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

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ANSWER TO AMICI CURIAE BRIEF

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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 27th day of January 2022.

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SUMMARY

Amici Curiae Nevada Hospital Association; Valley Health System, LLC; Renown Regional Medical Center; Renown South Meadows Medical Center; and Dignity Health ("Amici") request that this court issue a writ of mandamus, commanding the district court to vacate its order denying Petitioner Dr. David Garvey, M.D.'s 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 Dr. Garvey's favor. In support of their position, Amici proffer public policy concerns for this court's consideration. Fatal to Amici's position is this court's long held commitment to construing statutes as the Legislature wrote them. Indeed, this court will only go beyond the plain language of a statute where the parties demonstrate that a statute is ambiguous or that the Legislature clearly intended something other than the plain language. Given that Amici fail to demonstrate that any

part of NRS 41.503 is ambiguous, and given that Amici otherwise fail to demonstrate that the Legislature intended something other than what the plain language of NRS 41.503 provides, Real Party in Interest Diane Schwartz respectfully urges this court to reject Amici's public policy concerns and to enforce the plain language of NRS 41.503.

ARGUMENT

I. *Relevant rules of statutory construction*

When construing statutes, even when raised in a petition seeking writ relief, this court begins with the statute's plain language. *Piroozi v. Eighth Jud. Dist. Ct.*, 131 Nev. 1004, 1007-08, 363 P.3d 1168, 1170-71 (2015). When a statute's plain language is clear on its face, this court "will not look beyond that language when construing the provision," *id.* at 1008, 363 P.3d at 1171, unless the Legislature clearly intended a different meaning, *Szydel v. Markman*, 121 Nev. 453, 456-57, 117 P.3d 200, 202 (2005). This court may also look beyond a statute's plain language if it is ambiguous, rendering it susceptible to multiple interpretations. *Cty. of Clark ex. rel. Univ. Med. Ctr. v. Upchurch by & Through Upchurch*, 114 Nev. 749, 753, 961 P.2d 754, 757 (1998). Additionally, this court construes statutes as a whole, giving full meaning to each word, phrase, and provision "so as not to render

superfluous words or phrases or make provisions nugatory." *Clark Cty. v. S. Nev. Health Dist.*, 128 Nev. 651, 656, 289 P.3d 212, 215 (2012). Finally, courts narrowly construe statutory definitions using the term "means," as they typically represent a choice by legislatures to only include the express language. *See* 2A Norman Singer & Shambie Singer, *Sutherland Statutes and Statutory Construction* § 47:7 (7th ed. 2020) ("[A] definition which declares what a term "means" usually excludes any meaning not stated). This court applies the same rules when construing regulations. *See, e.g., Felton v. Douglas Cty.*, 134 Nev. 34, 37, 410 P.3d 991, 995 (2018) (construing NAC 616C.447 in accordance with its plain language and harmonizing the same with other relevant statutes).

II. *Application to NRS 41.503*

NRS 41.503(1) provides a cap of $50,000 in civil damages for any claim "arising out of any act or omission in rendering . . . care" by a qualifying provider to a person suffering from "a traumatic injury demanding immediate medical attention." NRS 41.503(4)(b) narrowly defines traumatic injury as "any acute injury which, according to standardized criteria for triage in the field, involves a significant risk of death or the precipitation of complications or disabilities." NRS 41.503(4)(b) does not cross-reference any other statute nor does it

delegate authority to an administrative agency or board to promulgate regulations expounding on this definition. NRS 41.503(4)(b) also does not expressly incorporate any treatise or publication.

NRS 41.503 contains exceptions to the civil damage cap. First, the civil damage cap does not apply where a qualifying provider renders care to a patient suffering from a traumatic injury in a manner "amounting to gross negligence or reckless, willful or wanton conduct." NRS 41.503(1)(e)(2). In determining whether a provider's care amounted to such, the fact-finder 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.

NRS 41.503(4)(a). Second, the civil damage cap does not apply to care that a qualifying provider renders after a patient suffering from a traumatic injury becomes stable "and is capable of receiving medical treatment as a nonemergency patient," unless the patient requires

surgery "as a result of the emergency within a reasonable time" after becoming stable. NRS 41.503(2)(a). Third, the civil damage cap does not apply to care that a qualifying provider renders to a patient that is "[u]nrelated to the original traumatic injury." NRS 41.503(2)(b). NRS 41.503(3) also provides a rebuttable presumption that the civil damage cap applies when a plaintiff sues a qualifying provider for malpractice for medical conditions arising during follow-up care resulting from and directly related to a traumatic injury.

Thus, as the plain and unambiguous language of NRS 41.503 demonstrates,[1] whether the civil damage cap applies turns on several factual determinations. Indeed, a patient may present to a qualifying provider with traumatic injuries, but that provider may not avail itself of the civil damage cap if the provider's rendered care amounts "to gross negligence or reckless, willful or wanton conduct," or the patient becomes stable. NRS 41.503(1)(e)(2); NRS 41.503(2)(a). Therefore, the plain language of NRS 41.503 belies Amici's assertion "that fact questions

[1]Neither Dr. Garvey nor Amici argue that any provision of NRS 41.503 is ambiguous. *See* Pet. 24-31; Amici Curiae Br. 16-24. Thus, this court may summarily reject Amici's reliance on legislative history, Amici Curiae Br. 9-21, as NRS 41.503 does not present any ambiguity for this court to resolve.

regarding the apparent 'state' of a patient's traumatic injuries when admitted to an emergency room for triage are immaterial in the summary judgment context if, as in this case, the pleadings and evidence objectively qualify as traumatic 'according to standardized criteria for triage in the field.'" Amici Curiae Br. 17 (quoting NRS 41.503(4)(b)). Had the Legislature intended for the civil damage cap to apply in the manner that Amici suggest, it would have omitted all the exceptions to the damage cap that plainly may only apply after the qualifying provider admits a patient. Indeed, Amici's proffered construction would render all the exceptions under NRS 41.503 superfluous and nugatory. While such a construction would certainly benefit Amici's pecuniary interests, what is economically expedient to an interested party is immaterial to this court's long-held commitment to construing statutes as the Legislature wrote them.

III. *Amici's cited statutes and regulations are not relevant*

Amici rely upon several statutes and regulations governing emergency medical care and transportation to assert that this court may apply the civil damage cap under NRS 41.503 notwithstanding any of the above exceptions. *See* Amici Curiae Br. 9-12, 16-21. Schwartz addresses each in turn.

First, Amici rely upon NRS 450B.237(2), NRS 450B.239, NAC 450B.786, NAC 450B.838, NAC 450B.845, NAC 450B.852, and NAC 450B.866 to suggest that the civil damage cap under NRS 41.503 must apply to the instant matter. *See* Amici Curiae Br. 9-12. Amici aver that the above statutes required Dr. Garvey to transfer the decedent, Douglas Schwartz, to a different facility for further treatment, thereby triggering the civil damage cap as a matter of law. *Id*. at 9-10. Amici's averments lack merit. Second, Amici rely upon NAC 450B.770(1) and NAC 450B.772 to suggest that Douglas objectively suffered a traumatic injury, thereby requiring the district court to apply the civil damage cap as a matter of law. *See* Amici Curiae Br. 16-21. This averment also lacks merit.

NRS Chapter 450B broadly governs the provision of emergency medical services in Nevada. *See* NRS 450B.015 (providing the Legislature's declaration regarding the general purpose of NRS Chapter 450B). NRS 450B.237(2) provides that the State Board of Health must "adopt regulations which establish the standards for the designation of hospitals as centers for the treatment of trauma." The statute further provides that the State Board of Health must "consider the standards

adopted by the American College of Surgeons for a center for the treatment of trauma as a guide for such regulations." *Id.* Thus, as its plain language demonstrates, NRS 450B.237(2) concerns the designation of hospitals as trauma centers. Contrary to Amici's suggestion, NRS 450B.237(2) does not provide a standard for what constitutes trauma, nor does it expressly adopt a publication to provide the same. Similarly, NRS 450B.239 provides that the Division of Public and Behavioral Health of the Department of Health and Human Services must "cooperate with the American College of Surgeons to provide training in the treatment of trauma." *See also* NRS 450B.0625 (defining "Division" under NRS Chapter 450B). Contrary to Amici's suggestion, as its plain language demonstrates, NRS 450B.239 does not provide a standard for what constitutions trauma nor does it expressly adopt a treatise or publication to provide the same. Indeed, the only statute within NRS Chapter 450B that is relevant to the instant matter is NRS 450B.105, which provides the same definition for trauma as NRS 41.503(4)(b). *Compare* NRS 450B.105 *with* NRS 41.503(4)(b). Accordingly, Amici's reliance upon NRS Chapter 450B is unavailing.

NRS Chapter 450B also delegates authority to the State Board of Health or the district board of health to promulgate regulations in furtherance of the Legislature's express policies. *See* NRS 450B.130. In so doing, the Legislature gave the governing board the discretion to rely upon standards and regulations from the following sources:

> (a) [t]he Committee on Trauma of the American College of Surgeons;
>
> (b) [t]he United States Department of Transportation;
>
> (c) [t]he United States Public Health Service;
>
> (d) [t]he Bureau of Health Insurance of the Social Security Administration;
>
> (e) [t]he American Academy of Orthopaedic [sic] Surgeons;
>
> (f) [t]he National Academy of Sciences — National Research Council;
>
> (g) [t]he American Heart Association; and
>
> (h) [r]egional, state and local emergency medical services committees and councils.

NRS 450B.140(1). Contrary to Amici's suggestion, the plain language of NRS 450B.140(1) does not constitute an express adoption of any of the above sources, but rather constitutes the Legislature's suggestion as to what sources the governing board may consider in promulgating standards and regulations.

Turning to Amici's proffered regulations, NAC 450B.786 defines what constitutes a trauma center and has no relevance as to what constitutes a traumatic injury. NAC 450B.838, NAC 450B.845, NAC 450B.852, and NAC 450B.866 respectively define what constitutes a level one trauma center, a pediatric center, a level two trauma center, and a level three trauma center. None of those regulations define what constitutes a traumatic injury. Tellingly, Amici does not bring this court's attention to two regulations within NAC Chapter 450B that are relevant to the instant matter, an analysis of which follows.

NAC 450B.798 provides that "'[p]atient with trauma' means a person who has sustained injury and meets the triage criteria used to evaluate the condition of the patient." NAC 450B.814 provides that "'[t]riage criteria' means a measure or method of assessing the severity of a person's injuries which is used to evaluate the patient's condition in the field and is based on anatomical considerations, physiological conditions and the mechanism of injury." Given that the board used "means" in defining these terms, this court must narrowly construe both definitions in accordance with their plain language. *See* 2A *Sutherland Statutes and Statutory Construction* § 47:7. Of particular significance to

the instant matter is the governing board's use of the conjunctive term "and" in defining triage criteria. Therefore, the plain language of NAC 450B.814 provides that triage criteria must measure all the listed considerations. Thus, this court may summarily reject Amici's singular reliance upon just the mechanism of injury criteria. *See* Amici Curiae Br. 19-21. Furthermore, NAC 450B.814 does not expressly reference or incorporate any particular treatise, standard, or publication. Rather, the plain language of NAC 450B.814 demonstrates that the governing board, by using the term "a," deliberately chose not to adopt a particular treatise, standard, or publication.[2]

Alternatively, Amici rely on their proffered regulations to stand for the broad proposition that a governing board has expressly adopted certain treatises, standards, or publications, which they contest mandated that the district court apply the civil damage cap. Amici's argument lacks merit. First, the governing board has only adopted two publications by reference, *Resources for Optimal Care of the Injured*

[2]The term "a" in NAC 450B.814 is an indefinite article, which dictionaries define in this context as "any." *See A*, *Merriam-Webster*, https://www.merriam-webster.com/dictionary/a (last visited Jan. 26, 2022).

Patient by the American College of Surgeons and *Guidelines for Design and Construction of Hospitals and Outpatient Facilities* by the Facility Guidelines Institute. *See* NAC 450B.816. Thus, this court may summarily reject Amici's assertion that the governing board adopted *Guidelines for Field Triage of Injured Patients* by the Centers for Disease Control and Prevention or the *2020 Annual Trauma Registry Report* by the Nevada Department of Health and Human Services. Second, when the governing board incorporates a portion of an adopted publication, it does so expressly. *See* NAC 450B.819(4)(c); NAC 450B.819(4)(h)(2); NAC 450B.8205(5); NAC 450B.830(2)(a); NAC 450B.830(2)(b); NAC 450B.838(1); NAC 450B.845(1); NAC 450B.845(2); NAC 450B.852(1); NAC 450B.866(1); NAC 450B.875. Given that NAC 450B.798 and NAC 450B.814 do not expressly incorporate any of Amici's referenced publications, Amici's reliance upon the same lacks merit.[3]

[3]Amici also repeat Dr. Garvey's erroneous complaints regarding unpleaded statutory exceptions and the necessity of early resolution of the application of the civil damages cap. *Compare* Pet. 21-24, 30-32 *with* Amici Curiae Br. 21-30. Schwartz invites this court to consider the arguments she presented in her answer should it entertain Amici's duplicative averments. *See* Ans. 10-13, 15, 23-25.

CONCLUSION

Amici present several policy contentions to encourage this court to grant Dr. Garvey's petition for a writ of mandamus. Such contentions are irrelevant, as this court, absent ambiguity, or a showing that the Legislature clearly intended a different meaning, construes statutes as the Legislature wrote them. Here, Amici fail to demonstrate that NRS 41.503 is ambiguous or that the Legislature clearly intended something other than the statute's plain and unambiguous language. Thus, Schwartz respectfully urges this court to summarily reject Amici's public policy concerns. Turning to controlling statutes and regulations, Schwartz has demonstrated that whether the civil damages cap under NRS 41.503 applies turns on a number of factual considerations, which the fact-finder must resolve. No statute in NRS Chapter 450B, no regulation in NAC Chapter 450B, and none of Amici's proffered contentions provide the contrary.

Given that she proffered admissible evidence demonstrating that some of the exceptions under NRS 41.503 apply, and given that this court must construe the facts and all inferences derived therefrom in a light most favorable to her, Schwartz respectfully urges this court to not

entertain Dr. Garvey's petition or, alternatively, deny his petition on its merits.

Dated this 27th day of January 2022.

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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:

☒ proportionally spaced, has a typeface of 14 points or more and contains 2,516 words; or

☐ does not exceed _____ pages.

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.

Dated this 27th day of January 2022.

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