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, IN AND FOR THE COUNTY OF ELKO; AND THE HONORABLE KRISTON N. HILL, DISTRICT JUDGE,
Respondents,
and

DIANE SCHWARTZ, INDIVIDUALLY AND AS SPECIAL ADMINISTRATOR OF THE ESTATE OF DOUGLAS R. SCHWARTZ,
Real Party in Interest.

No. 83533

ANSWER TO PETITION FOR WRIT OF MANDAMUS

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NRAP 26.1 DISCLOSURE

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

1. Diane Schwartz is an individual.

2. Claggett & Sykes Law Firm represents Diane Schwartz in the district court and in this court.

Dated this 21st day of December 2021.

CLAGGETT & SYKES LAW FIRM

/s/ Micah S. Echols

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RELIEF SOUGHT

Petitioner, Dr. David Garvey, M.D., requests that this court issue a writ of mandamus, commanding the district court to vacate its order denying his motion for partial summary judgment regarding the application of NRS 41.503 (providing a $50,000 cap on damages where a health care provider renders care to a patient with "a traumatic injury demanding immediate medical attention," unless, among other exceptions, the patient subsequently becomes stable or the provider's care amounts to "gross negligence or reckless, willful, or wanton conduct") and enter partial summary judgment in his favor. Given that genuine issues of material fact exist as to whether the decedent, Douglas Schwartz, needed immediate medical attention; whether Douglas was stable and capable of receiving medical treatment as a nonemergency patient; and whether Dr. Garvey's decision to intubate Douglas at least 9 times in a 48-minute period amounted to gross negligence or reckless, willful, or wanton conduct; and given that Dr. Garvey has an adequate remedy in the ordinary course of law; this court's extraordinary intervention is not warranted.

Additionally, Dr. Garvey requests that this court issue a writ of mandamus, commanding the district court to vacate its order denying his motions to strike two declarations in support of real party in interest Diane Schwartz's opposition to Dr. Garvey's motion for partial summary judgment. Given that Dr. Garvey fails to demonstrate that the district court had a clear duty to strike the at-issue declarations, this court's extraordinary intervention is not warranted.

Accordingly, Diane respectfully urges this court to decline to entertain Dr. Garvey's petition or, alternatively, deny his petition on its merits.

ISSUES PRESENTED

Whether the district court properly denied Dr. Garvey's motion for partial summary judgment regarding the application of NRS 41.503.

Whether the district court properly exercised its discretion in denying Dr. Garvey's motions to strike.

RELEVANT FACTS

I. *The accident, transport to the hospital, and evaluation*

A driver struck Douglas as he left a restaurant in Elko, Nevada. 10 PA 831, 839; 11 PA 903, 936-37; 12 PA 1022, 1028. The accident caused Douglas to sustain abrasions to his head, right bicep, right elbow,

right knee, fractures to his fourth through seventh right ribs, and a small pneumothorax in his right lung. 10 PA 840-43. Douglas also briefly lost consciousness. 12 PA 1022. A person called paramedics to assist Douglas at 8:17 p.m., 10 PA 831, and they arrived two minutes later, 10 PA 839. During transport, Douglas's vital signs were within normal limits, *id*. at 831. After treating Douglas for approximately 21 minutes, the paramedics transported Douglas to Northeastern Nevada Regional Hospital (NNRH) on a "non-emergent" mode without lights or sirens. *Id*. at 831, 839. Douglas arrived at the NNRH emergency room at approximately 8:51 p.m. *Id*. at 831, 839. Diane, having followed the paramedics in her own vehicle, arrived at NNRH at the same time and accompanied Douglas into the emergency room. 11 PA 905.

An NNRH nurse examined Douglas two minutes later. 12 PA 1028. She noted that Douglas was "breathing without difficulty" and had a heart rate "within normal limits." *Id*. However, she noted that Douglas had diminished breath sounds on his right side. *Id*. at 1029. His blood oxygenation was at 94 percent. *Id*.

Dr. Garvey examined Douglas at 9:15 p.m. *Id*. at 1022. He noted that Douglas did not have heart palpitations, shortness of breath, or

respiratory distress. *Id*. at 1022-23. He further noted that Douglas was pleasant and cooperative. *Id*. at 1023. He then ordered several computerized tomographic scans for Douglas. 10 PA 841. NNRH staff moved Douglas to the scan room around 9:40 p.m. *Id*. NNRH staff then performed scans of Douglas's abdomen and pelvis, brain and head, cervical spine, chest, and thoracic spine. 12 PA 1012-21. NNRH staff completed the scans by 11:00 p.m. and moved Douglas back to the emergency room. 10 PA 841.

Diane and fellow church member, Dr. James Patton, D.P.M., stayed with Douglas while he awaited his scans and after he received the same. 11 PA 876-78, 906-07. During their stay, Douglas was in pain, but otherwise appeared stable, talking about church activities, children, and joking. *Id*. at 878.

Upon return to the emergency room, Douglas's blood oxygenation was at 91 percent. 12 PA 1023, 1030. Upon receiving the scan results, 5 PA 207-08, Dr. Garvey contacted the University of Utah hospital to transfer Douglas for care and contacted REACH Air Medical Services to transport Douglas, 11 PA 936-37. REACH arrived at NNRH at 11:57 p.m. *Id*. at 937. Dr. Garvey noted that Douglas had a "10 [percent]

pneumothorax on the right side of his chest with a flail segment but [was] tolerating it well." *Id.* Dr. Garvey informed the REACH crew that they would intubate Douglas and place a chest tube in his right lung for flight transport to the University of Utah hospital. *Id.* Dr. Garvey planned to place the chest tube, and he instructed REACH paramedic Barry Bartlett to perform the intubation. *Id.*

II. *The failed intubations*

A REACH nurse administered a sedative and paralytic to Douglas, and Bartlett began the intubation at 12:20 a.m. *Id.* Douglas immediately aspirated "copious amounts of emesis and large food chunks" from his mouth and nose. *Id.* The team began suctioning Douglas's airway, which clogged the suction tubing. *Id.* The team spent 13 minutes attempting to clear Douglas's airway, and Douglas aspirated several more times. *Id.* Bartlett attempted to intubate Douglas again at 12:23 a.m. and failed. *Id.* He tried again at 12:33 a.m. and failed. *Id.* Bartlett then attempted "several tooled and digital intubations, all of which are unsuccessful." *Id.* Douglas lost his pulse at 12:35 a.m., though he regained it following a minute of cardiopulmonary resuscitation. *Id.*

The team suctioned Douglas's airway again. *Id.* Douglas's blood oxygenation level fell to 47 percent. *Id.* Dr. Garvey personally attempted

intubation at 12:40 a.m., 12:44 a.m., and 12:47 a.m. *Id.* All three attempts failed, and Douglas continued to aspirate. *Id.* Douglas's blood oxygenation level was now approximately 50 percent, and Dr. Garvey attempted another two intubations at 12:52 a.m. and 12:53 a.m., which also failed. *Id.* Douglas's blood oxygenation level fell to 42 percent. *Id.* Dr. Garvey discussed performing a cricothyrotomy and ordered the kit. *Id.*

At 12:58 a.m., Douglas's blood oxygenation level increased to 68 percent due to bag valve mask use. *Id.* By 1:02 a.m., Douglas's blood oxygenation level had increased to 75 percent, and Dr. Garvey attempted another intubation, which failed. *Id.* Dr. Garvey and Bartlett initiated a cricothyrotomy four minutes later. *Id.* They were unable to place the endotracheal tube, and the tube began filling up with vomit. *Id.* They attempted to place the tube two more times and failed. *Id.* At 1:17 a.m., Douglas lost his pulse, and the team initiated cardiopulmonary resuscitation. *Id.* The team stopped cardiopulmonary resuscitation at 1:33 a.m., and Dr. Garvey pronounced Douglas dead. *Id.*

III. *Relevant motion practice*

Diane filed a complaint against Dr. Garvey, among other defendants, alleging professional negligence, ordinary negligence,

wrongful death, lack of informed consent, and loss of consortium.[1] 1 PA 10-24. She then amended her complaint twice. *See id.* at 33-46; 2 PA 62-75. Dr. Garvey answered, raising, among others, the non-economic damages cap under NRS 41A.035. 1 RPIIA 1-9. He did not, however, raise the damages cap under NRS 41.503. *See id.*

A. *Motion for partial summary judgment as to NRS 41.503*

Dr. Garvey moved for partial summary judgment, arguing that the district court should apply the civil damages trauma cap under NRS 41.503. 3 PA 109-40. He urged the district court to address the application of the trauma cap early in the litigation. *Id.* at 127-28. He asserted that because Diane did not plead gross negligence or reckless, willful, or wanton conduct, she could not proffer evidence in opposition to his motion for partial summary judgment demonstrating that NRS 41.503 did not apply. 3 PA 130-33. Alternatively, he contended that undisputed material facts demonstrated that: Douglas had traumatic injuries; NNRH could not stabilize Douglas; he rendered care to Douglas in good faith; his care was not grossly negligent, reckless, willful, or

[1]Diane brought additional claims against other defendants, which are not relevant to the instant petition for a writ of mandamus. *See* 1 PA 10-24.

wanton; his decision to intubate Douglas and the number of attempts was within the standard of care; his decision to have a paramedic attempt the first intubation was within the standard of care; and Diane gave him informed consent to perform the intubations. *Id*. at 133-39.

Diane opposed. 10 PA 806-27. First, she argued that Dr. Garvey's motion was premature as discovery was ongoing. *Id*. at 814-15. Next, she argued that genuine issues of material fact remained regarding whether NRS 41.503 applied. 10 PA 815-26. Specifically, Diane proffered expert witness testimony that Douglas did not sustain a traumatic injury, that Dr. Garvey's negligence was unrelated to the car accident, and that Douglas was stable and capable of receiving nonemergency care. *Id*. Dr. Garvey replied, reiterating his prior arguments. 9 PA 765-87.

The district court denied Dr. Garvey's motion for partial summary judgment. 13 PA 1135-38. The district court found that both Dr. Garvey and Diane presented evidence that supported their respective theories of the case. *Id*. at 1138. It noted that a genuine issue of material fact existed as to whether Douglas sustained a traumatic injury such that

NRS 41.503 would apply. *Id.* Accordingly, the district court concluded that partial summary judgment was improper. *Id.*

B. *Motions to strike declarations*

Dr. Garvey also filed a motion to strike the declaration of one of Diane's attorneys, Shirley Blazich, Esq., 9 PA 725-30, and a motion to strike the declaration of one of Diane's expert witnesses, Dr. Seth Womack, M.D., *id.* at 757-62. As to Blazich, Dr. Garvey averred that her declaration seeking a continuance to obtain more discovery to oppose his partial motion for summary judgment was deficient. *Id.* at 725-30. As to Dr. Womack, Dr. Garvey complained that Dr. Womack's use of the terms "reckless," "grossly negligent," "in bad faith," and "wanton conduct" were improper legal conclusions. *Id.* at 760. Dr. Garvey further complained that Dr. Womack's declaration misstated facts. *Id.* at 760-61. Diane opposed, arguing that Blazich made her declaration in good faith and complied with NRCP 56(d), that Dr. Womack's statements were not legal conclusions, and that Dr. Womack was entitled to give his expert opinion about the facts of the case. 2 RPIIA 17-43.

Given that the district court denied Dr. Garvey's motion for partial summary judgment on grounds unrelated to the contested declarations, it denied Dr. Garvey's motions to strike as moot. 13 PA 1138.

POINTS AND LEGAL AUTHORITIES

I. *Mandamus relief standard*

As this court sagely stated, "Extraordinary relief should be extraordinary." *Walker v. Second Jud. Dist. Ct.,* 136 Nev., Adv. Op. 80, 476 P.3d 1194, 1195 (2020) (internal quotations omitted). Thus, mandamus relief is ordinarily restricted to instances where a state officer refuses to perform an act required by law, "to control an arbitrary or capricious exercise of discretion," or to clarify an important issue of law in service of "public policy or sound judicial economy and administration." *Int'l Game Tech., Inc. v. Second Jud. Dist. Ct.*, 122 Nev. 132, 142, 127 P.3d 1088, 1096 (2006); NRS 34.160. Furthermore, mandamus relief is ordinarily restricted to instances where the petitioner lacks an "adequate, sufficiently speedy remedy available at law." *Walker*, 136 Nev., Adv. Op. 80, 476 P.3d at 1198; NRS 34.170. The petitioner bears the burden of demonstrating the propriety of this court's extraordinary intervention. *Pan v. Eighth Jud. Dist. Ct.*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004).

A. *Mandamus relief is inappropriate where disputed material facts exist*

Here, Dr. Garvey first seeks this court's extraordinary intervention, challenging a district court order denying his motion for partial summary

judgment. Pet. 19, 21-23. This court ordinarily declines to entertain such petitions, as they generally lack merit and disrupt "the orderly processing of civil cases in the district courts," *State ex rel. Dep't of Transp. v. Thompson*, 99 Nev. 358, 361-62, 662 P.2d 1338, 1340 (1983), and petitioners have an adequate remedy at law in the form of an appeal from an eventual final judgment, *Walker*, 136 Nev., Adv. Op. 80, 476 P.3d at 1198. This is particularly true where disputed issues of material fact exist. *See Round Hill Gen. Improvement Dist. v. Newman*, 97 Nev. 601, 604, 637 P.2d 534, 536 (1981) (recognizing that "an appellate court is not an appropriate forum in which to resolve disputed questions of fact" and determining that when there are disputed facts, this court will not exercise its discretion to entertain a petition for extraordinary relief even though "important public interests are involved"). Indeed, this court only considers petitions challenging a district court's denial of summary judgment "where no disputed factual issues exist." *State Dep't of Transp. v. Eighth Jud. Dist. Ct.*, 133 Nev. 549, 552, 402 P.3d 677, 681 (2017) (internal quotations omitted).

Here, the district court concluded, and the record before this court demonstrates, that genuine issues of material fact exist regarding

whether Douglas needed immediate medical attention; whether Douglas was stable and capable of receiving medical treatment as a nonemergency patient; and whether Dr. Garvey's decision to intubate Douglas at least 9 times in a 48-minute period amounted to gross negligence or reckless, willful, or wanton conduct. 10 PA 806-66; 11 PA 874-959; 12 PA 967-1087; 13 PA 1135-38. Thus, Dr. Garvey's petition does not warrant this court's extraordinary intervention.

Despite this court's long-held aversion to entertaining writ petitions involving factual disputes, Dr. Garvey nonetheless contends that writ relief is appropriate because this court's intervention will significantly affect the course of the underlying litigation. Pet. 21-22. In so doing, he relies upon *Lund v. Eighth Judicial District Court*, 127 Nev. 358, 255 P.3d 280 (2011), and *Lowe Enterprises Residential Partners, L.P. v. Eighth Judicial District Court*, 118 Nev. 92, 40 P.3d 405 (2002).[2] Pet.

[2]Dr. Garvey's reliance, if any, upon *County of Clark ex rel. University Medical Center v. Upchurch ex. rel. Upchurch*, 114 Nev. 749, 961 P.2d 754 (1998), in support of this court's extraordinary intervention is misplaced. There, this court reviewed a district court's grant of summary judgment through the ordinary course of law. *Id.* at 751-52, 961 P.2d at 756. Thus, it is inapposite to the writ relief standard. Dr. Garvey also improperly relies upon a pre-2016 unpublished order from this court in contravention of NRAP 36(c)(3). Pet. 21. As this citation is improper, Diane does not address it.

21-22. Both are unavailing, as both addressed purely legal questions with undisputed material facts.[3] *See Lund*, 127 Nev. at 361-64, 255 P.3d at 282-85 (entertaining writ relief to address the district court's misapplication of NRCP 13 in determining whether a defendant could bring counterclaims against other parties, which would affect "the future course of [the] proceeding"); *Lowe Enters. Residential Partners, L.P.*, 118 Nev. at 95-102; 40 P.3d at 407-11 (entertaining writ relief to address whether a district court could enforce a jury trial waiver where the defendants did not dispute the conspicuousness of the waiver or that the plaintiff involuntarily obtained it). Accordingly, Dr. Garvey fails to demonstrate that mandamus relief is appropriate in this instance.

B. *Mandamus relief is inappropriate where the district court acted within its sound discretion*

Dr. Garvey also requests that this court exercise its discretion and issue a writ of mandamus, commanding the district court to vacate its order denying his motions to strike as moot and enter an order striking

[3]Dr. Garvey's petition does raise any legal questions regarding the proper construction of NRS 41.503. *See* Pet. 24-33. Rather, he merely challenges the district court's application of NRS 41.503 to the underlying matter's facts. *See* Pet. 24-33. Thus, his own petition belies his assertions that this court needs to clarify NRS 41.503.

the declarations of Blazich and Dr. Womack. Pet. 23, 32-33. As this court has repeatedly noted, a petitioner bears a substantial burden when seeking this court's intervention in a district court's discretionary decision. *Walker*, 136 Nev., Adv. Op. 80, 476 P.3d at 1196; *King v. Cartlidge*, 121 Nev. 926, 927, 124 P.3d 1161, 1162 (2005) (noting that the decision to deny a motion to strike is within a district court's sound discretion). Here, Dr. Garvey offers no citations to the record, nor does he offer any caselaw, in support of his request for this court's extraordinary invention on this issue. Pet. 32-33. Accordingly, Dr. Garvey has failed to cogently argue this appellate concern and this court should summarily reject it. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006); *see also Miller v. Wilfong*, 121 Nev. 619, 625, 119 P.3d 727, 731 (2005) (noting that this court expects counsel to pursue appellate relief "with high standards of diligence, professionalism, and competence").

Even if this court were to overlook Dr. Garvey's failure to cogently argue this appellate concern, he otherwise fails to demonstrate that the district court had a clear duty to strike the at-issue declarations. Pet. 32-33. He contends the at-issue declarations contained unpleaded

allegations, but he cites no caselaw clearly demonstrating that a district court must strike such declarations. *See* Pet. 32-33. He also contends that Dr. Womack's declaration lacked foundation and contained legal conclusions, but he cites no caselaw clearly demonstrating that a district court must strike a declaration for those reasons. *See id.* Accordingly, Dr. Garvey fails to demonstrate that mandamus relief is appropriate in this instance.[4] *Walker*, 136 Nev., Adv. Op. 80, 476 P.3d at 1196.

C. *Dr. Garvey is not entitled to mandamus relief*

Given that Dr. Garvey's first request for extraordinary relief involves disputed issues of material fact and given that Dr. Garvey's second request for extraordinary relief involves a decision within the district court's sound discretion, Diane urges this court to decline consideration of Dr. Garvey's petition for a writ of mandamus. An analysis of the substantive issues follows should this court elect to entertain Dr. Garvey's petition.

[4]Dr. Garvey's reliance, if any, on NRCP 56(e) in support of this court's extraordinary intervention in a district court's discretionary decision is meritless. NRCP 56 concerns summary judgment, not motions to strike.

II. *The district court properly denied Dr. Garvey's motion for summary judgment because disputed questions of material fact exist regarding the application of NRS 41.503*

Dr. Garvey contends that the district court erred in denying his motion for partial summary judgment. Pet. 24-33. He suggests that Douglas "undisputedly suffered traumatic injuries" such that the NRS 41.503 trauma cap applies.[5] *Id.* at 26-27. He further characterizes Diane's proffered evidence to the contrary as irrelevant. *Id.* at 27-28.

This court reviews a district court's denial of summary judgment de novo. *See Wood v. Safeway*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is appropriate "if the movant shows that

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[5]Despite not requesting this court to take judicial notice, Dr. Garvey attempts to rely upon a publication ostensibly from the U.S. Department of Health and Human Services to suggest that Douglas had traumatic injuries as a matter of law. Pet. 26-27. He proffers a hyperlink to a website, *id.*, but the hyperlink leads to a missing page message. He does not provide a citation to the record before this court where he included the purported publication. *See id.* Indeed, it appears that he did not include the purported publication as an exhibit to his motion for partial summary judgment, *see* 3 PA 109-143; 4 PA 151-74; 5 PA 182-412, or to his reply in support of the same. *See* 9 PA 765-98. This court has long held that it has "no power to look outside the record of a case," *Alderson v. Gilmore*, 13 Nev. 84, 85 (1878), and will not "consider matters not properly appearing in the record on appeal." *Carson Ready Mix, Inc. v. First Nat'l Bank of Nev.*, 97 Nev. 474, 476, 635 P.2d 276, 277 (1981). Accordingly, Dr. Garvey's reliance upon this publication is improper, and this court should summarily reject it.

there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." NRCP 56(a). "The substantive law controls which factual disputes are material and will preclude summary judgment," and this court reviews "the evidence, and any reasonable inferences drawn from it, . . . in a light most favorable to the [nonmovant]." *Wood*, 121 Nev. at 728-31, 121 P.3d at 1029-31. The movant "bears the initial burden of production to show the absence of a genuine issue of material fact." *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 602, 172 P.3d 131, 134 (2007). If the movant meets this burden, the nonmovant "assumes a burden of production to show the existence of a genuine issue of material fact." *Id.*

Here, Dr. Garvey contends that the district court erred in denying his motion for partial summary judgment, requesting that the district court apply the NRS 41.503 trauma cap to limit the damages that Diane

could recover to $50,000.[6] Pet. 24-33. For NRS 41.503 to apply, the defendant must establish several facts. First, the defendant must establish that NRS 41.503(1)(a)-(e) (defining the health care providers within NRS 41.503(1)'s scope) is applicable to the particular health care provider. Next, the defendant must establish that he or she rendered care in good faith to a patient with "a traumatic injury demanding immediate medical attention, for which the patient enter[ed] the hospital through its emergency room or trauma center." NRS 41.503(1)(e)(2). A traumatic injury is an "acute injury which, according to standardized criteria for triage in the field, involves a significant risk of death or the precipitation of complications or disabilities." NRS 41.503(4)(b).

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[6]Dr. Garvey relies upon *Nguyen v. Southwestern Emergency Physicians, P.C.*, 779 S.E.2d 334 (Ga. 2015) to suggest that plaintiffs have a heightened pleading standard under NRS 41.503. Pet. 26. Such reliance is misplaced, as Ga. Code Ann. § 51-1-29.5(c) (2015) provides that a plaintiff must prove negligence with "clear and convincing evidence that the physician or health care provider's actions showed gross negligence." The plain language of NRS 41.503 contains no such requirement. Diane notes, however, that the *Nguyen* court concluded that the trial court's grant of partial summary judgment under Georgia's emergency trauma statute was improper as genuine issues of material fact existed. 779 S.E.2d at 340-41 (concluding that disagreement among expert medical witnesses as to whether six-month-old child presenting to an emergency room was an emergency case constituted a genuine issue of material fact).

However, the trauma cap does not apply to care "amounting to gross negligence or reckless, willful or wanton conduct." NRS 41.503(1)(e)(2). Such conduct is that "which the [provider] knew or should have known at the time the [provider] rendered the care or assistance would be likely to result in injury so as to affect the life or health of the [patient]." NRS 41.503(4)(a). In evaluating such conduct, the finder of fact must consider:

> (1) [t]he extent or serious nature of the prevailing circumstances;
> (2) [t]he lack of time or ability to obtain appropriate consultation;
> (3) [t]he lack of a prior medical relationship with the patient;
> (4) [t]he inability to obtain an appropriate medical history of the patient; and
> (5) [t]he time constraints imposed by coexisting emergencies.

Id. The trauma cap similarly does not apply to a health care provider's act that "occurs after the patient is stabilized and is capable of receiving medical treatment as a nonemergency patient." NRS 41.503(2)(a).

In moving for partial summary judgment regarding NRS 41.503, Dr. Garvey primarily relied upon the expert opinion of Dr. David Barcay, M.D. 3 PA 113-17. Dr. Barcay opined that Douglas sustained a bilateral

flail chest injury, which he characterized as life-threating.[7] *Id*. at 114-16. Thus, Dr. Garvey contended that the district court should apply the NRS 41.503 trauma cap. *Id*. at 118-40.

To oppose partial summary judgment, Diane proffered evidence regarding the application of NRS 41.503 and the exceptions thereto. 10 PA 806-66; 11 PA 874-959; 12 PA 967-1087; 13 PA 1135-38. First, Diane proffered evidence that Douglas, while injured, did not suffer an acute injury such that he had a significant risk of death or the precipitation of

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[7]In his petition, Dr. Garvey states that "Dr. Barcay mistakenly referred to the flail chest injury as a 'bilateral' flail chest injury, rather than right-sided." Pet. 13 n.4. Dr. Garvey also states that another of his expert witnesses, Dr. Andrew Wachtel, M.D., "inadvertently included a reference to a 'bilateral' flail chest injury." *Id*. The record before this court demonstrates that Alissa Bestick, Esq., under the direction of Keith Weaver, Esq., drafted Drs. Barcay's and Wachtel's expert witness reports and included the references to a bilateral flail chest injury. 3 RPIIA 267. In so doing, Dr. Garvey's attorneys claim to have relied upon the coroner's report. 3 PA 114. However, the coroner's report does not contain any reference to a bilateral flail chest injury. *See* 1 RPIIA 11-16. Thus, Dr. Garvey's attorneys have knowingly made false statements of fact to the district court and to this court and have knowingly proffered evidence they knew to be false. *See* RPC 3.3(a) (providing that a lawyer shall not knowingly make false statements of fact or knowingly proffer false evidence). Indeed, in his sworn testimony, Weaver characterized this practice as commonplace. 3 RPIIA 267. Since Dr. Garvey filed his petition, the district court has presided over an evidentiary hearing regarding Diane's request for sanctions stemming from Weaver's misrepresentations, though the district court has yet to decide the matter. *See id*. at 262-79.

complications or disabilities such that he required immediate medical attention or, alternatively, that Douglas was stable at NNRH and capable of receiving treatment as a nonemergency patient. *See* 10 PA 831 (Dr. Kenneth Scissors, M.D., opining that Douglas's vital signs were stable in the ambulance and at NNRH prior to intubation), 840-51 (Dr. Womack opining that Douglas did not have injuries that were an immediate or imminent threat to his life and that he was stable prior to intubation); 11 PA 878 (Patton describing Douglas's demeanor prior to intubation), 906-07 (Diane describing Douglas's demeanor prior to intubation); 12 PA 1012-33 (medical records noting that Douglas arrived at NNRH at 8:51 p.m., Dr. Garvey first examined Douglas at 9:15 p.m., Douglas received computerized tomography scans starting at 10:19 p.m., and intubations began around 12:20 a.m.). Second, Diane proffered evidence that Dr. Garvey's provided care was grossly negligent, reckless, and in bad faith. 10 PA 851-61 (Dr. Womack opining that Dr. Garvey's misdiagnosis of Douglas, decision to unnecessarily intubate Douglas, failure to timely perform a cricothyrotomy once Douglas's airway failed, and decision to allow a paramedic to perform a high-risk procedure was grossly negligent, reckless, and in bad faith).

Viewing this evidence in a light most favorable to Diane,[8] a rational juror could find that Douglas did not need immediate medical attention or was stable given the nearly three-and-a-half hours that passed between his arrival at NNRH and the intubations. Alternatively, viewing this evidence in a light most favorable to Diane, a rational juror could find that Douglas was stable given the expert reports of Drs. Scissors and Womack. Finally, viewing this evidence in a light most favorable to Diane, a rational juror could find that Dr. Garvey's decision to intubate Douglas at least 9 times in a 48-minute period in the way they occurred was grossly negligent, reckless, or in bad faith. Accordingly, Diane met her burden of production to demonstrate that genuine issues

[8]Dr. Garvey relies upon *Campbell v. Pompa*, 585 S.W.3d 561 (Tex. App. 2019) to suggest that he is entitled to partial summary judgment under NRS 41.503 as a matter of law. Pet. 29-30. Such reliance is misplaced, as *Campbell* was before the court on an appeal from a jury verdict, finding that Texas's emergency trauma statute applied. 585 S.W.3d at 568. Thus, the *Campbell* court reviewed the record to determine if sufficient evidence supported the jury's finding. *Id*. at 571. The instant petition challenges the district court's denial of partial summary judgment, rendering Dr. Garvey's reliance upon *Campbell* inapposite, as this court must construe the facts in a light most favorable to Diane. *See Wood*, 121 Nev. at 728-31, 121 P.3d at 1029-31. Diane notes, however, that the *Campbell* court concluded that whether Texas's emergency trauma cap applied was a question for the trier of fact. 585 S.W.3d at 575.

of material fact existed regarding the application of NRS 41.503. Therefore, the district court properly concluded that Dr. Garvey was not entitled to partial summary judgment as genuine issues of material fact existed.[9] 13 PA 1135-38.

III. *The district court acted within its sound discretion in denying Dr. Garvey's motions to strike*

Dr. Garvey suggests that the district court should have granted his motion to strike because Diane did not specifically plead "gross negligence, bad faith, and reckless, willful and wanton conduct." Pet. 30-

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[9]Dr. Garvey's suggestion that the district court was required to grant partial summary judgment because Diane did not allege gross negligence, bad faith, or reckless, willful, or wanton conduct lacks merit. Diane alleged all the facts necessary to support a finding gross negligence or reckless, willful, or wanton conduct. 2 PA 67-70. Thus, under Nevada's liberal notice pleading standard, Diane gave Dr. Garvey sufficient notice of her grievance. *See Liston v. Las Vegas Metro. Police Dep't*, 111 Nev. 1575, 1578, 908 P.2d 720, 723 (1995) (footnote omitted). Furthermore, Dr. Garvey raised the NRS 41.503 trauma cap as an avoidance to liability, rendering his proffered caselaw inapposite. *See Hasan v. E. Wash. State Univ.*, 485 F. App'x 169, 170 (9th Cir. 2012) (affirming summary judgment where the plaintiff failed to adequately raise a statute that waived Eleventh Amendment immunity in a 42 U.S.C. § 1981 suit); *Young v. Mercury Cas. Co.*, No. 2:12-CV-00091-RFB-GWF at *14 (D. Nev. July 29, 2019) (declining to consider unpleaded claims of breach of contract and Unfair Claims Practices Act violations on a motion for summary judgment); *Marshall v. Eighth Jud. Dist. Ct.*, 108 Nev. 459, 465, 836 P.2d 47, 51 (1992) (granting a motion to dismiss where the plaintiff failed to allege negligence, bad faith, or malice to support a claim for false imprisonment).

33. Thus, Dr. Garvey posits that he did not have notice that Diane would present such evidence, rendering the declarations improper. *Id.* Here, Dr. Garvey raised the NRS 41.503 trauma cap in his motion for partial summary judgment, 3 PA 109-40, despite not raising it in his answer to Diane's second amended complaint. 13 PA 1121-29. Accordingly, Diane had the right to respond. *Cf. Williams v. Cottonwood Cove Dev. Co.*, 96 Nev. 857, 860, 619 P.2d 1219, 1221 (1980) (noting that a defendant may raise an unpleaded affirmative defense for the first time in a motion for summary judgment where the plaintiff has "reasonable notice and an opportunity to respond").

Alternatively, "Nevada is a notice-pleading jurisdiction and liberally construes pleadings," placing matters that a plaintiff fairly notices into issue. *Chavez v. Robberson Steel Co.*, 94 Nev. 597, 599, 584 P.2d 159 (1978) (holding that the plaintiff's allegation of negligence allowed recovery under a theory of negligence or products liability). Thus, a plaintiff must "set forth the facts which support a legal theory," but he or she need not correctly identify a particular theory. *Liston*, 111 Nev. at 1578, 908 P.2d at 723 (footnote omitted). Indeed, "[a] plaintiff who fails to use the precise legalese in describing his [or her] grievance

but who sets forth the facts which support his [or her] complaint thus satisfies the requisites of notice pleading." *Id.* Here, Diane alleged sufficient facts to support a finding of gross negligence or reckless, willful, or wanton conduct, 2 PA 67-70, giving Dr. Garvey notice that his conduct in treating Douglas was at-issue. That Diane did not specifically use the terms "gross negligence, bad faith, and reckless, willful and wanton conduct" is immaterial under *Liston*. Accordingly, Dr. Garvey failed to demonstrate that the district court had a clear duty to strike the at-issue declarations, rendering his request for this court's extraordinary intervention on this ground defective. *Walker*, 136 Nev., Adv. Op. 80, 476 P.3d at 1197.

CONCLUSION

Given that Dr. Garvey fails to demonstrate that no genuine issues of material fact remain as to whether NRS 41.503 applies and given that Dr. Garvey fails to demonstrate that the district court had a clear duty to strike the challenged declarations, Diane respectfully urges this court to decline to entertain Dr. Garvey's petition for a writ of mandamus. Alternatively, given that genuine issues of material fact exist regarding the application of NRS 41.503 and given that the district court acted

within its sound discretion in denying Dr. Garvey's motions to strike, Diane respectfully urges this court to deny Dr. Garvey's petition for a writ of mandamus on its merits.

Dated this 21st day of December 2021.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type-style requirements of NRAP 32(a)(6) because I prepared this brief in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Century Schoolbook font.

I further certify that this brief complies with the page – or type volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

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Finally, I hereby certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires a reference to the page and volume number, if any, of the transcript or appendix where the court will find the matter relied on to support every assertion in the brief.

I understand that I may be subject to sanctions if the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing ***ANSWER TO PETITION FOR WRIT OF MANDAMUS*** and ***APPENDIX OF REAL PARTY IN INTEREST, VOLUME 1*** with the Supreme Court of Nevada on the 21st day of December 2021. I will electronically serve the foregoing documents in accordance with the Master Service List as follows:

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