

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

RUSSELL GOLLARD, M.D.,

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT  
COURT OF THE STATE OF  
NEVADA ex rel. THE COUNTY OF  
CLARK, AND THE HONORABLE  
ERIC JOHNSON,

Respondent,

and

STEPHANIE V. HIDALGO,

Real Party in Interest.

Supreme Court No. :

District Court No. A-21-840279-6  
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**PETITION FOR WRIT OF MANDAMUS REGARDING  
MOTION TO DISMISS**

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LEWIS BRISBOIS BISGAARD & SMITH LLP

KEITH A. WEAVER

Nevada Bar No. 10271

Keith.Weaver@lewisbrisbois.com

XIAO WEN JIN

Nevada Bar No. 13901

XiaoWen.Jin@lewisbrisbois.com

6385 S. Rainbow Boulevard, Suite 600

Las Vegas, Nevada 89118

Attorneys for Petitioner Russell Gollard, M.D.

## **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 so that the justices of this Court may evaluate possible disqualification or recusal.

1. All parent corporations and publicly-held companies owning 10 percent or more of the party's stock: None.

2. 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: Lewis Brisbois Bisgaard & Smith LLP.

3. If litigant is using a pseudonym, the litigant's true name: Not applicable.

DATED this 15th day of August, 2022

LEWIS BRISBOIS BISGAARD &  
SMITH LLP

By /s/ Xiao Wen Jin  
KEITH A. WEAVER  
Nevada Bar No. 10271  
XIAO WEN JIN  
Nevada Bar No. 13901  
6385 S. Rainbow Boulevard, Suite 600  
Las Vegas, Nevada 89118  
*Attorneys for Petitioner Russell Gollard,  
M.D.*

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## **I. RELIEF SOUGHT**

Petitioner Russell Gollard, M.D. is a defendant in an action now pending before the District Court of the State of Nevada, County of Clark, entitled “Stephanie V. Hidalgo, individually and as Special Administrator of the Estate of Rene Hidalgo, Plaintiffs v. Russell Gollard, M.D., et al.,” Case No. A-21-842279-C. Respondent, the District Court of the State of Nevada, County of Clark, is now, and at all times mentioned herein has been, exercising judicial functions in connection with this action. This action is brought by real parties in interest Stephanie V. Hidalgo, individually and as the Special Administrator of the Estate of Rene Hidalgo (“Plaintiffs”).

Petitioner hereby submits this Petition for Writ of Mandamus (“Petition”) to request that this Court issue a Writ requiring Respondent to vacate its February 7, 2022 Order Denying Petitioner’s Motion to Dismiss (“MTD”) and grant the MTD pursuant to NRS 34.150 et seq., Nev. R. App. P. 21, and Nev. Const. art. VI, sec. 4.

This Petition is based on Plaintiffs’ failure to comply with NRS 41A.071 by failing to attach an affidavit by a physician in the same or substantially similar area of practice as Petitioner, a board-certified oncologist. Respondent improperly concluded that Plaintiffs’ expert, who is board-certified in internal medicine, critical care medicine, and pulmonary diseases, was qualified to render standard of care opinions against Petitioner in contravention of NRS 41A.071. This Petition is also

based on Respondent's improper failure to dismiss Plaintiffs' claim for punitive damages, which claim is legally insufficient and has only been asserted to avoid the mandatory noneconomic damages cap imposed by NRS 41A.035.

## **II. ROUTING STATEMENT**

This matter is presumptively retained by the Nevada Supreme Court pursuant to Nev. R. App. P. 17(a)(12), as this Petition raises as principal issues questions of statewide public importance.

## **III. ISSUES PRESENTED**

Did Respondent err in failing to dismiss Plaintiffs' claims against Petitioner based on Plaintiffs' failure to comply with the mandatory requirements of NRS 41A.071 when Plaintiffs attached the affidavit of a board-certified internal medicine, critical care, and pulmonary medicine physician to make standard of care opinions against Petitioner, a board-certified oncologist?

Further, did Respondent err in failing to dismiss Plaintiffs' claim for punitive damages when such claim is legally insufficient and has only been asserted to avoid the mandatory noneconomic damages cap imposed by NRS 41A.035?

## **IV. INTRODUCTION**

### **A. Procedural History**

The Complaint in this matter was filed on October 6, 2021 and alleges a single cause of action against Petitioner for "Medical Negligence/Professional



Negligence/Wrongful Death.”<sup>1</sup> On December 29, 2021, Petitioner filed his MTD. pursuant to NRCP 12(b)(5), NRS 41A.071, and NRS 41A.035.<sup>2</sup> Plaintiffs filed their Opposition on January 6, 2022 and Petitioner filed his Reply on January 26, 2022.<sup>3</sup> Without a hearing, Respondent entered a Minute Order on January 31, 2022 denying Petitioner’s MTD in all respects.<sup>4</sup> Respondent subsequently entered an Order Denying Petitioner’s MTD on February 7, 2022, necessitating this Writ Petition.<sup>5</sup>

## **B. Statement Of Relevant Facts**

Plaintiffs allege that on September 24, 2020, Rene Hidalgo presented to Petitioner with a history of squamous cell carcinoma of the scrotum, a type of cancer.<sup>6</sup> On October 5, 2020, Mr. Hidalgo presented to Sunrise Hospital and Medical Center with a complaint of scrotal pain.<sup>7</sup> On October 6, 2020, he underwent surgery for his cancer by Craig Hunter, M.D.<sup>8</sup> Mr. Hidalgo was discharged home on October 11, 2020 and allegedly developed bilateral lower extremity swelling and pain thereafter.<sup>9</sup>

Mr. Hidalgo presented to Southwest Medical Urgent Care two days later, on

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<sup>1</sup> Petitioner’s Appendix, pp. 001–018.

<sup>2</sup> Petitioner’s Appendix, pp. 029–039.

<sup>3</sup> Petitioner’s Appendix, pp. 040–070.

<sup>4</sup> Petitioner’s Appendix, pp. 084–085

<sup>5</sup> Petitioner’s Appendix, pp. 086–088.

<sup>6</sup> Petitioner’s Appendix, pp. 001–018, ¶ 10.

<sup>7</sup> *Id.*, ¶ 11.

<sup>8</sup> *Id.*, ¶ 11.

<sup>9</sup> *Id.*, ¶ 12.

October 13, 2020, with “significant” bilateral lower extremity swelling and pain.<sup>10</sup> An ultrasound was obtained to rule out a deep venous thrombosis (“DVT”), and Plaintiffs allege he was told to discuss his concerns at his appointment on October 14, 2020.<sup>11</sup>

Plaintiffs allege that on October 14, 2020, Mr. Hidalgo presented to Petitioner with increased bilateral lower extremity swelling.<sup>12</sup> Plaintiffs allege that Stephanie V. Hidalgo and Mr. Hidalgo communicated their concerns about the bilateral lower extremity swelling to Petitioner but that he only performed a “cursory physical examination” and “did not make any additional orders, referrals, recommendations or treatment plan[.]”<sup>13</sup> On October 16, 2020, Mr. Hidalgo died from a pulmonary embolism.<sup>14</sup>

Plaintiffs asserted a single cause of action against Petitioner and other unidentified Defendants for “Medical Negligence/Professional Negligence/Wrongful Death[,]” asserting that Defendants’ care fell below the standard of care by “failing to properly examine [Mr. Hidalgo] on October 14, 2020, in failing to properly examine [Mr. Hidalgo], in failing to make accurate medical records, in failing to note marked asymmetry in the size of [Mr. Hidalgo]’s lower

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<sup>10</sup> Petitioner’s Appendix, pp. 001–018, ¶ 13.

<sup>11</sup> *Id.*, ¶ 13.

<sup>12</sup> *Id.*, ¶ 14.

<sup>13</sup> *Id.*, ¶ 14.

<sup>14</sup> *Id.*, ¶¶ 2 & 15.

extremities, in failing to reach out to and discuss [Mr. Hidalgo]’s complaints and physical presentation with his surgeon, failing to refer [Mr. Hidalgo] to the emergency department for evaluation of deep veins in the pelvis and inferior vena cava, and failing to appreciate and work up the risk of DVT.”<sup>15</sup> They claim such negligence caused Mr. Hidalgo’s death. <sup>16</sup>

Plaintiffs allege such negligence also “amounted to a wanton and reckless disregard for the well-being of [Mr. Hidalgo] as to constitute malice, gross negligence and oppression[.]” and that they are “entitled to punitive and exemplary damages.”<sup>17</sup>

Plaintiffs claim they have incurred various general and special damages.<sup>18</sup>

Plaintiffs attached the affidavit of Kevin Shaw, M.D. to their Complaint to support the claims.<sup>19</sup> Dr. Shaw acknowledged that Petitioner is an “oncologist with Optum Cancer Center” and was treating Mr. Hidalgo for “a recent diagnosis of squamous cell carcinoma of the scrotum.”<sup>20</sup> Dr. Shaw is not board-certified in oncology; instead, he is board-certified in internal medicine, critical care medicine, and pulmonary diseases.<sup>21</sup> Nevertheless, and without any explanation or elaboration,

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<sup>15</sup> Petitioner’s Appendix, pp. 001–018, ¶ 21.

<sup>16</sup> *Id.*, ¶ 22.

<sup>17</sup> *Id.*, ¶ 23.

<sup>18</sup> *Id.*, ¶ 24.

<sup>19</sup> Petitioner’s Appendix, pp. 027–028; Petitioner’s Appendix, pp. 027–028, ¶ 16.

<sup>20</sup> *Id.*, ¶ 6.

<sup>21</sup> *Id.*, ¶ 1.

Dr. Shaw baldly asserted “I am qualified to offer the opinions expressed in this affidavit regarding the care and treatment of Mr. Hidalgo due to my practice as a pulmonary medicine and internal medicine physician. My medical practice is substantially similar to the events encountered by [Petitioner] in his interaction with Mr. Hidalgo. I diagnose and treat deep venous thromboses and pulmonary emboli on a frequent basis.”<sup>22</sup>

Dr. Shaw’s curriculum vitae demonstrates that his practice focuses on pulmonary and critical care medicine and his fellowship training was in those two areas.<sup>23</sup> His practice since he completed his fellowship in 2010 has been entirely centered around pulmonary and critical care medicine.<sup>24</sup> Dr. Shaw has no specialized training, education, or experience in oncology; he has no residency or fellowship training in oncology; he does not practice in the specialty of oncology; and he does not hold himself out as an oncologist.<sup>25</sup>

Nowhere does Dr. Shaw state that he is familiar with or has knowledge of the standard of care applicable to a board-certified oncologist.<sup>26</sup> Nowhere has Dr. Shaw stated that he diagnoses or treats cancer patients; that he is an expert regarding oncology; that he is an expert regarding the standard of care applicable to a board-

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<sup>22</sup> Petitioner’s Appendix, pp. 001–018, ¶ 3.

<sup>23</sup> Petitioner’s Appendix, pp. 019–026.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

certified oncologists; that the standard of care applicable to a specialist practicing internal medicine, critical care, and pulmonary diseases is the same as that applicable to a board-certified oncologist; or that the practice of internal medicine, critical care medicine, and pulmonary diseases medicine is the same or substantially similar to the practice of oncology.<sup>27</sup> Despite his lack of qualifications, Dr. Shaw offered standard of care opinions against Petitioner regarding Petitioner's October 14, 2020 oncology clinic visit with Mr. Hidalgo:

13. [Petitioner] breached the standard of care by failing to properly examine Mr. Hidalgo at the time of his clinic visit on 10/14/2020. The patient's widow describes little if any examination of the extremities. The documented physical examination confirms this suspicion, as several physical exam findings recorded by [Petitioner] were blatantly inaccurate.

14. The standard of care for [Petitioner] required that he perform a thorough physical examination. Had he done this, he would have noticed marked asymmetry in the size of Mr. Hidalgo's lower extremities.

15. The standard of care with a [sic] required a discussion with the patient's surgeon regarding these findings, as well as a referral to the emergency department for venography to evaluate the deep veins of the pelvis and inferior vena cava.

16. Given [Petitioner]'s expertise as an oncologist and hematologist, he should have been aware that Mr. Hidalgo was at increased risk for deep venous thromboses given his diagnosis of cancer and his recent surgery.

17. By failing to practice within the standard of care, these breaches of [Petitioner] directly lead to the pain, suffering,

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<sup>27</sup> Petitioner's Appendix, pp. 019–026.

and death of Mr. Hidalgo who suffered a catastrophic saddle pulmonary embolism.<sup>28</sup>

What Dr. Shaw is asserting is that Dr. Gollard (an oncologist) should be held to a pulmonologist's standard of care when it comes to the treatment of a pulmonary embolism. Such unqualified opinions turn the purpose of NRS 41A.071 on its head, which necessitated the filing of Petitioner's MTD.<sup>29</sup>

Petitioner's MTD also argued that Plaintiffs were precluded from amending their Complaint, that Plaintiffs' claim for punitive damages should be dismissed, and that they should be precluded from circumventing the noneconomic damages cap imposed by NRS 41A.035.<sup>30</sup>

In Plaintiffs' Opposition, they acknowledged that NRS 41A.071(2) "requires an expert report be 'submitted by a medical expert who practices or has practiced in an area that is substantially similar to the type of practice engaged in at the time of the alleged professional negligence[]'" and that "the threshold question of admissibility is governed by the scope of the witness' knowledge and not the artificial classification of the witness by title."<sup>31</sup> Plaintiffs affirmed that Dr. Shaw's expertise is not the same as Petitioner's by acknowledging that "Dr. Shaw's area of expertise as a pulmonologist who in his clinic based practice encounters patients,

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<sup>28</sup> Petitioner's Appendix, pp. 027–028, ¶¶ 13–17.

<sup>29</sup> Petitioner's Appendix, pp. 029–039.

<sup>30</sup> *Id.*

<sup>31</sup> Petitioner's Appendix, pp. 040–070 (citation omitted).

like the decedent, who present to his clinic with pulmonary embolism.”<sup>32</sup>

Without citing any evidence or authority, Plaintiffs argued that “[Petitioner]’s ‘diagnosis and treatment’ [or lack thereof] of the decedent’s symptoms of pulmonary embolism necessarily implicate Dr. Shaw’s area of expertise as a board-certified pulmonary medicine, critical care and internal medicine physician.”<sup>33</sup> Plaintiffs incorrectly asserted that Dr. Shaw’s affidavit, completed under the penalty of perjury, affirms on its face that “he and [Petitioner]’s practices are substantially similar. . . .” Plaintiffs went on further by referring to Dr. Shaw’s unsupported belief:

“[my] medical practice is substantially similar to the events encountered by [Petitioner] in his interaction with Mr. Hidalgo. I diagnose and treat deep venous thromboses and pulmonary emboli on a frequent basis.”<sup>34</sup>

Again, Plaintiffs’ argument is that because Dr. Shaw is qualified to offer standard of care opinions about the diagnosis and treatment of a pulmonary embolism while practicing pulmonology, he is qualified to offer standard of care opinions for an oncologist treating cancer that encounters a pulmonary embolism. That argument is totally nonsensical. Dr. Shaw wants this Court to believe is that because he’s qualified to treat a pulmonary embolism, he is qualified to offer standard of care opinions for *any* specialty that may encounter pulmonary emboli.

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<sup>32</sup> Petitioner’s Appendix, pp. 040–070 (emphasis added).

<sup>33</sup> *Id.* (second alteration in original).

<sup>34</sup> *Id.* (emphasis in original).

Plaintiffs next argued that if Dr. Shaw’s affidavit was deficient, the trial court had discretion to allow them to amend it.<sup>35</sup> Lastly, regarding punitive damages, Plaintiffs acknowledged that “under NRCP 12(b)(5), the question is whether there are sufficient allegations to support a claim.”<sup>36</sup> They assert they “very clearly allege[] facts giving rise to a prayer for punitive damages[,]” but then without more, simply restated paragraph 23 of their Complaint, which contained nothing more than the allegations supporting their negligence cause of action.<sup>37</sup>

Without a hearing, Respondent entered a Minute Order on January 31, 2022 denying Petitioner’s MTD in all respects.<sup>38</sup> Without explanation, Respondent concluded that Dr. Shaw’s affidavit was sufficient, permitted Plaintiff to pursue punitive damages, and concluded that dismissal was not appropriate.<sup>39</sup>

Respondent’s February 7, 2022, Order<sup>40</sup> Denying Petitioner’s MTD made the same conclusions.<sup>41</sup>

Respondent erred in denying Petitioner’s MTD. Dr. Shaw’s affidavit failed to satisfy the requirements of NRS 41A.071, requiring the dismissal of Plaintiffs’ Complaint and precluding of any amendment thereto. Further, plaintiffs’ punitive

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<sup>35</sup> Petitioner’s Appendix, pp. 040–070.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> Petitioner’s Appendix, pp. 084–085.

<sup>39</sup> *Id.*

<sup>40</sup> Petitioner’s Appendix, pp. 086–088.

<sup>41</sup> *Id.*



damages claim was legally insufficient and pled as nothing more than an improper attempt to avoid the mandatory noneconomic damages cap imposed by NRS 41A.035.

## **V. STATEMENT OF REASONS THE WRIT SHOULD ISSUE**

### **A. Writ of Mandamus Standard**

“A writ of mandamus is available ‘to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station.’” *Washoe Med. Ctr. v. Second Judicial Dist. Court*, 122 Nev. 1298, 1301, 148 P.3d 790 (2006) (citation omitted). A writ of mandamus may also issue “to control or correct a manifest abuse or an arbitrary or capricious exercise of discretion.” *Cote H. v. Eighth Judicial Dist. Court*, 124 Nev. 36, 39, 175 P.3d 906 (2008) (citation omitted).

A writ “shall issue in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law.” NRS 34.170. “[U]nless dismissal is clearly required by a statute or rule or an important issue of law needs clarification, [the Nevada Supreme Court] will not exercise its discretion to consider writ petitions that challenge district court orders denying motions to dismiss.” *Washoe*, 122 Nev. at 1301 (citations omitted). The Nevada Supreme Court has complete discretion to determine whether a writ will be considered. *Halverson v. Miller*, 124 Nev. 484, 489, 186 P.3d 893 (2008).

This Court should exercise its discretion to consider and issue a Writ of Mandamus in this case directing Respondent to grant Petitioner's MTD as the dismissal is required by NRS 41A.071, Plaintiffs' claim for punitive damages is legally insufficient, and because important issues of law need clarification. The Respondent's errors will require Petitioner to expend tremendous amounts of time, resources, and expenses to proceed through extensive and unnecessary discovery in the underlying matter and a trial of the same. Such time, resources, and expenses are unnecessary and substantially prejudicial because Plaintiffs failed to comply with NRS 41A.071, their claim for punitive damages is legally insufficient, and they are improperly attempting to avoid the damages cap under NRS 41A.035.

Respondent's conclusion that Dr. Shaw is qualified to render standard of care opinions against Petitioner is unsupported and runs counter to the dictates of NRS 41A.071. Similarly, Respondent's conclusion that punitive damages were legally sufficient is unsupported and is nothing more than an improper attempt to avoid the requirements of NRS 41A.035. Petitioner has no plain, speedy, or adequate remedy at law to address these manifest abuses of discretion or to prevent the substantial prejudice and expenses that he will be required to endure if a writ is not issued.

Although this Court may decline to entertain this Petition until the issues are before it on appeal, the issues herein are better addressed at this time. The issues pertaining to both expert affidavit requirements and punitive damages are

appropriate for interlocutory review because if they are decided in favor of Petitioner, they will be case dispositive; they will clarify the pleading and dismissal requirements as they pertain to medical affidavits and punitive damages; they involve important recurrent issues pertaining to the interpretation and application of NRS 41A.071 and the avoidance of the noneconomic damages cap; they involve pressing public policy issues regarding the protection of medical providers in Nevada; and they involve important legal issues that are likely to be the subject of repeated and extensive litigation in Nevada courts, which will likely result in inconsistent or conflicting rulings and waste judicial resources. *See Borger v. Eighth Judicial Dist. Court*, 120 Nev. 1021, 1025-26, 102 P.3d 600 (2004).

Likewise, the punitive damages issues are appropriate for interlocutory review because they will clarify recurrent and important pleading and dismissal requirements for such damages; they involve pressing public policy issues relating to medical providers in Nevada as such attempts are aimed at avoiding the noneconomic damages cap; and they involve important legal issues that are likely to be the subject of repeated and extensive litigation in the Nevada courts, which will likely result in inconsistent or conflicting rulings and waste judicial resources. *See id.* Petitioner therefore respectfully requests that this Court accept review of this Petition.

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**B. Respondent Manifestly Abused Its Discretion by Denying Petitioner's MTD Because Plaintiff Failed to Comply with NRS 41A.071.**

NRS 41A.071 requires dismissal if an affidavit fails to comply with its enumerated requirements. It states, among other things, that “the district court shall dismiss an action . . . if the action is filed without an affidavit that . . . [i]s submitted by a medical expert who practices or has practiced in an area that is substantially similar to the type of practice engaged in at the time of the alleged professional negligence.” NRS 41A.071(2).

“NRS 41A.071 was adopted as part of the 2002 medical malpractice tort reform that abolished the Medical-Legal Screening Panel.” *Washoe*, 122 Nev. at 1304. Its prerequisites are required “to lower costs, reduce frivolous lawsuits, and ensure that medical malpractice actions are filed in good faith based upon competent expert medical opinion.” *See id.* (citation omitted). The Nevada Legislature was concerned with strengthening the expert witness requirements for medical malpractice cases. *See id.*

The legislative history further shows that “a medical expert’s affidavit was necessary for the district court to confirm that the case was meritorious[;]” that “there needed to be a deterrent from cases being filed in order to get a quick settlement, and that the affidavit requirement would protect against this by ensuring that medical records would be reviewed by an expert before a case was filed.” *Id.* (citation

omitted) (emphasis in original). Indeed, “the statute clearly works against frivolous lawsuits filed with some vague hope that a favorable expert opinion might eventually surface.” *Borger*, 120 Nev. at 1029. In other words, a plaintiff must demonstrate from the outset of his or her case that the expert requirements of NRS 41A.071 have been satisfied. The Nevada Supreme Court has repeatedly made clear that “[b]ecause a complaint that does not comply with NRS 41A.071 is void *ab initio*, it does not legally exist and thus it cannot be amended.” *Washoe*, 122 Nev. at 1304. This is because “NRS 41A.071 is jurisdictional in nature.” *Szydel v. Markman*, 121 Nev. 453, 461, 117 P.3d 200, 205 (2005). Here, Plaintiffs’ submission of Dr. Shaw’s affidavit violates the very purpose for which the requirements in NRS 41A.071 were imposed. Because Dr. Shaw’s affidavit has not and cannot satisfy those requirements, Respondent was required to dismiss Plaintiffs’ Complaint.

*1. Plaintiffs’ Expert Affidavit Fails to Demonstrate that Dr. Shaw Practices or Has Practiced in an Area That is Substantially Similar to the Type of Practice Engaged in by Petitioner At the Time of the Alleged Negligence*

NRS commands that “the district court shall dismiss an action . . . if the action is filed without an affidavit that . . . [i]s submitted by a medical expert who practices or has practiced in an area that is substantially similar to the type of practice engaged in at the time of the alleged professional negligence.” NRS 41A.071(2) (emphases added). Indeed, Plaintiffs acknowledged that requirement in their Opposition to

Petitioner's MTD.<sup>42</sup>

“The possession of a medical degree does not qualify a physician to offer expert testimony on every medical question[]” and “[g]iven the increasingly specialized and technical nature of medicine, such a rule would ignore the modern realities of medical specialization and eliminate the trial court’s rule of ensuring that those who purport to be experts truly have expertise concerning the actual subject about which they are offering an opinion.” *McMahon v. Smith & Nephew Richards, Inc.*, 14-99-00616-CV, 2000 WL 991697, at \*3 (Tex. App. July 20, 2000) (citation omitted). “The proponent of the testimony has the burden to show that the expert ‘possesses special knowledge as to the very matter on which he proposes to give an opinion.’” *Id.* at \*8 (citation omitted). The fact that an expert witness states that he or she is familiar with the applicable standard of care does not, ipso facto, render the testimony admissible. *Carmichael v. Bridgeman*, No. 03A01-9904-CV-00124, 2000 WL 124843, at \*1-2 (Tenn. Ct. App. E.S. Jan. 26, 2000).

Without any evidence or authority, Plaintiffs asserted that “Dr. Shaw and [Petitioner]’s practice areas are substantially similar.” Such a bald claim is incorrect. As acknowledged by Dr. Shaw, Petitioner is an “oncologist with Optum Cancer Center” and was treating Mr. Hidalgo for “a recent diagnosis of squamous cell

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<sup>42</sup> Petitioner’s Appendix, pp. 029–039.

carcinoma of the scrotum.”<sup>43</sup> Likewise, Plaintiffs alleged in their Complaint that Mr. Hidalgo presented to Petitioner “with a history of squamous cell carcinoma of the scrotum.” In other words, Petitioner was engaged in oncology and treating Mr. Hidalgo’s cancer when he was administering medical care to him. Dr. Shaw, on the other hand, is not an oncologist and instead specializes in internal medicine, critical care medicine, and pulmonary diseases. Dr. Shaw’s practice focuses on pulmonary and critical care medicine and his fellowship training was in those two areas. Dr. Shaw’s practice since his fellowship training in 2010 has been centered entirely around pulmonary and critical care medicine.<sup>44</sup> Accordingly, Dr. Shaw’s practice is entirely different from that of Petitioner’s and Plaintiffs failed to provide any evidence or authority demonstrating that their practice areas were the same or substantially similar.

Moreover, Dr. Shaw has no specialized training, education, or experience in oncology; has no residency or fellowship training in oncology; does not practice in the specialty of oncology; and does not hold himself out as an oncologist.<sup>45</sup> Nowhere does he state that he is familiar with or has knowledge of the standard of care applicable to a board-certified oncologist.<sup>46</sup> Nowhere has Dr. Shaw stated that he is

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<sup>43</sup> Petitioner’s Appendix, pp. 027–028, ¶ 6.

<sup>44</sup> Petitioner’s Appendix, pp. 019–026.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

an expert regarding oncology; that he has ever practiced oncology; that he is an expert regarding the standard of care applicable to a board-certified oncologist; that the standard of care applicable to a specialist practicing internal medicine, critical care, and pulmonary diseases is the same as that applicable to a board-certified oncologist; or that the practice of internal medicine, critical care medicine, and pulmonary diseases medicine is the same or substantially similar to the practice of oncology.<sup>47</sup> Accordingly, Dr. Shaw and Petitioner’s practice areas are not the same and are not substantially similar and Plaintiffs failed to provide any evidence that Dr. Shaw has the requisite knowledge or expertise to render any expert opinions regarding the standard of care applicable to Petitioner.

Plaintiffs next asserted that “[Petitioner]’s diagnosis and treatment [or lack thereof] of the decedent’s symptoms of pulmonary embolism necessarily implicate Dr. Shaw’s area of expertise as a board-certified pulmonary medicine, critical care and internal medicine physician.” Plaintiffs’ argument fails.

First, Petitioner was not treating a pulmonary embolism; instead, Petitioner was treating Mr. Hidalgo’s cancer. Indeed, Dr. Shaw acknowledged that Petitioner was treating Mr. Hidalgo for “a recent diagnosis of squamous cell carcinoma of the scrotum[.]” and Plaintiffs acknowledged that Mr. Hidalgo presented to Petitioner “with a history of squamous cell carcinoma of the scrotum.” In other words,

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<sup>47</sup> Petitioner’s Appendix, pp. 019–026.



Petitioner was treating Mr. Hidalgo's cancer. Dr. Shaw on the other hand, specializes in treating pulmonary embolisms and regularly treats patients that present to him with that condition as acknowledged by Plaintiffs: "Dr. Shaw's area of expertise as a pulmonologist who is his clinic based practice encounters patients, like the decedent, who present to his clinic with pulmonary embolism."<sup>48</sup> Petitioner does not have any expertise in pulmonology, does not treat pulmonology patients in his clinic, and does not have patients with pulmonary complaints presenting to him for treatment.

Second, even if Petitioner's care "implicate[d]" Dr. Shaw's area of expertise (which it did not), establishing an implication without more is not enough. Instead, an expert must practice or have practiced "in an area that is substantially similar to the type of practice engaged in at the time of the alleged professional negligence." NRS 41A.071(2) (emphasis added). In other words, Dr. Shaw's practice must be "substantially similar" to that of Petitioner's, which Plaintiffs failed to establish.

In *Werner v. Nanticoke Mem. Hosp., Inc.*, the plaintiff sued an emergency medicine physician for alleged medical malpractice arising out of the treatment of an ischemic stroke in an emergency department by the emergency medicine physician defendant. No. N12C-02-191 JAP, 2014 Del. Super. LEXIS 570, \*1-\*2 (Del. Super. Nov. 3, 2014) (unpublished disposition). The plaintiff designated a

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<sup>48</sup> Petitioner's Appendix, pp. 040–070 (emphasis added).

board-certified neurologist to testify regarding the emergency medicine standard of care and the defendants moved to exclude the neurologist because he was not qualified to provide such opinions. *Id.* at \*2-\*3. Among other things, the plaintiff asserted that the neurologist expert was proper because the emergency medicine defendant “was acting as a neurologist when was treating [the plaintiff].” *Id.* at \*4.

Like Nevada, the *Werner* court explained that the “standard of skill and care required of every health care provider in rendering professional services or health care to a patient shall be that degree of skill and care ordinarily employed in the same or similar field of medicine as defendant . . .” *Id.* (citation omitted) (emphasis and omission in original). It concluded that “[t]here is nothing in the language of the statute that would justify holding an emergency room physician to the standard of care of a neurologist simply because an emergency patient presents [with] a possible neurological problem.” *Id.* “In short, an emergency room physician has training and skills which, although may overlap in some instances, are for the most part distinct from those of board certified neurologists[]” and “[t]he fact that [the emergency medicine physician]’s care of [the plaintiff] touched upon neurological issues does not mean he is acting as a neurologist any more than his emergency treatment of a high school football player with an injured knee means he is acting as an orthopedic surgeon.” *Id.* at \*4-\*5.

The *Werner* court precluded the neurologist from offering standard of care

opinions against the emergency medicine defendant and explained that “although ‘[a]n expert may be highly qualified and competent to offer many opinions,’ they ‘must be competent to offer opinions in a given specific factual setting.’” *Id.* at \*5 (alteration and emphasis in original).

Third, Plaintiffs acknowledged in their Opposition to Petitioner’s MTD that “the threshold question of admissibility is governed by the scope of the witness’ knowledge and not the artificial classification of the witness by title.”<sup>49</sup> In other words, to be qualified to render standard of care opinions against Petitioner, Dr. Shaw must have sufficient knowledge of the standard of care applicable to a board-certified oncologist. He doesn’t.

Dr. Shaw has no specialized training, education, or experience in oncology; he has no residency or fellowship training in oncology; he does not practice in the specialty of oncology; and he does not hold himself out as an oncologist. He is not familiar with and has no knowledge of the standard of care applicable to a board-certified oncologist; he does not diagnose or treat cancer patients; he is not an expert regarding oncology; and he is not an expert regarding the standard of care applicable to a board-certified oncologist. Dr. Shaw has provided no evidence that the standard of care applicable to him is the same as that applicable to a board-certified oncologist or that his practice is the same or substantially similar to the practice of oncology.

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<sup>49</sup> Petitioner’s Appendix, pp. 040–070 (emphasis added).

Indeed, Dr. Shaw makes no mention of the standard of care applicable to board-certified oncologists and has provided no information regarding how he is qualified to render opinions about that standard. Instead, all that Dr. Shaw asserted was that “[m]y medical practice is substantially similar to the events encountered by [Petitioner] in his interaction with Mr. Hidalgo. I diagnose and treat deep venous thromboses and pulmonary emboli on a frequent basis.”<sup>50</sup> Dr. Shaw’s statement and choice of words is important. In the first sentence, he merely stated that his medical practice is similar to the events that Petitioner encountered; he did not state that his practice was substantially similar to Petitioner’s practice or that the standards of care are the same or substantially similar. If they were, he would have said so. Moreover, he did not specify what “events” or what “interaction” he was referring to. His nonspecific claim regarding unspecified “events” during an unspecified “interaction” cannot and do not provide the foundation necessary to qualify him to render standard of care opinions against Petitioner.

The second sentence of Dr. Shaw’s statement is equally important. Dr. Shaw alleges that he diagnoses and treats deep vein thromboses and pulmonary emboli on a frequent basis. He does not state that he treats cancer patients. Instead, he emphasizes that his specialization is distinct from that of Petitioner. Petitioner does not treat patients with deep vein thromboses or pulmonary emboli; instead, Petitioner

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<sup>50</sup> Petitioner’s Appendix, pp. 027–028, ¶ 3 (emphasis added).

treats cancer patients and was involved in treating Mr. Hidalgo's cancer during his care of him.

The standard of care applicable to Petitioner is not what a board-certified internal medicine, critical care, and pulmonary diseases specialist would have done, but what a board-certified oncologist – who treats cancer – would have done under the circumstances. Indeed, because Dr. Shaw acknowledged that he “diagnose[s] and treat[s] deep venous thromboses and pulmonary emboli on a frequent basis[,]” something that Petitioner does not do, and because he is a specialist regarding those conditions, Dr. Shaw is impermissibly examining Petitioner's conduct through eyes much more highly trained than those of Petitioner. *See e.g. King v. Singing River Health Sys.*, 158 So. 3d 318, 333 (Miss. Ct. App. 2014). Respondent's refusal to grant Petitioner's MTD and thereby permit Dr. Shaw to offer opinions about the standard of care applicable to board-certified oncologists – and whether such standard was breached – was a clear error as it will permit improper and prejudicial speculation.

The Plaintiffs' attempt to hold Petitioner to the standard of care applicable to Dr. Shaw, who is unfamiliar with the standard of care applicable to a board-certified oncologist, is contrary to the mandates of NRS 41A.071 and the Nevada Legislature's intent to ensure that medical malpractice cases are filed in good faith, that Nevada physicians are judged by competent experts, and to strengthen the

requirements for expert witnesses. Respondent's failure to preclude Dr. Shaw from offering standard of care opinions against Petitioner was a manifest abuse of discretion. Petitioner therefore respectfully requests that this Court reverse Respondent and order Respondent to grant Petitioner's MTD.

2. *Plaintiffs Are Precluded From Amending Their Complaint as a Matter of Law*

Because Respondent improperly denied Petitioner's MTD, it did not address whether Plaintiffs were able to amend their Complaint in light of Dr. Shaw's failure to satisfy NRS 41A.071. Because Dr. Shaw's affidavit was defective under NRS 41A.071, they are precluded from amending their Complaint as a matter of law.

First, NRS 41A.071(1)-(4) states:

If an action for professional negligence is filed in the district court, the district court shall dismiss the action, without prejudice, if the action is filed without an affidavit that:

1. Supports the allegations contained in the action;
2. Is submitted by a medical expert who practices or has practiced in an area that is substantially similar to the type of practice engaged in at the time of the alleged professional negligence;
3. Identifies by name, or describes by conduct, each provider of health care who is allegedly to be negligent; and
4. Sets forth factually a specific act or acts of alleged negligence separately as to each defendant in simple, concise and direct terms.

(emphases added). In other words, each of the four enumerated requirements under NRS 41A.071 are mandatory and dismissal is required unless each of four requirements have been satisfied. “When a statute is clear on its face, we will not look beyond the statute’s plain language.” *Washoe*, 122 Nev. at 1302 (citation omitted). Because Dr. Shaw’s affidavit fails to satisfy NRS 41A.071, dismissal of Plaintiffs’ complaint was required. Respondent’s failure to do so was clear error.

“[I]n Nevada, noncompliance with NRS 41A.071’s affidavit requirement renders the complaint void ab initio[]” and “amendment is not permitted and dismissal is required.” *Washoe*, 122 Nev. at 1305 (citations omitted). The *Szydel v. Markman* court explained that “NRS 41A.071 requires the dismissal of a medical malpractice action filed without an affidavit from a medical professional practicing in a substantially similar field[]” and that “NRS 41A.071 requires dismissal whenever the expert affidavit requirement is not met.” 121 Nev. 453, 458, 117 P.3d 200 (2005) (citations omitted) (emphasis added). Simply put, if one of the enumerated requirements set forth in NRS 41A.071 has not been satisfied, the complaint must be dismissed and no amendment is permitted.<sup>51</sup>

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<sup>51</sup> Indeed, although not citable for precedential or persuasive value, the Nevada Supreme Court has previously made clear that dismissal is required when an expert’s affidavit fails to comply with NRS 41A.071. *Salcedo v. Eighth Judicial Dist. Court of Nev.*, No. 55751, 2011 Nev. Unpub. LEXIS 825, \*6-\*7 (Nev. Apr. 28, 2011) (unpublished disposition) (“[I]n analyzing cases involving NRS 41A.071’s expert filing requirement, this court has refused to allow subsequent amendment of a

Because Dr. Shaw's affidavit failed to comply with NRS 41A.071, Respondent was required to dismiss Plaintiffs' Complaint and preclude any amendment. Petitioner respectfully requests that this Court preclude Plaintiffs from making any amendment to their Complaint.

**C. Respondent Manifestly Abused Its Discretion by Failing to Dismiss Plaintiff's Claim for Punitive Damages**

Without elaboration, Respondent concluded that Plaintiffs' prayer for punitive damages had been adequately pled under NRCP 12(b)(5).<sup>52</sup> Respondent manifestly abused its discretion by failing to dismiss Plaintiffs' claim for punitive damages.

In Nevada, punitive damages may only be awarded in circumstances "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(2). "Oppression" is "despicable conduct that subjects a person to cruel and unjust hardship with conscious disregard of the rights of the person." NRS 42.001(4) (emphases added). "Fraud" is "an intentional misrepresentation, deception or concealment of a material fact known to the person with the intent to deprive another person of his or her rights or property or to otherwise injury another person." NRS 42.001(2) (emphases added). "Malice, express or implied" is "conduct which is intended to injure a person

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complaint to bring it into compliance with the statute[.]" and concluded that the district court has an obligation to dismiss actions that do not comply with NRS 41A.071).

<sup>52</sup> Petitioner's Appendix, pp. 001–018.



or despicable conduct which is engaged in with a conscious disregard of the rights and safety of others.” NRS 42.001(3). “Conscious disregard” is “the knowledge of the probable harmful consequences of a wrongful act and a willful and deliberate failure to act to avoid those consequences.” NRS 42.001(1). Conscious disregard is more than negligence and requires a culpable state of mind. *See Countrywide Home Loans, Inc. v. Thitchener*, 124 Nev. 725, 743, 192 P.3d 243 (2008). Indeed, “at a minimum, [it] must exceed mere recklessness or gross negligence.” *Id.* (emphasis added). In other words, oppression, fraud, and malice all require intentional conduct.

In *Guar v. Real Estate v. Hanover Ins. Co.*, the plaintiff sought punitive damages and in support of that claim, alleged the following:

In performing the acts and omissions to act and creating the conditions alleged herein, [Defendant] acted or failed to act with the intent to injure [Plaintiff] and acted with malice, oppression and/or fraud. Further, the acts of [Defendant] were despicable and in conscious disregard of the probability that damage would occur to [Plaintiff] and, thus, the conduct alleged herein, supports an award of punitive damages[.]

No. 1:14-cv-00860-TLN-MJS, 2014 U.S. Dist. LEXIS 158062, \*3 (E.D. Cal. Nov. 7, 2014) (unpublished disposition). The defendant sought to preclude the plaintiff’s punitive damages claim. *Id.* at \*8-\*10. The *Guar* court explained that “[w]hen a plaintiff alleges a claim for punitive damages, a court may dismiss the claim if the plaintiff fails to allege sufficient facts to show ‘oppression, fraud, or malice.’” *Id.* at \*11 (citation omitted). “Moreover, facts are insufficient when the plaintiff asserts

‘nothing more than conclusory allegations’ of oppression, fraud, or malice.” *Id.* (citation omitted). It concluded that the plaintiff “does no more than offer a legal conclusion couched as a factual allegation[.]” and that the plaintiff “states, ‘. . . [Defendant] acted or failed to act with the intent to injure [Plaintiff] and acted with *malice, oppression and/or fraud . . .*.’” *Id.* (omissions, alteration, and emphasis in original). It concluded that the “[p]laintiff’s conclusory allegations fail to provide [d]efendant with fair notice of the nature of [p]laintiff’s claim for punitive damages[.]” and dismissed the plaintiff’s punitive damages claims.

Here, Plaintiffs utterly failed to allege any facts beyond alleged negligence to support their claim for punitive damages and alleged no facts to support any kind of intentional or culpable state of mind. Instead, Plaintiffs alleged nothing more than negligence. In fact, Plaintiff simply re-stated the identical claims supporting their negligence cause of action<sup>53</sup> and it was clear error for Respondent not to dismiss the claim.

In fact, Plaintiffs’ alleged “facts” are nothing more than medical negligence claims and are insufficient to support a claim for punitive damages.<sup>54</sup> Indeed, Dr. Shaw characterized the alleged deficient care as nothing more than breaches of the standard of care and identified no conduct that was intentional or amounted to a

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<sup>53</sup> Petitioner’s Appendix, pp. 001–018, ¶¶ 22 & 23.

conscious disregard.<sup>55</sup>

Dr. Shaw identified no conduct that was intentional or amounted to a conscious disregard. Because Plaintiffs failed to allege any facts to “show ‘oppression, fraud, or malice[,]’” their punitive damages claim must be dismissed. Moreover, because Plaintiff’s assertions supporting their punitive damages are nothing more than conclusory allegations that which fail to provide the requisite fair notice of their claim, their claim for punitive damages must be dismissed. Accordingly, Plaintiffs’ claim for punitive damages should have been dismissed.

Additionally, NRS 41A.035 commands that in actions against health care providers, damages “must not exceed \$350,000[.]” NRS 41A.035 was overwhelmingly approved by Nevada voters in 2004 as part of tort reform to prevent physicians from fleeing the state due to rising malpractice costs. *See Tam v. Eighth Judicial Dist. Court*, 131 Nev. 792, 798, 358 P.3d 234 (2015).

This is a straightforward case of alleged professional negligence and nothing more. Even accepting all of Plaintiffs’ factual allegations as true (which they are not), Petitioner’s alleged care amounts to nothing more than negligent error in judgment. Plaintiffs’ punitive damages claim under such circumstances is an improper attempt to avoid the noneconomic damages cap imposed by NRS 41A.035 and to thwart its goals of retaining physicians in Nevada, protecting physicians and

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<sup>55</sup> *See generally* Petitioner’s Appendix, pp. 001–018, ¶¶ 13-17 (emphases added).

patients, and maintaining affordable health care. If plaintiffs in Nevada are permitted to assert claims of punitive damages based on nothing more than alleged negligence, such goals will be eviscerated. Plaintiffs should not have been permitted to do so here.

Accordingly, Plaintiffs' claim for punitive damages should have been dismissed and Respondent manifestly abused its discretion by failing to do so. Based on the foregoing, Petitioner respectfully requests that this Court preclude Plaintiffs' claim for punitive damages.

## **VI. CONCLUSION**

Based on the foregoing, Petitioner respectfully requests that this Court grant his Petition for Writ of Mandamus and Order the Respondent to Grant Petitioner's MTD.

DATED this 15th day of August, 2022

LEWIS BRISBOIS BISGAARD &  
SMITH LLP

By /s/ Xiao Wen Jin  
KEITH A. WEAVER  
Nevada Bar No. 10271  
XIAO WEN JIN  
Nevada Bar No. 13901  
6385 S. Rainbow Boulevard, Suite 600  
Las Vegas, Nevada 89118  
*Attorneys for Petitioner Russell Gollard,  
M.D.*

**DECLARATION IN SUPPORT OF**  
**PETITION FOR WRIT OF MANDAMUS**

STATE OF NEVADA     )  
  ) ss:  
COUNTY OF CLARK    )

Xiao Wen Jin, Esq. deposes and states the following:

1. I am an attorney of record for Petitioner and make this Declaration 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 Memorandum of Points and Authorities are based upon my own personal knowledge as counsel for Petitioner. This Affidavit is not made by Petitioner personally because the salient issues involve procedural and legal issues that require legal analysis.

3. The contents of the foregoing Petition for Writ of Mandamus and the following Memorandum of Points and Authorities are true based upon my personal knowledge, except as to those matters stated on information and belief.

4. All documents contained in Petitioner's Appendix, filed herewith, are true and correct copies of the pleadings and documents they are represented to be in the Petitioner's Index and as cited herein.

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5. This Petition complies with Nev R. App. P. 21(d) and Nev. R. App. P. 32(c)(2).

FURTHER YOUR AFFIANT SAYETH NAUGHT.

By /s/ Xiao Wen Jin  
XIAO WEN JIN, ESQ.

## **CERTIFICATE OF COMPLIANCE**

1. 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:

This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point type

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 21(d) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 6,968 words.

3. Finally, I hereby certify that I have read this appellate 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 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 if the accompanying brief is not in conformity with the requirements of the Nevada

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Rules of Appellate Procedure.

DATED this 15th day of August, 2022.

LEWIS BRISBOIS BISGAARD &  
SMITH LLP

By /s/ Xiao Wen Jin  
KEITH A. WEAVER  
Nevada Bar No. 10271  
XIAO WEN JIN  
Nevada Bar No. 13901  
6385 S. Rainbow Boulevard, Suite 600  
Las Vegas, Nevada 89118  
*Attorneys for Petitioner Russell Gollard,  
M.D.*



**CERTIFICATE OF SERVICE**

I hereby certify that on this 15th day of August, 2022, I served the foregoing  
**PETITION FOR WRIT OF MANDAMUS REGARDING MOTION TO  
DISMISS** 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:

AIMEE CLARK NEWBERRY, ESQ.  
Nevada Bar No. 11084  
CLARK NEWBERRY LAW FIRM  
410 S. Rampart Blvd., Suite #390  
Las Vegas, Nevada 89145  
T: (702) 608-4232  
F: (702) 946-1380  
Email: aclarknewberry@cnlawlv.com  
*Attorneys for Real Parties in Interest*

Judge Eric Johnson  
Department XX  
Eighth Judicial District Court  
Regional Justice Center  
200 Lewis Ave.  
Las Vegas, NV 89155

By /s/ Tina Sims  
An Employee of  
LEWIS BRISBOIS BISGAARD &  
SMITH LLP