

IN THE SUPREME COURT OF THE STATE OF NEVADA

SHANNA MARIE BALTAR, D.O.,
and MIRIAM SITHOLE, APRN,
Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT
COURT, of the State of Nevada, in
and for the County of Clark; and THE
HONORABLE TARA CLARK
NEWBERRY, District Judge,
Respondents,

and

BARRY HEIFETZ, individually,
SPRING VALLEY HEALTHCARE,
LLC, a foreign limited-liability
company d/b/a SPANISH HILLS
WELLNESS SUITES

Real Parties in Interest.

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PETITION FOR WRIT OF MANDAMUS

District Court Case No. A-20-808436-C

JOHN H. COTTON, ESQ.
Nevada Bar No. 005268
jhcotton@jhcottonlaw.com
BRANDON C. VERDE, ESQ.
Nevada Bar Number 14638
bverde@jhcottonlaw.com
JOHN H. COTTON & ASSOCIATES
7900 W. Sahara Avenue, Suite 200
Las Vegas, Nevada 89117
Telephone: 702/832-5909
Facsimile: 702/832-5910

VERIFICATION IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

State of Nevada)
) ss.
County of Clark)

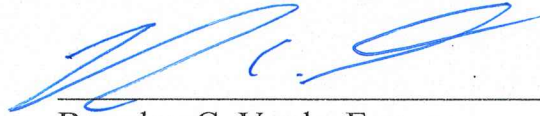
Brandon C. Verde, Esq. being first duly sworn, deposes and states:

1. I am an attorney of record for Petitioners and make this Affidavit pursuant to Nev. R. App. P. 21(a)(5).
2. The facts and procedural history contained in the foregoing Petition for Writ of Mandamus and the following Memorandum of Points and Authorities are based upon my own personal knowledge as counsel for Petitioner. This Affidavit is not made by Petitioners personally because of the salient issues involving procedural developments and legal analysis.
3. The contents of the foregoing Petition for Writ of Mandamus and the following Memorandum of Points and Authorities are true and based upon my personal knowledge, except as to those matters stated on information and belief.
4. All documents contained in the Petitioner's Appendix, filed herewith, are true and correct copies of the pleadings and documents they are represented to be in the Petitioners' Appendix and as cited herein.
5. This Petition complies with Nev. R. App. P. 21(d) and Nev. R. App. P. 32(c)(2).

FURTHER YOUR AFFIANT SAYETH NAUGHT.

Dated this 7th day of July, 2022.

JOHN H. COTTON & ASSOCIATES

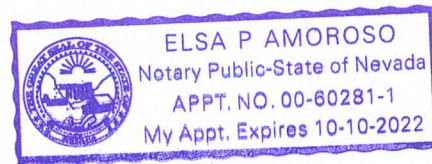


Brandon C. Verde, Esq.

Subscribed and Sworn to before me
this 7th day of July, 2022.



Notary Public



My Commission Expires: 10-10-2022

NRAP RULE 26.1 DISCLOSURE

Pursuant to NRAP 26.1, 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 so that the judges of this court may evaluate possible disqualification or recusal.

Petitioners, Shanna Marie Baltar, D.O., and Miriam Sithole, APRN, are individuals – and thus, are not governmental entities, and the disclosure of publicly traded corporations owning stock in Petitioners is not applicable.

Names of all law firms whose attorneys have appeared for the party or amicus in this case (including proceedings in the district court or before an administrative agency) or are expected to appear in this court: John H. Cotton & Associates, Ltd., Claggett & Sykes Law Firm, and McBride Hall.

Dated this 7th day of July, 2022.

JOHN H. COTTON & ASSOCIATES

By: /s/ *Brandon C. Verde, Esq.*

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**RELIEF SOUGHT
THROUGH THIS PETITION**

Shanna Marie Baltar, D.O., (“Dr. Baltar”) and Miriam Sithole, APRN (“APRN Sithole” collectively, “Petitioners”), hereby petitions for a writ of mandamus requiring the district court to vacate its order of March 25, 2022, in the case of *Heifetz v. Baltar, D.O., et al.*, Clark County District Court, Case No. A-20-808436-C, before the respondent judge, the Honorable Tara Clark Newberry. Petitioners’ Appendix Vol. 3, 108-121. In the underlying case, Real Party in Interest Heifetz (“Plaintiff”) alleges various negligence-based causes of action against Petitioners and Real Party in Interest Spanish Hills Wellness Suites. Specifically, Real Party in Interest Heifetz has alleged a claim for elder abuse and a prayer for punitive damages. The order denied Petitioners’ request for partial summary judgment on Real Party in Interest Heifetz’s elder abuse cause of action and prayer for punitive damages.

This petition is based on the grounds that the district court’s order is without a legal and factual basis. Respondent abused its discretion by denying Petitioners’ motion for partial summary judgment when Real Party in Interest Heifetz failed to assert sufficient facts to meet the requirements of NRS 41.1395 and NRS 42.005. This petition is also based upon the grounds that Petitioners do not have a plain, speedy and adequate remedy in the ordinary course of law.

ROUTING STATEMENT

The Nevada Supreme Court should retain this writ proceeding because it raises a question of statewide, public importance. NRAP 21(a)(3)(A); NRAP 17(a)(11). The Court's resolution of the issue presented here will affect actions for professional negligence, particularly those incorrectly characterized as claims for "elder abuse."

Therefore – if the district court's erroneous determination as to the distinction between professional negligence and elder abuse stands – the statutory protections against physicians, including the cap on the amount of damages awardable, will be thwarted.

ISSUES PRESENTED

1. Whether a claim for elder abuse and/or neglect of an elderly individual provides a separate and distinct cause of action from a claim for medical negligence brought under NRS Chapter 41A and is not limited in any manner by the provisions of NRS Chapter 41A.
2. Whether the alleged facts of care and treatment provided by Petitioners allow for a claim of elderly abuse or neglect under NRS 41.1395.
3. Whether the alleged facts of care and treatment provided by Petitioners allow for a prayer of punitive damages under NRS 42.005.
4. Whether Respondent abused its discretion in its Order answer the above

three questions in the affirmative.

PROCEDURAL BACKGROUND & CASE HISTORY

Petitioners are Defendants in a case entitled BARRY HEIFETZ vs. SPRING VALLEY HEALTH CARE, LLC, a foreign limited liability company, d/b/a SPANISH HILLS WELLNESS SUITES; SHANNA MARIE BALTAR, DO; an individual, MIRIAM SITHOLE, APRN; an individual, DOE DOCTOR I, an individually; DOE NURSE I, an individual; DOES I through X; ROE BUSINESS ENTITIES XI through XX; (Nevada Eighth Judicial District Court Case No. A-20-808436-C).

On January 13, 2020, Real Party in Interest Heifetz filed his initial Complaint. Real Party in Interest Heifetz alleged causes of action for (1) Professional Negligence and (2) Violation of NRS 41.1395 (Elder abuse) against “all defendants.” Real Party in Interest Heifetz further alleged a cause of action of (1) Ordinary Negligence, and (2) Corporate Negligence, Vicarious Liability, Negligent Hiring, Training and Supervision against co-defendant Spanish Hills Wellness Suites. Real Party in Interest Heifetz attached an affidavit from Dr. Scott Bolhack (“Dr. Bolhack”), an internal medicine specialist, to his Complaint. Petitioners’ Appendix Vol. 1, pp. 1-13.

The allegations cited in the Complaint are that Petitioners violated the standard of care in their treatment of Real Party in Interest Heifetz at Spanish Hills

Wellness Suites, a licensed skilled nursing facility by failing to (1) complete a baseline care plan to prevent the occurrence of pressure injuries; (2) implementing appropriate offloading procedures for Real Party in Interest Heifetz to prevent the occurrence of pressure injuries; (3) failing to remove Real Party in Interest Heifetz's compression stocking every 12 hours as ordered; and (4) accurately assess Real Party in Interest Heifetz's risk for pressure injuries and/or initiate a care plan for prevention of heel injuries. All these allegedly caused Real Party in Interest Heifetz's pressure injuries. Petitioners' Appendix Vol. 1, pp. 1-13.

On December 14, 2021, Petitioners moved for partial summary judgment requesting that Respondent find that the elder abuse and neglect claims were not separate and distinct from the professional negligence claim. Petitioners' Appendix Vol. 1, pp. 31-45.

On December 21, 2021, Real Party in Interest Spanish Hills Wellness Suites filed its Joinder to the Motion for Partial Summary Judgment. Petitioners' Appendix Vol. 1, pp. 162-164.

On December 22, 2021, Real Party in Interest Heifetz filed his Opposition to the Motion for Partial Summary Judgment. Petitioners' Appendix Vol. 2, pp. 165-385.

On December 27, 2021, Real Party in Interest Heifetz filed his Opposition to Real Party in Interest Spanish Hills Wellness Suites' Joinder to the Motion for

Partial Summary Judgment. Petitioners' Appendix Vol. 3, pp. 1-3.

On January 12, 2022, Petitioners filed their Reply in Support of the Motion for Partial Summary Judgment. Petitioners' Appendix Vol. 3, pp. 16-17.

On February 18, 2022, Respondent denied the Petitioners' Motion for Partial Summary Judgment. The Order was memorialized on March 25, 2022. Petitioners' Appendix Vol. 3, pp. 108-121.

Respondent manifestly abused its discretion by failing to grant partial summary judgment in the above-referenced case. This manifest abuse of discretion will result in unnecessary harm to Petitioners as they are now forced to suffer due to Respondent's ruling on Petitioners' Motion for Partial Summary Judgment, which will subject Petitioners to more than the \$350,000 professional negligence noneconomic damages cap, as well as an award for punitive damages. No adequate, speedy remedy is available to Petitioners to address these problems.

This manifest abuse of discretion is contrary to the legislative intent and application of NRS 41.1395 to circumvent provisions of NRS Chapter 41A. Due to the unique circumstances and set of facts present in this particular case, a review of this Petition will allow this Court to clarify a highly important issue of law that continues to appear in professional negligence cases before the Eighth Judicial District Court. Although this Court has the discretion to withhold ruling until the appellate stage (trial is set to begin on July 25, 2022), this case should be reviewed

at this time given the chance that an appeal may never occur should there be a defense verdict or settlement.

STATEMENT OF FACTS

Real Party in Interest Heifetz was a 79-year-old male with a past medical history of hypertension, hypothyroidism, peripheral neuropathy, stasis dermatitis due to vascular insufficiency who had a left total hip arthroplasty (hip replacement) on January 7, 2019, by orthopedic surgeon, Dr. Mark Allen.¹ Dr. Allen recommended an abduction left hip brace and physical and occupational therapy. After a brief hospital stay, he was transferred to Spanish Hills Wellness Suites for rehabilitation.²

On January 14, 2019, Real Party in Interest Heifetz was admitted to Spanish Hills Wellness Suites. During the course of providing health care, Petitioner Shanna Marie. Baltar, D.O. (“Petitioner Dr. Baltar”) performed a physical examination of Real Party in Interest Heifetz.³ Admission orders by Petitioner Dr. Baltar included Real Party in Interest Heifetz’s discharge medications from the hospital and a pressure-relieving mattress.

On January 15, 2019, Petitioner Dr. Baltar performed an initial admission history and physical. Part and parcel of her job duties as a provider of healthcare,

¹ Petitioners’ Appendix Vol. 1, pp. 4, ¶ 12-13

² Petitioners’ Appendix Vol. 1, pp. 4, ¶ 18 -19

³ Petitioners’ Appendix Vol. 1, pp. 4, ¶ 20

she noted on her physical examination that he had 2/4 distal pulses which means his amplitude of the distal pulses were described as expected or normal. She also noted his left lower extremity had an abductor brace in place and noted that the orthopedic surgeon had evaluated him and recommended that he wear the abductor brace 24 hours a day, 7 days a week. Real Party in Interest Heifetz was to follow up with Dr. Allen, an orthopedic surgeon, as scheduled. Petitioner Dr. Baltar gave an order for a wound care consult. She also ordered staff to monitor every 30 minutes and release and reposition every two hours and as needed for turning and/or repositioning.

On January 16, 2019, Real Party in Interest Heifetz was seen by Petitioner Miriam Sithole, APRN, (“Petitioner Sithole”) who reviewed his medical records, examined him, and noted an abductor brace was in place as recommended to be worn 24 hours a day, 7 days a week. She ordered compression stockings on for 12 hours in a.m., and off for 12 hours at night.⁴

On January 22, 2019, Petitioner Sithole conducted a skilled follow-up visit and noted that he had increased edema to his left lower extremity. He denied pain at that time. She ordered an ultrasound to rule out deep venous thrombosis of the left lower extremity and to hold physical therapy and occupational therapy until the results of the ultrasound were received. She also recommended compression socks

⁴ Petitioners’ Appendix Vol. 1, pp. 5, ¶ 22.

as ordered.

On January 23, 2019, Real Party in Interest Heifetz was seen by Petitioner Sithole for a scheduled follow-up visit. She noted that his abductor brace was on his left hip. She identified left lower extremity lesions due to vascular insufficiency and noted a wound care team to manage and treat as indicated. She also noted chronic vascular insufficiency and continued vasculera.

On January 23, 2019, Nurse, Javier Canan, noted that he spoke to Petitioner Dr. Baltar regarding the resident's heels and noted Petitioner Dr. Baltar gave new orders, which were carried out and Real Party in Interest Heifetz was made aware. Orders from Petitioner Dr. Baltar noted, "deep tissue injury left heel cleanse with normal saline, pat dry, apply betadine, cover with dry dressing, wrap with Kerlix daily x 30 days. Fluid filled blister right heel, cleanse with normal saline, pat dry, apply betadine, cover with dry dressing, wrap with Kerlix daily x 30 days."

On January 23, 2019, at 23:58, Nurse, Rachel Anderson, LPN noted, "dressing changed to bilateral lower extremities, no bleeding or drainage noted. Nurse also noted left leg elevated on pillows to prevent pressure on heel."

On January 24, 2019, Real Party in Interest Heifetz was again evaluated by Petitioner Sithole for skilled follow-up. Then seen again on January 25, 2019 and noted an abductor brace on the left hip and no cyanosis of his extremities. She again noted left lower extremity lesions due to vascular insufficiency and the

wound care team to manage and treat as indicated.

On January 28, 2019, Petitioner Sithole noted he is weight bearing as tolerated and to continue current pain management. He was seen again by Petitioner Sithole on January 29, 2019. On January 30, 2019, in the Discharge Instructions, Petitioner Sithole ordered wound care/treatment for Southwest Medical Associates Home Health Wound Care Team for daily wound management with the following orders: “Deep Tissue Injury, left heel, cleanse with normal saline, pat dry, apply betadine solution and cover with dry dressing, wrap with Kerlix every day for 30 days. Fluid-filled blister right heel: cleanse with normal saline, pat dry, apply betadine solution, cover with dry dressing wrap with Kerlix every day for 30 days.”

On January 30, 2019, Real Party in Interest Heifetz was discharged home with home health care. Petitioner Sithole noted in the discharge summary that he continued aggressive pain management and rehabilitation. He was noted to be in stable condition to be discharged home to live with his daughter for a couple of days prior to him going to his home. She also noted the discharge plan was discussed with Real Party in Interest Heifetz, his sister, case management for Spanish Hills, and the case management for Optum and the provider.

She also made arrangements for him to be seen by his primary care provider, Dr. Asimenios on February 1, 2019, at 2 PM. She noted that her home

health care wound care team has been notified by the case manager for daily treatment and assistance with management and monitoring of bilateral lesions to the lower extremities.

STATEMENT OF REASONS THE WRIT SHOULD ISSUE

A. Writ of Mandamus Standard

Petitioners seek relief in the form of a writ of mandamus. A writ of mandamus is an extraordinary remedy that may be issued to compel an act that the law requires. *Cote H. v. Eighth Judicial Dist. Court*, 175 P.3d 906, 907-08, 124 (Nev. 2008) A writ of mandamus may also issue when there is no plain, speedy and adequate remedy in the ordinary course of the law. Nev. Rev. Stat. 34.170; *Sims v. Eighth Judicial Dist. Court*, 206 P.3d 980, 982 (Nev. 2009). This Court has complete discretion to determine whether a writ will be considered. *Halverson v. Miller*, 186 P.3d 898 (Nev. 2008) (“the determination of whether to consider a petition is solely within the court’s discretion.”); “This Court has original jurisdiction to issue writs of mandamus and prohibition.” *Mountainview Hosp., Inc. v. Eighth Judicial Dist. Court*, 128 Nev. 180, 184, 273 P.3d 861, 864 (2012); Nev. Const. art. 6, § 4. A writ of mandamus “compel[s] the performance of an act which the law requires as a duty resulting from an office, trust or station, or to control a manifest abuse or an arbitrary or capricious exercise of discretion.” *Id.*, 124 Nev. at 39, 175 P.3d at 907-908. Mandamus may be appropriate where the

petition raises important legal issues – such as (i) those which are likely to be the subject of extensive litigation in Nevada, or (ii) to conserve judicial resources in the avoidance of multiple, similar actions. *Borger*, 120 Nev. at 1025-1026; 102 P.3d at 603. This writ should issue as a result of likely being the subject of extensive litigation in Nevada. This Court can exercise its discretion to consider writ petitions of district court orders denying summary judgment motions where no disputed factual issues remain and summary judgment is clearly required by a statute or rule, or an important issue of law requires clarification. *Smith v. Eighth Jud. Dist. Ct.*, 113 Nev. 1343, 1345, 950 P.2d 280, 281 (1997).

The purpose of writ relief is not to control the judicial discretion of the district court – “unless [such] discretion is manifestly abused or is exercised arbitrarily or capriciously.” *State v. Eighth Judicial Dist. Court (Anzalone)*, 118 Nev. 140, 147, 42 P.3d 233, 237-238 (2002).

This Court should exercise its discretion to consider and issue a Writ of Mandamus in this case directing Respondent to grant Petitioners’ Motion for Partial Summary Judgment. Respondent manifestly abused its discretion when it determined that the record was sufficient for a claim for elder abuse and punitive damages. There was no admissible evidence presented by Real Party in Interest Heifetz to support an award for punitive damages and elder abuse.

Specifically, Respondent manifestly abused its discretion when it found that

Real Party in Interest Heifetz produced admissible evidence that Petitioners acted with oppression, fraud, or malice. However, the allegations against Petitioners for failing to monitor his compression stockings which resulted in pressure ulcers do not allow for punitive damages. This Petition presents such a situation where the interplay between the alleged “elder abuse” and NRS 41A with the bona fide rendering of healthcare to a patient who just so happens to be 60 years old or older. Furthermore, in addition to a possible punitive damages award, Respondent manifestly abused its discretion when it decided that this was also an elder abuse case thus allowing Petitioners to be exposed to an award above the noneconomic damages cap of \$350,000.

This Court has repeatedly stated that a Writ of Mandamus is an appropriate remedy for important issues of law that need clarification or that implicate important public policies. *Lower Enters. Residential Ptnrs., L.P. v. Eighth Judicial Dist. Court*, 118 Nev. 92, 97 (2002) (“We have previously stated that where an important issue of law needs clarification and public policy is served by this court’s invocation of its original jurisdiction, our consideration of a petition for extraordinary relief may be justified.”); *Business Comput. Rentals v. State Treasurer*, 114 Nev. 63, 67 (1998) (“Additionally, where an important issue of law needs clarification and public policy is served by this court’s invocation of its original jurisdiction, our consideration of a petition for extraordinary relief may be

justified.”)

Thus, in accordance with the above authorities, Petitioners respectfully request that this Court choose to accept this Petition for Writ of Mandamus for review.

B. Respondent Manifestly Abused Its Discretion When It Found that a Claim for Elderly Abuse or Neglect Pursuant to NRS 41.1395 is a Separate and Distinct Cause of Action from Professional Negligence Under NRS Chapter 41A and is not Affected by the Provisions of NRS Chapter 41A

NRS Chapter 41A governs actions for professional negligence. Professional negligence is defined as “the failure of a provider of health care in rendering services, to use the reasonable care, skill or knowledge ordinarily used under similar circumstances by similarly trained and experienced providers of health care.” NRS 41A.015. A “provider of health care” is defined as “a physician licensed under chapter 630 or 633 of NRS, physician assistant, dentist, licensed nurse, dispensing optician, optometrist, registered physical therapist, podiatric physician, licensed psychologist, chiropractor, doctor of Oriental medicine, holder of a license or a limited license under the provisions of chapter 653 of NRS, medical laboratory director or technician, licensed dietitian or a licensed hospital, clinic, surgery center, physicians’ professional corporation or group practice that employs any such person and its employees.” NRS 41A.017. In actions governed by NRS Chapter 41A, “the injured plaintiff may recover noneconomic damages,

but the amount of noneconomic damages awarded in such an action must not exceed \$350,000 regardless of the number of plaintiffs, defendants or theories upon which liability may be based.” NRS 41A.035.

NRS 41.1395 states in pertinent part that:

[I]f an older person or a vulnerable person suffers personal injury or death that is caused by abuse or neglect or suffers a loss of money or property caused by exploitation, the person who caused the injury, death or loss is liable to the older person or vulnerable person for two times the actual damages incurred by the older person or vulnerable person.

The purpose of the statute was “to encourage private attorneys to take up the fight on behalf of elder[ly] victims,” therefore allowing “attorneys to assist senior citizens when they are at a stage in their lives where they cannot help themselves.” History of S.B. 80: Comm. On the Judiciary, 69th Regular Sess., pp. 5 (N.Y.1997). The legislative history also indicates that it was previously difficult “to prove criminal abuse due to the victim’s inability to testify and some other evidentiary problems.” *Id.* at 24. Because the burden of proof in a civil action was not as high as in a criminal case, it was hoped that the statute “would help victims to recover their losses, both in terms of damages from abuse and neglect, but especially when financial exploitation occurred.” *Id.*

Nevada’s Attorney General proposed the elder abuse statute incentivizing private attorney generals to enforce criminal prohibitions against elder abuse. The Attorney General explained, “The burden of proof required in a civil action is not

as high as that in a criminal trial, so it is hoped that this will help victims to recover for their losses.” *Id.* The double-damages recovery and an additional attorney’s fees provision were designed to encourage private attorneys “to prosecute [elder abuse] cases when criminal prosecutors cannot.” *Id.*

When the ballot initiative petition regarding the professional negligence statute was passed in 2003, the residents of Nevada provided that the statutory noneconomic cap of \$350,000 would apply to all professional negligence cases. In addition to placing a cap on noneconomic damages, the people of Nevada also abrogated the “gross negligence” exception. This evidences a clear intent to limit professional negligence damages to \$350,000 when a “provider of healthcare” is providing care without the ability to double such damages through NRS 41.1395. The elderly abuse statute had been enacted at the time that the ballot initiative was created (enacted in 1997) and a provision would have been created had the people of Nevada wanted an avenue to get double damages in elderly abuse cases.

Additionally, to allow such double damages to apply to a physician would create a loophole for Plaintiff counsels in future cases as physicians are often charged with treating the most vulnerable, that being, individuals over the age of 60 and those with physical or mental impairments. Should such a loophole be created, the \$350,000 damages cap would be eviscerated in most cases and litigation would spring up regarding the definition of “physical or mental

impairment that substantially limits one or more of the major life activities of the person.”

Not only does this language note the hesitance of applying this statute in the first place, but it specifically recognizes only nursing homes (including their employees). There is no mention of independent contractor physicians and physician assistants who happen to provide medical care at the facility. It has not been disputed that Petitioners are independent contractors for Spanish Hills Wellness Suites, a licensed skilled nursing facility.

C. Respondent Manifestly Abused Its Discretion When It Found that the Evidence Supported a Claim for Elderly Abuse or Neglect Under NRS 41.1395

If this Court determines that a claim for elderly abuse or neglect under NRS 41.1395 is a separate and distinct cause of action from professional negligence. Respondent has abused its discretion by finding that Petitioners’ conduct was considered as willful abuse or that they failed to provide a service. *Estate of Curtis*, 466 P.3d 1263, 1271 fn. 5 (Nev. 2020). This Court held in the *Estate of Curtis* that the “record did not support an elder abuse claim here, where Nurse Dawson’s actions were grounded in negligence, rather than in willful abuse or the failure to provide a service.” *Id.* Real Party in Interest Heifetz has failed to provide and cannot provide any admissible evidence that the Petitioners’ conduct was considered willful abuse or that they failed to provide a service.

In this case, the record does not support a claim for elder abuse. Just as this Court held in the *Estate of Curtis*, the facts are rooted in professional negligence. In summary, this case is about the failure to remove Real Party in Interest Heifetz's compression stockings during the first two days upon admission to Spanish Hills Wellness Suites, wherein he allegedly developed pressure ulcers. There was no evidence presented by Real Party in Interest Heifetz that Petitioners willfully abused Real Party in Interest Heifetz or that they failed to provide a service. The record does not support an elder abuse claim against Petitioners. Real Party in Interest Heifetz's allegations against Petitioners are merely criticisms of their care and treatment.

For all the reasons stated, this Court should find that Respondent manifestly abused its discretion when it held that the evidence presented by Real Party in Interest Heifetz is sufficient to maintain a claim for elderly abuse and neglect under NRS 41.1395.

D. Respondent Manifestly Abused Its Discretion When It Found that Real Party in Interest Heifetz's Claims Satisfied Nevada's Punitive Damage Statute NRS 42.005 as a Matter of law

Under NRS 42.005, a Real Party in Interest Heifetz may recover punitive damages in an action for the breach of an obligation not arising from contract, only "where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud or malice, express or implied." NRS 42.005(1). Tort

liability alone is insufficient to support an award of punitive damages. *See First Interstate Bank of Nevada v. Jafbros Auto Body, Inc.*, 106 Nev. 54, 57, 787 P.2d 765 (1990).

The Court must make the threshold determination as a matter of law whether Plaintiff's claims are sufficient to invoke the punitive damages statute. *Countrywide Home Loans, Inc. v. Thitchener*, 124 Nev. 725, 192 P.3d 243, 252-53 (2008); *Evans. Dean Witter Reynolds, Inc.*, 116 Nev. 598, 612, 5 P.3d 1043 (2000); *Dillards Department Stores v. Beckwith*, 115 Nev. 372, 380, 989 P.2d 882, 887 (1999); *Wickliffe v. Fletcher Jones of Las Vegas, Inc.*, 99 Nev. 343, 356, 661 P.2d 1295 (1983).

Oppression is defined in statute as “despicable conduct that subjects a person to cruel and unjust hardship with conscious disregard of the rights of the person.” NRS 42.001(4) Fraud is defined as an “intentional misrepresentation, deception or concealment of a material fact known to the person with the intent to deprive another person of his rights or property or to otherwise injure another person.” NRS 42.001(2). Express malice is conduct that is intended to injure another person. *Clark v. Lubritz*, 113 Nev. 1089, 1099, 944 P.2d 861 (1997). Implied malice is despicable conduct performed with a conscious disregard of the rights of others. *Bongiovi v. Sullivan*, 122 Nev. 556, 138 P.3d 433, 451 (2006).

The legislature has defined “conscious disregard” as “the knowledge of

probably harmful consequences of a wrongful act and a willful and deliberate failure to act to avoid those consequences.” NRS 42.001(1). Thus, NRS 42.001, requires that the defendant acted with a culpable state of mind and “denotes conduct that, at a minimum, must exceed mere recklessness or gross negligence.” *Countrywide*, 192 P.2d at 255. Furthermore, this Court cited the California Book of Approved Jury Instructions when defining extreme and outrageous conduct as “conduct which is ‘outside all possible bounds of decency and is regarded as ‘utterly intolerable in a civilized community.’”

Real Party in Interest Heifetz failed to produce admissible evidence that Petitioners acted with oppression, fraud, or malice. Yet despite these failures, Respondent abused its discretion and inflicted severe prejudice upon Petitioners with its Order.

This is a professional negligence case wherein Real Party in Interest Heifetz alleged Petitioners’ treatment of him fell below the standard of care. Real Party in Interest Heifetz’s allegations against Petitioners are merely criticisms of Petitioners’ care and treatment. Respondent has failed to analyze sufficient facts to withstand a prayer for punitive damages against Petitioners. Real Party in Interest Heifetz has failed to set forth admissible evidence to meet the strict requirements of NRS 42.005. The alleged facts of this case are that Petitioners failed to change his compression stockings upon arrival at Spanish Hills Wellness Suites and failed

to properly monitor Real Party in Interest Heifetz, wherein he allegedly developed pressure ulcers. The allegations presented against Petitioners' conduct do not amount to allowing Real Party in Interest Heifetz the opportunity to seek an award for punitive damages in this case.

The record does not provide a level of gross negligence. If Petitioners are found to be liable, their conduct cannot be described as oppressive, fraudulent, or malicious. Petitioners' expert geriatric physician, Dr. Mike Jeong, M.D., opined that Petitioners provided excellent, attentive care to Real Party in Interest Heifetz, meeting or exceeding the standard of care. Petitioners' expert support for their care and treatment demonstrates that this is not a case where Petitioners' actions were outside all possible bounds of decency or in conscious disregard of Real Party in Interest Heifetz's right and safety. This demonstrates that this is simply a professional negligence case alleging the failure to use reasonable care, skill, or knowledge ordinarily used under similar circumstances. Punitive damages are not warranted.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court grant this Petition for Writ of Mandamus and Order the Respondent to grant Petitioners' motion for partial summary judgment on Real Party in Interest Heifetz's claim for elder abuse, and prayer for punitive damages.

Dated this 7th day of July 2022.

JOHN H. COTTON & ASSOCIATES, LTD

/s/ *Brandon C. Verde*

John H. Cotton, Esq. (Nev. Bar No. 05268)

jhcotton@jhcottonlaw.com

Brandon C. Verde, Esq. (Nev. Bar No. 14638)

bverde@jhcottonlaw.com

7900 W. Sahara Ave. #200

Las Vegas, NV 89117

Telephone: (702) 832-5909

Facsimile: (702) 832-5910

Attorneys for Petitioners

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 NRAP32(a)(6) because: This brief has been prepared in a proportionally spaced typeface using Times New Roman, 14 point font, for the principal text of the brief, and also for footnotes.

I further certify that this brief complies with the page- or type-volume limitations of NRAP 21(d) because, it is: proportionately spaced, has a typeface of 14 points or more, and contains approximately 6,048 words as counted by the word-processing software used to draft the brief, and in any event fewer than 4,571 words— exclusive of the table of contents, table of authorities, disclosures and certificates of service and compliance with these rules.

Finally, I 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 brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the

requirements of the Nevada Rules of Appellate Procedure.

Dated this 7th day of July 2022.

JOHN H. COTTON & ASSOCIATES, LTD

/s/ *Brandon C. Verde*

John H. Cotton, Esq. (Nev. Bar No. 05268)

jhcotton@jhcottonlaw.com

Brandon C. Verde, Esq. (Nev. Bar No. 14638)

bverde@jhcottonlaw.com

7900 W. Sahara Ave. #200

Las Vegas, NV 89117

Telephone: (702) 832-5909

Facsimile: (702) 832-5910

Attorneys for Petitioners

CERTIFICATE OF MAILING

I hereby certify that on the 7th day of July 2022, I served the foregoing **PETITION FOR WRIT OF MANDAMUS** upon the following parties by placing a true and correct copy thereof in the United States Mail in Las Vegas, Nevada with first class postage fully prepaid:

The Honorable Tara Clark Newberry
The Eighth Judicial District Court
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89101
Respondent

Jennifer Morales, Esq.
Shirley Blazich, Esq.
Shannon Wise, Esq.
Claggett & Sykes Law Firm
4191 Meadows Lane, Suite 100
Las Vegas, NV 89107
*Attorneys for Real Party in Interest Heifetz/Real Parties
In Interest*

Robert C. McBride, Esq.
McBride Hall
8329 W. Sunset Road, Suite 260
Las Vegas, NV 89113
*Attorney for Additional Parties in Interest,
Spring Valley Health Care, LLC
d/b/a Spanish Hills Wellness Suites*

Dated this 7th day of July 2022.

/s/ Arielle Atkinson
An employee of JOHN H. COTTON &
ASSOCIATES, LTD