IN THE SUPREME COURT OF THE STATE OF NEVADA

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SHAIA SCHUCHMACHER; AND BEVERLY SCHUCHMACHER, Petitioners, v. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE CARLI L. KIERNY, District Court Judge, Clark County, Nevada, Respondent, ALANA BARTON, both Individually and as Special Administrator of the Estate of YVONNE SUGGS, Real Parties in Interest/ Plaintiffs in the underlying action. ALANA BARTON; BH BARTON; AND ALEXANDER MENDIA, Real Parties in Interest/ CounterDefendant and Third-Party Defendants in underlying action.	CASE NO: _____ **PETITION FOR WRIT OF MANDAMUS**

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Pursuant to NRAP 21(a)(3)(A), Petitioners submit that the matter falls into the category of cases presumptively assigned to the Court of Appeals.

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III. RELIEF SOUGHT

Petitioners respectfully request that the Court issues a Writ of Mandamus directing Respondent to:

1) Vacate the order denying the motion to strike Plaintiff's expert, Neil Opfer, and denying Petitioners' motion for summary judgment;
2) Enter an order granting the motion for summary judgment; and
3) Enter judgment in favor of Petitioners.

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IV. PETITIONER'S NRAP 26.1 DISCLOSURE STATEMENT

Petitioners do not have a parent corporation or publicly held company that owns 10% or more of the party's stock.

The attorneys and law firms whose partners or associates have appeared for Petitioners are:

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No litigant is using a pseudonym.

DATED this 22nd day of December, 2021.

RESNICK & LOUIS, P.C.

/s/Carissa Yuhas

_____

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V. STATEMENT OF ISSUES PRESENTED FOR REVIEW

Did Respondent abuse her discretion or commit clear error in:

1) Failing to rule that Counter-Defendant and Third-Party Defendant lacked standing to oppose Petitioners' motion to strike Plaintiff's experts and for summary judgment;
2) Ruling that Plaintiff's untimely joinder to Counter-Defendant and Third-Party Defendant's opposition to Petitioners' motion to strike Plaintiff's experts and for summary judgment was a "technical issue";
3) Failing to rule that that Plaintiff's expert, Neil Opfer's opinions were completely speculative and therefore, inadmissible; and
4) Ruling that there were genuine issues of material fact regarding the dispute of the causation element of Plaintiff's claims.

VI. RELEVANT FACTS AND PROCEDURAL HISTORY

The underlying case involves a wrongful death lawsuit. However, there is absolutely no "wrong" done by Mr. and Mrs. Schuchmacher ("Petitioners") that Plaintiff, Alana Barton, can prove caused the death of her mother, Yvonne Suggs ("Decedent"). Alana Barton rented Petitioners' property located at 11593 Autunno Street in Las Vegas, Nevada ("subject property"), and allowed Decedent to live there with her. *2 P.App. 168*. On 01/27/18, Decedent was discovered unresponsive in the swimming pool located on the subject property and passed away shortly thereafter. *Id.* Nobody witnessed how Decedent got into the pool. *1*

P.App. 138-139. Did Decedent have a heart attack and fall in? Did Decedent trip over her dog and fall in? Did Decedent walk through the flower bed area behind the pool, lose her balance, and fall in? No reasonable person can come to a conclusion as Plaintiff presented no admissible evidence whatsoever to prove her negligence claim. Accordingly, Respondent abused her discretion in denying Petitioners' motion for summary judgment.

As a result of Ms. Suggs' death, Alana Barton, both individually and as the Special Administer on behalf of the Estate of Yvonne Suggs, ("Plaintiff") filed a complaint on 09/24/19 alleging (based upon pure conjecture) that Ms. Suggs tripped and fell into a pool located on the subject property and died from drowning. *1 P.App. 1-3.* The complaint alleges that Petitioners were negligent in the care, maintenance and upkeep of the backyard of the premises by allowing uneven surfaces to remain which posed a substantial trip hazard to the tenants, including Ms. Suggs. *Id.* The complaint fails to allege what Ms. Suggs may have tripped over but merely alleges that Ms. Suggs tripped as a result of the dilapidated condition of the premises (the premises is pictured below solely for reference). *Id.*

Petitioners filed an answer to the complaint on 12/06/2019. *1 P.App. 4-7.* Petitioners also filed a counterclaim and third-party complaint against the tenants of the subject property, Alana Barton, BH Barton, and Alexander Mendia, alleging breaches of their duties pursuant to NRS 118A.310(1)(a), NRS 118A.310(1)(b), and the terms of their Lease Agreement to keep the subject property in a clean and good condition, to keep and maintain the landscaping and pool located at the subject property in a clean and good condition, to keep the part of the subject property which is occupied and used, as clean and safe as the condition of the premises permit, and to immediately report any defect or problem on the subject property to Petitioners. *1 P.App. 8-17.*

It remains undisputed that there were no witnesses who saw Ms. Suggs' alleged trip or fall into the pool. *1 P.App. 138-139.* Alana Barton admitted during her deposition that she had no evidence to demonstrate that Ms. Suggs tripped over anything in the backyard at the subject property, as opposed to any other item, such as her dog or her own shoes**.** *1 P.App.*

147. It is also undisputed that the tenants of the subject property never reported any tripping hazard issues at the subject property to Petitioners prior to the occurrence of the alleged subject incident. *1 P.App. 120-121; 126; 133.*

Ms. Suggs' autopsy was performed by the investigating coroner, Mark Shuman, MD. *1 P.App. 159.* During Dr. Shuman's deposition, he testified that, to a degree of medical probability, Ms. Suggs fell into the pool at the subject property because she had a cardiac event. *1 P.App. 161.* Dr. Shuman testified that he found that Ms. Suggs' heart was enlarged and that she had moderate atherosclerosis which decreased blood flow to the heart which was the cause of her cardiac event. *1 P.App. 159-160.*

Petitioners moved to strike Plaintiff's experts and for summary judgment regarding the allegations in the complaint on 04/15/2021. *1 P.App. 18-165.* Petitioners' motion was based on the grounds that: 1) Plaintiff's experts must be stricken since their opinions do not meet the standards of NRS 50.275 or Hallmark v. Eldridge, 124 Nev. Adv. Rep. 48, 189 P.3d 646, 650 (2008); and 2) Plaintiff's negligence claim fails as a matter of law because she cannot meet her burden of proof that a dangerous condition existed on the property, that Ms. Suggs tripped on a dangerous condition causing her to fall into the pool, or that Ms. Suggs' death was due to drowning rather than a sudden cardiac event. *Id.*

On 04/29/2021, Alana Barton and BH Barton (in their capacities as Counter-Defendant and Third-Party Defendant) filed and served their opposition. *2 P.App. 166-396.* Alana Barton (in her capacity as Plaintiff) did not file and serve her joinder to the opposition until 14 days

later on 05/13/2021. *3 P.App. 397-399.* Petitioners filed their reply on 05/19/2021. *3 P.App. 400-413.*

On 07/28/2021, the District Court heard argument on Petitioners' motion to strike Plaintiff's experts and for summary judgment. *3 P.App. 414-429.* As can be seen from the hearing transcript, Respondent found that there were genuine issues of material fact regarding the dispute of the causation element of Plaintiff's claims. *3 P.App. 427-429.* Specifically, Respondent relied on the opinions of Plaintiffs' experts to demonstrate that there were questions regarding which experts are to be believed. *Id.*

Respondent went on to find that Plaintiffs' experts met the standard set forth in Hallmark v. Eldridge (2008) 124 Nev. 492 in their qualifications and ability to provide assistance to the trier of fact and that Petitioners' arguments regarding the reliability of the methodology of the experts' opinions reflected the weight of the evidence rather than the admissibility. *Id.* Lastly, Respondent found that that Petitioners' arguments regarding the standing of the opposition and the timing of the joinder to the opposition were "technical issues" and since the motion was continued to a later hearing date, it would be unfair to disregard the opposition and joinder based on untimeliness. *Id.* The order denying Petitioners' motion to strike Plaintiff's experts and for summary judgment was entered on 08/11/2021. *3 P.App. 430-437.*

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VII. ARGUMENTS IN SUPPORT OF ISSUANCE OF THE WRIT

A writ of mandamus may be issued by the Nevada Supreme Court to compel the performance of an act which the law requires as a duty resulting from an office, trust or station. International Game Tech. v. Second Judicial Dist. Ct., 124 Nev. 193, 179 P.3d 556 (2008); NRS 34.160, if the petitioner does not have a plain, speedy and adequate remedy at law. NRS 34.170. Denials of motions for summary judgment are reviewable in mandamus. Sorenson v. Pavlikowski, 94 Nev. 440, 581 P. 2d 851 (1978). A writ of mandamus will issue to compel entry of summary judgment when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Sandler v. Eighth Judicial Dist. Ct., 96 Nev. 622, 614 P.2d 10 (1980).

At the crux of the subject of this writ petition is the situation where Respondent has abused her discretion and committed clear error by disregarding controlling authority and denying the motion to strike Plaintiff's expert, Neil Opfer, and denying Petitioners' motion for summary judgment. As demonstrated below, Respondent should have granted the motions outright pursuant to EDCR 2.20(e) because there was no properly asserted opposition. Additionally, Respondent was required to strike Plaintiff's expert, Neil Opfer, pursuant to NRS 50.275 and Hallmark v. Eldridge, 189 P.3d 646 (Nev. 2008). Lastly, Respondent was required to grant Petitioners' motion for summary judgment because Petitioners met their burden of production that there was an absence of evidence to support

Plaintiff's case and Plaintiff failed to provide sufficient admissible evidence to dispute the same.

However, Respondent abused her discretion and disregarded controlling authority in ruling that: the opposition and the timing of the joinder were "technical issues"; Plaintiff's expert met the applicable standards because the reliability of the methodology of the experts' opinions reflect the weight of the evidence rather than the admissibility; and there were genuine issues of material fact regarding the dispute of the causation element of Plaintiff's claims. Petitioners submit they have met their burden to demonstrate the writ petition should be considered and relief granted.

A. RESPONDENT ABUSED HER DISCRECTION AND COMMITTED CLEAR ERROR IN DENYING PETITIONERS' MOTION TO STRIKE PLAINTIFF'S EXPERT, NEIL OPFER, AND DENYING PETITIONERS' MOTION FOR SUMMARY JUDGMENT.

As can be seen in the motion to strike Plaintiff's experts and for summary judgment, as well as Petitioners' reply brief, Petitioners offered the following enumerated reasons why the motion should have been granted:

1) Petitioners' motions should have been granted pursuant to EDCR 2.20(e) because there was no properly asserted opposition since Alana Barton and BH Barton (in their capacities as Counter-Defendant and Third-Party Defendant) did not have standing to oppose the motions and Plaintiff's joinder was filed untimely; 2) Plaintiff's expert, Neil Opfer, must be stricken since his opinions do not meet the standards of NRS 50.275 or Hallmark v. Eldridge, 189 P.3d 646 (Nev. 2008); and 3) Plaintiff's negligence claim fails as a matter of law because

she cannot meet her burden of proof that a dangerous condition existed on the property or that Ms. Suggs tripped on a dangerous condition causing her to fall into the pool rather than a sudden cardiac event causing her to end up in the pool. *1 P.App. 18-165; 3 P.App. 400-413.*

For the reasons that will be addressed immediately below, Respondent was required to grant the motion for summary judgment and her failure to do so was an abuse of discretion and clear error.

1. RESPONDENT ABUSED HER DISCRETION IN ALLOWING CONSIDERATION OF THE OPPOSITION AND JOINDER WHEN ALANA BARTON AND BH BARTON (IN THEIR CAPACITIES AS COUNTER-DEFENDANT AND THIRD-PARTY DEFENDANT) DID NOT HAVE STANDING AND PLAINTIFF'S JOINDER WAS FILED UNTIMELY.

Petitioners' motions should have been granted pursuant to EDCR 2.20(e) because there was no properly asserted opposition since Alana Barton and BH Barton (in their capacities as Counter-Defendant and Third-Party Defendant) did not have standing to oppose the motions and Plaintiff's joinder was filed untimely. Petitioners filed and served their motion to strike Plaintiff's experts and motion for summary judgment on 04/15/2021. *1 P.App. 18-165.* Alana Barton and BH Barton (in their capacities as Counter-Defendant and Third-Party Defendant) filed and served their opposition on 04/29/2021. *2 P.App. 166-396.* Plaintiff did not file and serve her joinder to Alana Barton and BH Barton's opposition until 14 days later on 05/13/2021. *3 P.App. 397-399.*

When a motion for summary judgment is made and supported, an **adversary party** who does not set forth specific facts showing a genuine issue to be resolved at trial may have a summary judgment entered against him. Collins v. Union Fed. Sav. & Loan Ass'n, 99 Nev. 284, 662 P.2d 610 (1983)(emphasis added). Furthermore, a party asserting that a fact cannot be or is genuinely disputed must support the assertion by either: (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an **adverse party** cannot produce admissible evidence to support the fact. *See*, NRCP 56(c)(1).

It follows that to have standing to oppose a motion for summary judgment, the party must have some adversary interest in the outcome of the motion. Federal courts have recently been faced with this dispositive decision and found no standing. Rather than allowing sole opposition to a motion by a coparty, these courts have required that parties be adverse to one another on at least some claims in order to promote efficient disposition of trials. *See,* Blonder v. Casco Inn Residential Care, Inc., No. 99-274-P-C, 2000 U.S. Dist. LEXIS 8054, at *1, *3–4 (D. Me. May 4, 2000) (finding the codefendant did not have standing to oppose the defendant's motion for summary judgment regarding claims for injuries sustained in a fire); Eckert v. City of Sacramento & Union Pac. R.R. Co., No. 2:07- cv-00825-GEB-GGH, 2009 U.S. Dist. LEXIS 95655, at *7–9 (E.D. Cal. Sept. 29, 2009) (refusing to grant standing to the

city as a codefendant to oppose Union Pacific's motion for summary judgment because the city was not an adverse party); Thurman v. Wood Grp. Prod. Servs., Inc., No. 09-4142 Sec.: J(3), 2010 U.S. Dist. LEXIS 132190, at *4–5 (E.D. La. Dec. 14, 2010) (holding that only parties to the motion for summary judgment, those on opposing sides, were eligible to oppose the motion).

Additionally, in support of the notion that parties with standing to oppose a motion must have some adversary interest in the outcome of the motion is the related concept of standing to appeal the outcome of such a motion. NRAP 3A(a) provides that only a party who is aggrieved by an appealable judgment or order has the right to appeal. *See,* NRAP 3A(a). Applying these principles, it is clear that Alana Barton and BH Barton (in their capacities of Counter-Defendant and Third-Party Defendant) did not have standing to oppose Petitioners' motions. There may well be instances in which a co-party does have some existing right that will be adversely affected by the grant of summary judgment or any other motion in favor of another, and, if so, his or her opposition may be considered. However, this was not the situation presented here.

Counter-Defendant and Third-Party Defendant, Alana Barton and BH Barton, did not designate either expert at issue in the motion to strike as witnesses who would testify on their behalf, as to do so would be non-sensical. Petitioners' claims against Alana Barton and BH Barton stem from the alleged breach of duties pursuant to NRS 118A.310(1)(a) and the terms of the Lease Agreement to keep the subject property in a clean and good condition, to

keep and maintain the landscaping and pool located at the subject property in a clean and good condition, and to immediately report any defect or problem on the subject property to Mr. and Mrs. Schuchmacher. *1 P.App. 8-17.* As such, Alana Barton and BH Barton would have no need for testimony from a medical expert. Additionally, the opinions of Mr. Opfer directly implicated Alana Barton and BH Barton as being in breach of their duties if it is to be believed that hazards existed on the property. Thus, Alana Barton and BH Barton had no adversary interest in Petitioners' motion to strike Plaintiff's experts being granted and did not have standing to oppose the motion.

Furthermore, pursuant to EDCR 2.20(d), any joinder to an opposition should be filed within 7 days of the opposition. Since Plaintiff's joinder was not served until 14 days after service of the opposition, it should have been disregarded as untimely.

Consequently, Mr. and Mrs. Schuchmacher's motions should have been granted pursuant to EDCR 2.20(e). EDCR 2.20(e) reads:

> Within 14 days after the service of the motion, and 5 days after service of any joinder to the motion, the opposing party must serve and file written notice of nonopposition or opposition thereto, together with a memorandum of points and authorities and supporting affidavits, if any, stating facts showing why the motion and/or joinder should be denied. Failure of the opposing party to serve and file written opposition may be construed as an admission that the motion and/or joinder is meritorious and a consent to granting the same.

Thus, the Court should have construed the failure to serve any proper opposition to Petitioners' motions as an admission that the motions were meritorious and in turn, grant the motions. Rather, Respondent abused her discretion when she found that the untimely filing

of the joinder was merely a "technical issue" and when she entirely failed to address the arguments related to the lack of standing. It is unclear if Respondent simply ignored the case law and arguments raised by Petitioners or if Respondent chose to deviate from it all together. If Respondent had taken into account the lack of standing of Alana Barton and BH Barton (in their capacities of Counter-Defendant and Third-Party Defendant) to oppose the motions, then it follows that there was no argument for Plaintiff to (untimely) join. Thus, the failure to serve any proper opposition should have prompted Respondent to grant Petitioners' motions in full and her failure to due so constituted an abuse of discretion.

2. RESPONDENT WAS REQUIRED TO STRIKE PLAINTIFF'S EXPERT, NEIL OPFER, BECAUSE HIS OPINOINS WERE BASED ENTIRELY ON SPECULATION AND DID NOT MEET THE STANDARDS OF NRS 50.275 OR HALLMARK V. ELDRIDGE, 189 P.3D 646 (NEV. 2008) AND HER FAILURE TO DO SO WAS CLEAR ERROR.

NRS 50.275 states that there are three requirements a witness must satisfy as an expert: (1) The expert "must be qualified in an area of scientific, technical or other specialized knowledge (the qualification requirement), (2) the expert's specialized knowledge must assist the trier of fact to understand the evidence or to determine a fact in issue (the assistance requirement), and (3) the expert's testimony must be limited to matters within the scope of [his or her] knowledge (the limited scope requirement)." Hallmark v. Eldridge, 124 Nev. Adv. Rep. 48, 189 P.3d 646, 650 (2008) (referencing NRS 50.275).

If a person is qualified to testify as an expert under NRS 50.275, the district court must then determine whether his or her expected testimony will assist the trier of fact in understanding the evidence or determining a fact in issue. An expert's testimony will assist

the trier of fact only when it is relevant under NRS 48.015 and NRS 48.025 and the product of ***reliable methodology***. Hallmark v. Eldridge, 189 P.3d 651 (emphasis added).

In determining whether an expert's opinion is based upon reliable methodology, a district court should consider whether the opinion is (1) within a recognized field of expertise; (2) testable and has been tested; (3) published and subjected to peer review; (4) generally accepted in the scientific community (not always determinative); and (5) based more on particularized facts rather than assumption, conjecture, or generalization. *Id.*

Even where experts are offered to establish facts beyond the expertise of the jury, their opinions are limited to issues within their expertise. Further, an expert must have a sufficient factual basis to offer a reliable opinion. The Nevada Supreme Court has held that expert testimony which is highly speculative or lacking in foundation is properly excluded. Hallmark v. Eldridge, 189 P.3d 646, 649 (Nev. 2008). The Nevada Supreme Court's decision in Wrenn v. State, 89 Nev. 71 (1973) also affirms the exclusion of expert witness testimony based upon assumptions. If an expert witness cannot explain how he arrived at his conclusion, he should not be allowed to give expert testimony. IMA North America, Inc. v. Maryln Nutraceuticals, Inc., 2008 U.S. Dist. LEXIS 109623 (D. Ariz. Oct. 17, 2008). "An expert who supplies nothing but a bottom line supplies nothing of value to the judicial process." Mid-State Fertilizer Co. v. Exchange National Bank, 877 F.2d 1333, 1339 (7th Cir. 1989).

Expert opinions based on insufficient facts or data, or on unsupported suppositions are not admissible. Schwab v. Philip Morris USA. Inc., 449 F. Supp. 2d 992, 1136 (D.N.Y.

2006). Anecdotal evidence and "general assumptions" are inadequate bases for an expert report. *Id.* Subjective methodology, as well as testimony that is insufficiently connected to the facts of the case, have been relied upon by appellate courts as grounds for rejection of expert testimony. *Id.* Finally, it is properly held that sound scientific methodology requires a scholar to make some effort to account for alternative explanations for the effect whose cause is at issue. *Id.*

"[E]xpert testimony must also withstand the challenge to all relevant evidence, i.e., whether probative value exceeds prejudicial effect." Townsend v. State, 103 Nev. 113, 117 (Nev. 1987)(citing NRS §48.035(1)). The goal of expert testimony "'is to provide the trier of fact a resource for ascertaining truth in relevant areas outside the ken of ordinary laity.'" Mosley v. Nev. Comm'n on Judicial Discipline (In re Mosley), 120 Nev. 908, 921 (Nev. 2004). Because a juror is likely to give great deference to the opinions of an expert witness a court must be conscious of the reliability of the expert opinion before allowing the opinion into evidence. Otherwise, the parties will be forced to "unring the bell," which Nevada courts have recognized as a futile effort. *See*, Whitehead v. Commission of Jud. Discipline, 110 Nev. 128, 139 (1994). Thus, experts who have nothing more than their own *ipse dixit* ("I am an expert and therefore am correct") to support their opinions, which have full assertion but are empty of facts and reasons are properly excluded. *See*, Zenith Elecs. Corp. v. WH-TV Broad. Corp., 395 F.3d 416, 419 (7th Cir. Ill. 2005).

Plaintiff's expert, Neil Opfer, should have been stricken because his opinions did not meet the standards of NRS 50.275 or Hallmark v. Eldridge. On 07/07/2020, Plaintiff disclosed a report authored by Neil Opfer. *1 P.App. 40-103*. The ultimate conclusions drawn from his report were that "the fatality of Ms. Yvonne Suggs is most likely that she was outside in the landscaped area picking up after the dog" and that "there were numerous trip-fall hazards present in the areas to the West and South of the pool deck." *1 P.App. 58-59.* ***To be clear, Mr. Opfer did not provide any specific opinions as to what hazard specifically caused Ms. Suggs to trip or whether Ms. Suggs even tripped at all.***

First, Mr. Opfer's opinion that Ms. Suggs was likely in the landscaped area picking up after the dog was based upon it being conveyed to him by an unknown individual and his observations of pets utilizing landscaped areas as a bathroom in other residential sites. *1 P.App. 58.* Mr. Opfer's supplemental report went on to confirm that his opinion that Ms. Suggs was likely in the landscaped area picking up after the dog was based more so upon the unknown individual informing him that this was the "likely circumstance". *2 P.App. 201.* There is no question that this opinion is not the product of reliable methodology. It was not testable, nor was it tested, published, or subjected to peer review. It was obviously not generally accepted in the scientific community or Mr. Opfer would have been able to cite to some authority to support his proposition. Clearly, this opinion was based on assumption, conjecture, and generalization rather than facts. Further, this opinion cannot assist the trier of fact in determining if Ms. Suggs tripped or what she tripped on since it was not based upon

reasonably scientific probability. Mr. Opfer's inclusion of opinions regarding several other "tripping hazards" in different places throughout the backyard also causes one to question the reliable nature of his opinion as to where Ms. Suggs was at when she allegedly tripped. Therefore, Mr. Opfer's opinion as to Ms. Suggs being in the landscaped area picking up after a dog must have been excluded pursuant to NRS 50.275 and Nevada case law interpreting the same.

Additionally, Mr. Opfer's opinion that "there were numerous trip-fall hazards present in the areas to the West and South of the pool deck" was not based upon reliable methodology that was generally accepted in the scientific community. In support of his broad opinion, Mr. Opfer cited to Chapter 10 of the 1997 Uniform Building Code requirements for ramps for disabled-person access and stairways in determining that the difference in height in several areas between the landscaped area and the pool deck was too steep of a slope/step which posed a tripping hazard. *1 P.App. 49-59.* However, it was unmistakably clear that there was no ramp structure within the backyard of the subject property. Furthermore, Chapter 10 of the UBC applies to means of egress which is defined by the UBC as "a continuous and unobstructed path of vertical and horizontal egress travel from any point **in a building or structure to a public way**. A means of egress consists of three separate and distinct parts, the exit access, the exit, and the exit discharge." (emphasis added).

As such, it was obvious that the codes Mr. Opfer relied on in support of developing his opinions were simply not applicable to the area where the landscaping meets the pool deck.

Mr. Opfer did not deny in his report or supplemental report that Chapter 10 of the UBC applied to means of egress. Therefore, it was not an issue of a battle of the experts to determine that the codes Mr. Opfer relied on in support of developing his opinions were simply not applicable to the area where the landscaping meets the pool deck. It was not a means of egress since it was not connected to a building or structure to a public way or any way of exit. Without any reliable authority to support Mr. Opfer's opinion that the landscaping presented a tripping hazard, this conclusion also failed to meet the standards of NRS 50.275 and Nevada case law interpreting the same.

Consequently, Mr. Opfer's entire opinion amounted to nothing more than subjective speculation which was based on assumptions and insufficient facts and data. Additionally, Mr. Opfer failed to provide any specific opinions as to what hazard specifically caused Ms. Suggs to trip or whether Ms. Suggs even tripped at all. This is clearly because to reach those ultimate conclusions would require an even greater level of speculation.

Accordingly, pursuant to the clear, controlling authority of NRS 50.275 and Nevada case law interpreting the same, Respondent was required to find that Mr. Opfer be stricken as an expert and his opinions to be inadmissible at trial. Instead, Respondent clearly confused the reliable methodology standard set forth in Hallmark v. Eldridge as going towards the weight of the evidence rather than the admissibility of the evidence and disregarded a litany of controlling authority in the process. As such, Respondent committed clear error when she failed to strike Plaintiff's expert, Neil Opfer.

3. RESPONDENT COMMITTED CLEAR ERROR WHEN SHE DENIED PETITIONERS' MOTION FOR SUMMARY JUDGMENT BECAUSE RESPONDENT RELIED UPON INADMISSIABLE EVIDENCE AND FAILED TO ACKNOWLEDGE THAT PLAINTIFF DID NOT MEET HER BURDEN TO INTRODUCE SPECIFIC FACTS THAT DEMONSTRATE A GENUINE ISSUE OF MATERIAL FACT.

Plaintiff's complaint asserted a negligence claim against Petitioners as the owners of the subject property. *1 P.App. 1-3.* To prevail on a negligence theory, the plaintiff generally must show that: (1) the defendant had a duty to exercise due care towards the plaintiff; (2) the defendant breached the duty; (3) the breach was an actual cause of the plaintiff's injury; (4) the breach was the proximate cause of the injury; and (5) the plaintiff suffered damage. Perez v. Las Vegas Medical Ctr., 107 Nev. 1, 805 P.2d 589 (1991). **If even one element of a negligence claim cannot be proven, summary judgment must be granted.** *Id.* (emphasis added).

NRCP 56 allows a party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor. In Wood v. Safeway, Inc., 121 Nev. Adv. Rep. 3, 121 P.3d 1026 (2005), the Nevada Supreme Court ruled that summary judgment is appropriate under NRCP 56 when the pleadings, depositions, answers to interrogatories, admissions and affidavits, if any demonstrate that no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. A factual dispute is genuine when the evidence is such that a rational trier of fact could return a verdict for the non-moving party. *Id.* The non-moving party may not defeat a motion for summary

judgment by relying on the gossamer threads of whimsy, speculation and conjecture. Pegasus v. Reno Newspapers, Inc., 118 Nev. 706, 57 P.3d 82 (2002). When a motion for summary judgment is made and supported by NRCP 56, the non-moving party may not rest upon general allegations and conclusions, but must by affidavit or other admissible evidence, set forth specific facts demonstrating the existence of a genuine factual issue. *Id.*

When the non-moving party bears the burden of persuasion at trial, the party moving for summary judgment may satisfy the burden of production by either: 1) submitting evidence that negates an essential element of the non-moving party's claim; or 2) by showing there is an absence of evidence to support the non-moving party's case. Cuzze v. Univ. & Cmty. College Sys., 123 Nev. 598, 172 P.3d 131 (2007). In such cases, the non-moving party must transcend the pleadings and, by affidavit or other admissible evidence, introduce specific facts that demonstrate a genuine issue of material fact. *Id.*

Additionally, pursuant to NRCP 56(e), affidavits in support of or in opposition to summary judgment shall set forth such facts as would be admissible in evidence. S*ee also*, Collins v. Union Federal Savings & Loan Ass'n, 99 Nev. 284, 301, 662 P.2d 610, 621 (1983) (requiring that evidence in support of or in opposition to summary judgment must be evidence that would be admissible at trial); Schneider v. Continental Assurance Co., 110 Nev. 1270, 1274, 885 P.2d 572, 575 (1994) ("The district court thus erred in relying solely on inadmissible evidence to grant summary judgment"); Adamson v. Bowker, 85 Nev. 115, 119, 450 P.2d 796,

799 (1969) ("[E]vidence that would be inadmissible at the trial of the case is inadmissible on a motion for summary judgment").

Respondent erroneously denied Petitioners' motion for summary judgment because Petitioners met their burden of production that there was an absence of evidence to support Plaintiff's case and Plaintiff failed to provide sufficient admissible evidence to dispute the same. However, Respondent erroneously relied on inadmissible expert opinions to justify the finding that there were genuine issues of material fact regarding the causation element of Plaintiff's claims. Respondent's complete failure or refusal to abide by the controlling authority discussed herein with regard to Plaintiff's expert, Neil Opfer, provided Respondent with the key evidence relied upon to fashion her ruling. If Mr. Opfer's opinions had been stricken like they were required to be under Nevada law (as demonstrated herein), the evidence before Respondent clearly demonstrated that Plaintiff did not meet her burden to introduce specific facts that demonstrated a genuine issue of material fact. Therefore, Petitioners' motion for summary judgment should have been granted.

Assuming *arguendo* that the expert opinions were somehow admissible, Respondent's ruling that there was an issue of material fact related to the causation element of Plaintiff's claims was still erroneous. Even when the expert opinions were considered and the evidence was viewed in the light most favorable to Plaintiff, Plaintiff could not meet her burden of proof that Petitioners breached a duty by allowing a dangerous condition to exist on the subject

property or that Ms. Suggs tripped on a dangerous condition causing her to fall into the pool rather than a sudden cardiac event causing a fall.

A dangerous condition is, generally, "[a] property defect creating a substantial risk of injury when the property is used in a reasonably foreseeable manner." Condition, Black's Law Dictionary (10th ed. 2014). The Nevada Supreme Court has employed this definition when analyzing dangerous conditions on a premises. *See generally,* Foster v. Costco Wholesale Corp., 128 Nev. 773, 775, 291 P.3d 150, 152 (2012). Applying the same definition here, it is clear based on the admissible evidence Plaintiff has produced that the "dangerous condition" was not a defect that posed a substantial risk of injury when used in a reasonably foreseeable manner.

During Plaintiff's deposition, she testified that the dangerous condition she claims Petitioners allowed to remain on the subject property was simply the "dilapidated condition" of the area behind the pool. *1 P.App. 146*. Plaintiff confirmed that the area between the cement walkway lining the pool and the brick pavers (as seen to the left) is the hazardous tripping condition that she claims existed on the

subject property. *Id.* Plaintiff conceded that this particular area was *not a common walking path* and stated that, "You wouldn't want to walk on the rocks." *1 P.App. 148*.

Even if Mr. Opfer's opinion that tripping hazards existed on the property is taken into account, Plaintiff's own testimony discredits that the tripping hazards would create a substantial risk of injury because it would not be reasonably foreseeable for an individual to be walking in that area. It is also undisputed that the tenants of the subject property never reported any tripping hazard issues at the subject property to Petitioners prior to the occurrence of the alleged subject incident. Thus, even when the evidence is viewed in the light most favorable to Plaintiff, no dangerous condition existed on the subject property and Plaintiff failed to demonstrate that Petitioners breached a duty. Accordingly, Plaintiff's claim must fail as a matter of law.

Moreover, Plaintiff failed to provide even a scintilla of evidence to demonstrate that Ms. Suggs tripped on the alleged "dangerous condition". It remains undisputed that there were no witnesses who saw Ms. Suggs' alleged trip or fall into the pool. *1 P.App. 138-139.* Plaintiff even admitted during her deposition that she had no evidence to demonstrate that Ms. Suggs tripped over anything in the backyard at the subject property, as opposed to any other item, such as her dog or her own shoes. *1 P.App. 147.* Even if Mr. Opfer's opinions were considered, the evidence when viewed in a light most favorable to Plaintiff does not demonstrate by a preponderance of the evidence that Ms. Suggs fell into the pool due to any

alleged dangerous condition. Thus, Plaintiff did not meet her burden of proof that the alleged dangerous condition was the actual or proximate cause of Ms. Suggs' death.

Accordingly, Plaintiff's claim for negligence must fail as a matter of law. *See*, Perez v. Las Vegas Medical Ctr., 107 Nev. 1, 805 P.2d 589 (1991)(holding that if even one element of a negligence claim cannot be proven, summary judgment must be granted). This alone was enough to grant the motion for summary judgment. *See*, Wood v. Safeway, Inc., 121 Nev. Adv. Rep. 73, 121 P.3d 1026 (2005)(holding that summary judgment is appropriate under NRCP 56 when the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, that are properly before the court demonstrate that no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law).

Most importantly, even if Plaintiff could have demonstrated that an alleged dangerous condition caused Ms. Suggs to fall into the pool, summary judgment would still have been required to be granted because it is equally as probable based on the evidence that Ms. Suggs fell into the pool for any one of a multitude of other reasons. *See*, Wilson v. Circus Circus Hotels, 101 Nev. 751, 710, P.2d 77 (1985)(holding that **when causes of a situation or injury are equally probable, a jury's determination of liability and its verdict will be determined to be based on speculation and conjecture**)(emphasis added). Thus, no genuine issue of material fact existed because no reasonable jury could have returned a verdict for Plaintiff as any such verdict would be improperly based upon speculation and conjecture.

Accordingly, it was Respondent's duty under Nevada law to grant Petitioners' motion for summary judgment as a matter of law for any one of the reasons discussed herein.

VIII. CONCLUSION

When a motion for summary judgment is made and supported as required by NRCP 56, as this one was, the non-moving party may not rest upon general allegations and conclusions, but must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine factual issue. Pegasus v. Reno Newspapers, Inc., 118 Nev. 706, 57 P.3d 82 (2002). If they cannot, summary judgment must be granted. Hickman v. Meadow Wood Reno, 96 Nev. 782, 617 P.2d 871 (1980).

As discussed above, Respondent abused her discretion and committed clear error when denying the motion to strike Plaintiff's expert, Neil Opfer, and denying Petitioners' motion for summary judgment. Not only should Respondent have granted the motions outright pursuant to EDCR 2.20(e) because there was no properly asserted opposition, but Respondent was required to strike Plaintiff's expert, Neil Opfer, pursuant to NRS 50.275 and Hallmark v. Eldridge, 189 P.3d 646 (Nev. 2008) and was required to grant Petitioners' motion for summary judgment because Petitioners met their burden of production that there was an absence of evidence to support Plaintiff's case and Plaintiff failed to provide sufficient admissible evidence to dispute the same.

Petitioners have no plain, speedy or adequate remedy in the ordinary course of law to correct Respondent's abuse of discretion that has operated to force Petitioners to defend a

frivolous lawsuit. If the writ is not granted, Petitioners will have to expend resources to defend against this lawsuit upon which Plaintiff has no legal or factual basis to prevail. Based upon the foregoing, Petitioners respectfully request that the Court issues a Writ of Mandamus directing Respondent to:

1) Vacate the order denying the motion to strike Plaintiff's expert, Neil Opfer, and denying Petitioners' motion for summary judgment;
2) Enter an order granting the motion for summary judgment; and
3) Enter judgment in favor of Petitioners.

DATED this 22nd day of December, 2021.

RESNICK & LOUIS, P.C.

/s/Carissa Yuhas

_____

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IX. VERIFICATION

Under penalty of perjury, the undersigned declares that she is the attorney for the Petitioners named in the foregoing Petition for Writ of Mandamus; that she knows the contents of the Petition; that the facts alleged in the Petition are true to her own knowledge, except as to those matters stated on information and belief; and that as to those matters stated on information and belief, she believes them to be true.

DATED this 22nd day of December, 2021.

RESNICK & LOUIS, P.C.

/s/Carissa Yuhas

_____

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X. CERTIFICATION OF COMPLIANCE

I hereby certify that I have read this petition, 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 petition complies with all applicable Nevada Rules of Appellate Procedure. I further certify that this petition 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 this petition has been prepared in a proportionally spaced typeface using Microsoft Word 365 ProPlus, Arial Narrow 14 point and the type-volume limitation. This petition also complies with the length requirements of NRAP 21(d) because this petition does not exceed 7,000 words (the entirety of this brief contains 6,838 words).

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

DATED this 22nd day of December, 2021.

RESNICK & LOUIS, P.C.

/s/Carissa Yuhas

_____

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XI. CERTIFICATE OF SERVICE

I HEREBY CERTIFY that service of the foregoing **PETITION FOR WRIT OF MANDAMUS** was served this 22nd day of December, 2021, by:

[X] **BY PERSONAL SERVICE**: by causing personal delivery by an employee of Resnick & Louis, P.C. of the document(s) listed above to the person(s) at the address(es) set forth below.

[X] **BY ELECTRONIC SERVICE**: by transmitting via the Court's electronic filing services the document(s) listed above to the Counsel set forth on the service list on this date pursuant to EDCR Rule 7.26(c)(4).

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The Honorable CARLI L. KIERNY
Eighth Judicial District Court, Dept. 2
200 Lewis Ave.
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Respondent

/s/Lisa Bell

An Employee of Resnick & Louis, P.C.