAIM FOR RELIEF**

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

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

25. Answering Paragraph 62, this Answering Defendant repeats and realleges his responses to the preceding paragraphs and incorporates the same by reference as though fully set forth therein.

26. The allegations in Paragraphs 63 through 73 contain allegations that are not directed to this Answering Defendant. To the extent that the allegations in Paragraphs 63 through 73 call for a response from this Answering Defendant, this Answering Defendant is without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations in Paragraphs 63 through 73, and therefore denies such allegations.

## **THIRD CLAIM FOR RELIEF**

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

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

27. Answering Paragraph 74, this Answering Defendant repeats and realleges his responses to the preceding paragraphs and incorporates the same by reference as

though fully set forth therein.

28. The allegations in Paragraphs 75 through 85 contain allegations that are not directed to this Answering Defendant. To the extent that the allegations in Paragraphs 75 through 85 call for a response from this Answering Defendant, this Answering Defendant is without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations in Paragraphs 75 through 85, and therefore denies such allegations.

#### **FOURTH CLAIM FOR RELIEF**

**(Lack of Informed Consent)**

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

29. Answering Paragraph 86, this Answering Defendant repeats and realleges his responses to the preceding paragraphs and incorporates the same by reference as though fully set forth therein.

30. The allegations in Paragraph 87 contain legal conclusions that do not call for a response from this Answering Defendant. To the extent that the allegations in Paragraph 87 call for a response from this Answering Defendant, this Answering Defendant denies the allegations contained in Paragraph 87.

31. This Answering Defendant denies the allegations contained in Paragraphs 88 through 89, as phrased.

32. This Answering Defendant denies the allegations contained in Paragraphs 90 through 94.

#### **FIFTH CLAIM FOR RELIEF**

**(Loss of Consortium)**

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

33. Answering Paragraph 95, this Answering Defendant repeats and realleges his responses to the preceding paragraphs and incorporates the same by reference as though fully set forth therein.

34. This Answering Defendant is without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations contained in Paragraph 96, and

therefore denies such allegations.

35. This Answering Defendant denies the allegations contained in Paragraph 97.

36. The allegations in Paragraph 98 contain allegations that are not directed to this Answering Defendant. To the extent that the allegations in Paragraph 98 call for a response from this Answering Defendant, this Answering Defendant is without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations in Paragraph 98, and therefore denies such allegations.

37. This Answering Defendant denies the allegations contained in Paragraphs 98 through 101.

#### **SIXTH CLAIM FOR RELIEF**

**(Medical Battery/ Battery)**

**Against REACH AIR**

38. Answering Paragraph 102, this Answering Defendant repeats and realleges his responses to the preceding paragraphs and incorporates the same by reference as though fully set forth therein.

39. The allegations in Paragraphs 103 through 124 contain allegations that are not directed to this Answering Defendant. To the extent that the allegations in Paragraphs 103 through 124 call for a response from this Answering Defendant, this Answering Defendant is without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations in Paragraphs 103 through 124, and therefore denies such allegations.

#### **SEVENTH CLAIM FOR RELIEF**

**(Assault)**

**Against REACH AIR**

40. Answering Paragraph 125, this Answering Defendant repeats and realleges his responses to the preceding paragraphs and incorporates the same by reference as though fully set forth therein.



41. The allegations in Paragraphs 126 through 146 contain allegations that are not directed to this Answering Defendant. To the extent that the allegations in Paragraphs 126 through 146 call for a response from this Answering Defendant, this Answering Defendant is without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations in Paragraphs 126 through 146, and therefore denies such allegations.

#### **EIGHTH CLAIM FOR RELIEF**

**(False Imprisonment)**

**Against REACH AIR**

42. Answering Paragraph 147, this Answering Defendant repeats and realleges his responses to the preceding paragraphs and incorporates the same by reference as though fully set forth therein.

43. The allegations in Paragraphs 148 through 166 contain allegations that are not directed to this Answering Defendant. To the extent that the allegations in Paragraphs 148 through 166 call for a response from this Answering Defendant, this Answering Defendant is without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations in Paragraphs 148 through 166, and therefore denies such allegations.

#### **AFFIRMATIVE DEFENSES**

##### **FIRST AFFIRMATIVE DEFENSE**

Plaintiff's Third Amended Complaint fails to state a claim on which relief may be granted.

##### **SECOND AFFIRMATIVE DEFENSE**

Plaintiff's damages, if any, were not proximately caused by this Answering Defendant's conduct.

##### **THIRD AFFIRMATIVE DEFENSE**

Plaintiff is comparatively at fault; Plaintiff's recovery, if any, should be reduced in proportion to Plaintiff's fault, or in the event Plaintiff's fault exceeds that of this Answering

Defendant, Plaintiff is not entitled to any recovery.

#### **FOURTH AFFIRMATIVE DEFENSE**

Plaintiff's injuries and damages, if any, are the result of forces of nature over which this Answering Defendant has no control or responsibility.

#### **FIFTH AFFIRMATIVE DEFENSE**

Plaintiff is barred from asserting any claims against this Answering Defendant because the alleged damages were the result of one or more unforeseeable intervening and superseding causes.

#### **SIXTH AFFIRMATIVE DEFENSE**

Plaintiff is barred from bringing this action for failure to comply with applicable contractual remedies and requirements, including arbitration, if applicable. Plaintiff's failure to comply with the contractual remedies and requirements notwithstanding, this Answering Defendant reserves his right to enforce any applicable arbitration provision.

#### **SEVENTH AFFIRMATIVE DEFENSE**

The damages, if any, incurred by Plaintiff was not attributable to any act, conduct, or omission on the part of this Answering Defendant. This Answering Defendant denies that he was culpable in any matter or in any degree with respect to the matters set forth in Plaintiff's Third Amended Complaint.

#### **EIGHTH AFFIRMATIVE DEFENSE**

Plaintiff's claims are barred due to the applicable statute of limitations applicable to each cause of action, and/or the doctrines of estoppel, laches and/or unclean hands.

#### **NINTH AFFIRMATIVE DEFENSE**

Plaintiff's damages, if any, were caused in whole or part by the negligence of third parties over which this Answering Defendant had no control.

#### **TENTH AFFIRMATIVE DEFENSE**

Plaintiff failed to take reasonable efforts to mitigate his or her damages, if any, and is therefore barred from recovering any damages from this Answering Defendant.

#### **ELEVENTH AFFIRMATIVE DEFENSE**

Plaintiff's maladies and injuries, if any, were caused by inevitable disease processes and not by any act of this Answering Defendant.

#### **TWELFTH AFFIRMATIVE DEFENSE**

This Answering Defendant is entitled to all limitations, protections, and other provisions contained within NRS Chapter 41A and/or NRS 42.021.

#### **THIRTEENTH AFFIRMATIVE DEFENSE**

This Answering Defendant denies each and every allegation of Plaintiff's Third Amended Complaint not specifically admitted or otherwise pled herein.

#### **FOURTEENTH AFFIRMATIVE DEFENSE**

Plaintiff has failed to comply with NRS 41A.071.

#### **FIFTEENTH AFFIRMATIVE DEFENSE**

Plaintiff's non-economic damages, if any, may not exceed \$350,000, pursuant to NRS 41A.035.

#### **SIXTEENTH AFFIRMATIVE DEFENSE**

To the extent Plaintiff is entitled to recover any damages from this Answering Defendant, this Answering Defendant may be held severally liable only for that portion of any judgment which represents the percentage of negligence attributable this Answering Defendant, pursuant to NRS 41A.045 and NRS 41.141.

#### **SEVENTEENTH AFFIRMATIVE DEFENSE**

To the extent Plaintiff is entitled to recover any future damages from this Answering Defendant, this Answering Defendant may satisfy that amount through periodic payments pursuant to NRS 42.021.

#### **EIGHTEENTH AFFIRMATIVE DEFENSE**

Plaintiff has failed to name an indispensable party whose presence is indispensable to full relief.

#### **NINETEENTH AFFIRMATIVE DEFENSE**

Pursuant to N.R.C.P. 11, as amended, all affirmative defenses have not been

alleged herein insofar as sufficient facts are not available after reasonable inquiry upon the filing of this Answering Defendant's Answer. This Answering Defendant reserves the right to allege additional affirmative defenses subsequently, if investigation so warrants.

#### **TWENTIETH AFFIRMATIVE DEFENSE**

This Answering Defendant alleges that the injuries and damages, if any, suffered by Plaintiffs can and do occur in the absence of negligence.

#### **TWENTY-FIRST AFFIRMATIVE DEFENSE**

This Answering Defendant hereby incorporates by reference those affirmative defenses enumerated in Rule 8 of the Nevada Rules of Civil Procedure as if fully set forth herein, for the specific purpose of not waiving any such defenses. In the event further investigation or discovery reveals the applicability of any such defenses, or any other affirmative defenses, this Answering Defendant reserves the right to seek leave of court to amend this Answer to specifically assert any such defense.

#### **TWENTY-SECOND AFFIRMATIVE DEFENSE**

NRS 41.503, the "trauma statute" applies to the facts of this case and therefore, Defendant may not be held liable for more than \$50,000 in civil damages.

#### **TWENTY-THIRD AFFIRMATIVE DEFENSE**

An award of punitive damages would be unconstitutional under applicable constitutional protections.

#### **TWENTY-FOURTH AFFIRMATIVE DEFENSE**

To the extent Plaintiff has been reimbursed from any source for any special damages claimed to have been sustained as a result of the incident alleged in Plaintiff's Third Amended Complaint, this Answering Defendant may elect to offer those amounts into evidence and, if this Answering Defendant so elects, Plaintiff's special damages shall be reduced by those amounts pursuant to NRS 42.021.

#### **TWENTY-FIFTH AFFIRMATIVE DEFENSE**

Pursuant to NRS 41A.110, this Answering Defendant is entitled to a conclusive presumption of informed consent.

## TWENTY-SIXTH AFFIRMATIVE DEFENSE

Plaintiff assumed the risk of such an incident occurring; thus, Plaintiff is barred from recovering any damages from this Answering Defendant.

WHEREFORE, this Answering Defendant prays for judgment as follows:

1. That Plaintiffs take nothing by reason of Plaintiff's Third Amended Complaint on file herein;
2. For all attorneys' fees incurred in the defense of this action;
3. For costs and disbursements incurred herein; and
4. For such other and further relief as the court may deem just and proper in these premises.

DATED this 12th day of July, 2021

LEWIS BRISBOIS BISGAARD & SMITH LLP

By /s/ Alissa Bestick  
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ALISSA N. BESTICK  
Nevada Bar No. 14979C  
6385 S. Rainbow Boulevard, Suite 600  
Las Vegas, Nevada 89118  
*Attorneys for Defendant David Garvey, M.D.*

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**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.

By /s/ Emma L. Gonzales  
An Employee of  
LEWIS BRISBOIS BISGAARD & SMITH LLP

## CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of July, 2021, a true and correct copy of **DEFENDANT DAVID GARVEY, M.D.'S ANSWER TO PLAINTIFFS' THIRD AMENDED COMPLAINT** was sent via electronic mail to the following:

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named employees*

By /s/ Emma L. Gonzales

An Employee of  
LEWIS BRISBOIS BISGAARD & SMITH LLP

## CERTIFICATE OF SERVICE

I hereby certify that on this 22<sup>nd</sup> day of September, 2021, I served the foregoing APPENDIX OF EXHIBITS IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS [13 VOLUMES, PAGES 1-1246] via electronic mail to all parties on the current service list:

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Jennifer Morales, Esq.  
Shirley Blazich, Esq.  
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*Attorneys for Defendant Ruby Crest*



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

Honorable Kriston Hill  
Elko County District Court Department 1  
571 Idaho Street,  
Elko, Nevada 89801

By /s/ Emma Gonzales

An Employee of  
LEWIS BRISBOIS BISGAARD &  
SMITH LLP