

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

2
3 PHC-ELKO, INC. dba NORTHEASTERN NEVADA
4 REGIONAL HOSPITAL

5 *Petitioners*

6 v.

7 THE FOURTH JUDICIAL DISTRICT COURT OF
8 THE STATE OF NEVADA ex rel. THE COUNTY
9 OF ELKO, AND THE HONORABLE JUDGE
10 KRISTON N. HILL,

11 *Respondents,*

12 and

13 DIANE SCHWARTZ, individually and as Special
14 Administrator of the Estate of Douglas R. Schwartz,
15 deceased,

16 *Real Party in Interest.*

17 **PETITIONER'S APPENDIX TO THE PETITION WRIT OF**
18 **MANDAMUS**
19 **Vol. 6 of 6**

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32 d/b/a Northeastern Nevada Regional Hospital

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CV-C-17-439

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1 Notice of Entry of Order Regarding
2 Defendant NNRH's Motions in Limine
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4 Order Addressing All Parties' Motions
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7 Order Denying Defendants' Motions
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11 Motion for Partial Summary Judgment
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12
13 Plaintiff's Third Amended Complaint
14 (filed on June 28, 2021)

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of HALL PRANGLE & SCHOONVELD, LLC; that on the 31st day of October 2022, I served a true and correct copy of the foregoing **PETITIONER'S APPENDIX TO THE PETITION FOR WRIT OF MANDAMUS** via USPS mail and/or E-Service Master List for the above referenced matter in the Nevada Supreme Court e-filing System in accordance with the electronic service requirements of Administrative Order 14-2 and the Nevada Electronic Filing and Conversion Rules, to the following:

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FILED

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ELKO CO DISTRICT COURT

CLERK _____ DEPUTY 

**IN THE FOURTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF ELKO**

DIANE SCHWARTZ, individual and as
Special Administrator of the Estate of
DOUGLAS R. SCHWARTZ, deceased;

Plaintiff,

vs.

DAVID GARVEY, M.D., an individual;
BARRY BARTLETT, an individual
(Formerly Identified as BARRY RN);
CRUM, STEFANKO & JONES, LTD., dba
RUBY CREST EMERGENCY MEDICINE;
PHC-ELKO, INC., dba NORTHEASTERN
NEVADA REGIONAL HOSPITAL, a
domestic corporation duly authorized to
conduct business in the State of Nevada;
REACH AIR MEDICAL SERVICES, L.L.C.;
DOE BUSINESS ENTITIES XI through XX,
inclusive,

Defendants.

CASE NO. CV-C-17-439
DEPT NO. 1

**NOTICE OF ENTRY OF ORDER
REGARDING DEFENDANT NNRH'S
MOTIONS IN LIMINE**

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1 PLEASE TAKE NOTICE that an Order Regarding Defendant NNRH's Motions in Limine
2 was entered in the above entitled matter on the 12th day of July, 2022, a copy of which is attached
3 hereto.

4 **AFFIRMATION**

5 Pursuant to NRS 239B.030, the undersigned does hereby affirm that the preceding
6 document DOES NOT contain the Social Security Number of any person.
7

8 DATED this 27th day of July, 2022.

9 HALL PRANGLE & SCHOONVELD, LLC

10 By: /s/ Richard De Jong
11 JENNIFER RIES-BUNTAIN, ESQ.
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21 *Hospital*
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of HALL PRANGLE & SCHOONVELD, LLC; that on the 27th day of July, 2022, I served a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER REGARDING DEFENDANT NNRH'S MOTIONS IN LIMINE** via Electronic Mail to the following:

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An employee of HALL PRANGLE & SCHOONVELD, LLC

Case No: CV-C-17-439

Dept No. 1

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CLERK

IN THE FOURTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF ELKO

DIANE SCHWARTZ, individually and as
administrator of the Estate of DOUGLAS R.
SCHWARTZ, deceased;

Plaintiff,

V.

**ORDER REGARDING DEFENDANT
NNRH'S MOTIONS IN LIMINE**

DAVID GARVEY, M.D., an individual; CRUM,
STEFANKO, & JONES, LTD., dba RUBY
CREST EMERGENCY MEDICINE, PHC-
ELKO, INC., dba NORTHEASTERN NEVADA
REGIONAL HOSPITAL, a domestic corporation
duly authorized to conduct business in the State
of Nevada; REACH MEDICAL SERVICES,
L.L.C., DOES 1 through X; ROE BUSINESS
ENTITIES XI through XX, inclusive,

Defendants.

In anticipation of trial, all parties in this matter filed their own separate motions in limine. Oral argument was heard on these motions on November 2, 3, and 4, 2021. The Court addresses PHC-Elko, Inc. dba Northeastern Nevada Regional Hospital ("NNRH")'s motions in limine below.

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1 **1. Motion in Limine 1 to Preclude Argument or Evidence Regarding Post-Incident Investigation by**
2 **the Hospital.**

3 Defendant NNRH seeks to preclude as irrelevant the admission of any evidence regarding any after-
4 the-fact investigations it conducted into Douglas Schwartz's death. NNRH also argues that any post-
5 incident investigation is privileged as a subsequent remedial measure under NRS 439.830-890. Plaintiff
6 argues that post-incident investigations will be relevant if the Court allows punitive damages to be assessed
7 against NNRH; even if not, however, Plaintiff argues that evidence of these investigations, and of "critical
8 events" both before and after Schwartz's death, should still be allowed as relevant, unprivileged, and not
9 covered under NRS 439.830-890.

10 As a preliminary matter, the Court does not address Plaintiff's punitive damages argument in this
11 motion and instead will address it in the motion in which it was filed. Plaintiff's remaining argument asks
12 the Court to admit evidence of ante- and post-death "critical events," which she says are relevant without
13 ever providing the Court with any specific description of what these events are or why the ones that
14 occurred post-death are relevant. Relatedly, Plaintiff argues that post-death remedial measures may be
15 admissible under NRS 48.095 when offered for a purpose other than to prove liability, such as to prove
16 ownership, control, feasibility of precautionary measures, or impeachment. Plaintiff again does not provide
17 any specific information as to what post-death remedial measures she believes could be used to show
18 ownership, control, feasibility of precautionary measures, or used to impeach a witness. Without providing
19 any specifics as to how anything that occurred after Mr. Schwartz's death is relevant to a judicial
20 determination of the cause of that death, the Court is inclined to agree with Defendant that nothing post-
21 death meets the requirements for relevance under NRS 48.015. Defendant NNRH's Motion in Limine 1
22 is therefore GRANTED.

23 ///

24 ///

25 ///

26 ///

1 **2. Motion in Limine 2 to Preclude Argument or Evidence Regarding the Trauma Cart.**

2 Defendant NNRH next seeks to preclude any argument or evidence relating to whether the trauma
3 cart was improperly stocked at the time of Schwartz's death. Defendant argues that there are only two
4 sources of evidence relating to the trauma cart, Nurse Donna Kevitt's occurrence report and Dr. Seth
5 Womack's deposition testimony, and both are inadmissible. Defendant argues that Nurse Kevitt's
6 occurrence report, which indicates that something was missing from the trauma cart, is inadmissible as a
7 post-incident remedial measure under NRS 48.095. Defendant argues that Dr. Womack's deposition
8 testimony, which states that it was reckless for the hospital to have inadequately stocked the trauma cart,
9 is irrelevant and likely to confuse a jury because Womack himself admits that he has no idea what, if
10 anything, was missing from the trauma cart or how that missing item caused Schwartz's death. Defendant
11 lastly argues that if Kevitt's report is neither irrelevant nor excluded under NRS 48.095, that it is
12 inadmissible hearsay.

13 Plaintiff argues that the trauma cart evidence is relevant "to tell the story of the case," as well as to
14 impeach some witnesses whose stories have changed. Plaintiff argues that the report is not inadmissible
15 hearsay because it falls under the business record and/or state of mind exceptions to the hearsay rule.
16 Plaintiff argues that Womack did provide a causation opinion when he stated that inadequate equipment
17 availability was a contributing factor to Schwartz's death, and that it is not improper for Womack to
18 comment on other witnesses suddenly forgetting what was missing from the trauma cart.

19 Nurse Kevitt's occurrence report seems clearly to be a post-incident remedial measure. The
20 hospital's occurrence report policy states that the purpose of these reports is, among other things, to reduce
21 the risk of negative events reoccurring, and to identify changes that must be made to hospital procedure to
22 this end. This report is thus clearly inadmissible under NRS 48.095. Further, although Kevitt's report lists
23 "inadequate equipment availability" as a contributing factor to Schwartz's death, Nurse Kevitt could not
24 identify what items from the trauma cart were missing; the only items she could remember people leaving
25 the room to get were items, such as the King airway, extra suction, and bougie, that would never have been
26 stored in the cart in the first place. Kevitt admitted that she does not know how to use these devices or even

1 what the difference between them is; it is thus unclear how Kevitt made the determination that these or
2 other items not being on the cart contributed to Schwartz's death. Dr. Womack's opinion that NNRH was
3 reckless when it inadequately stocked the cart, and that this recklessness caused or contributed to
4 Schwartz's death, is based entirely on Kevitt's report as he, too, admitted that he had no idea what items,
5 if any, were missing from that trauma cart. This is supposition stacked upon supposition. As Kevitt's report
6 is inadmissible under NRS 48.095, and as the probative value of both her and Womack's reports is
7 substantially outweighed by "the danger of unfair prejudice, of confusion of the issues or of misleading the
8 jury," under NRS 48.035, Defendant's Motion in Limine 2 is GRANTED.

9
10 **3. Motion in Limine 3 to Preclude Argument or Evidence Regarding Credentialing.**

11 Defendant next argues that Plaintiff should be prohibited from raising credentialing-related
12 arguments against it for two reasons: a) no credentialing claim related to NNRH and REACH Air personnel
13 appears anywhere in Plaintiff's Complaint or in her expert medical reports; and b) the credentialing claim
14 which does appear in Plaintiff's Complaint (related to NNRH and Dr. Garvey) is directly contradicted by
15 the only credentialing-related information that appears in Plaintiff's expert medical reports. Defendant
16 therefore asks the Court to preclude any argument relating to either the unpled claim or the contradicted
17 claim. Plaintiff argues that both credentialing claims are subsumed into the corporate negligence allegations
18 in her Complaint, and that her expert, Dr. Burroughs, supplemented his written expert reports with
19 deposition testimony directly addressing the NNRH/REACH Air credentialing issue. The Court addresses
20 each issue in turn.

21
22 **a. NNRH/REACH Air Credentialing Claim.**

23 Defendant NNRH argues that there is nothing in the Third Amended Complaint to put it on notice
24 that Plaintiff is making any NNRH/REACH Air credentialing claims; the Court agrees. In terms of
25 credentialing-related issues, Plaintiff's Third Amended Complaint only alleges that NNRH "failed through
26 their credentialing and re-credentialing process to employ and or grant privileges to an emergency room

1 physician with adequate training....” This allegation differs from Plaintiff’s new allegation against NNRH
2 in two key ways: firstly, the Complaint states that NNRH gave credentials and/or privileges to someone
3 who should not have received them. Plaintiff’s new allegation against NNRH states that NNRH *did not*
4 *grant* any credentials or privileges to REACH personnel. Secondly, Plaintiff’s Complaint states that the
5 hospital should not have given an emergency room *physician* the privileges or credentials which NNRH
6 gave him, whereas Plaintiff’s new allegation is that the hospital should not have let an unqualified *flight*
7 *nurse and flight paramedic* perform services in the emergency room. Contrary to Plaintiff’s assertions,
8 these new allegations are therefore clearly not subsumed into Plaintiff’s previous credentialing claims. Any
9 testimony related to NNRH allowing REACH personnel into the emergency room without proper
10 credentials and/or privileges does not have a tendency to make a fact at issue more or less probable than
11 it would be without the testimony; this testimony is therefore not relevant pursuant to NRS 48.015.
12 Defendant’s Motion in Limine 3 is GRANTED as to the NNRH/REACH credentialing issue.

13
14 **b. NNRH/Dr. Garvey Credentialing Claim.**

15 Defendant NNRH next states that, although Plaintiff’s Third Amended Complaint does state a claim
16 against NNRH for negligent credentialing and/or privileging of Dr. Garvey, this claim is directly
17 contradicted by Plaintiff’s expert deposition testimony and therefore should not be permitted. Plaintiff does
18 not address Defendant’s credentialing argument in regards to Dr. Garvey.

19 The issue with Plaintiff’s Garvey-credentialing allegations against NNRH is essentially the opposite
20 of the issue with Plaintiff’s REACH-credentialing allegations against NNRH. Whereas the REACH
21 allegations *do not* appear in the Complaint, but *do* appear in one of Dr. Burroughs’ medical expert reports,
22 the Garvey allegations *do* appear in the Complaint, but *do not* appear in any of the medical expert reports.
23 In fact, Dr. Burroughs’s initial expert report explicitly states that he saw Garvey’s credentialing material
24 and found him well-trained and qualified. Dr. Burroughs’ Expert Report, at 22. The parties’ expert
25 witnesses may not testify to opinions not disclosed in their expert reports. NRCP 16.1(2)(B)(i). As Dr.
26 Burroughs specifically opined that Dr. Garvey was well-trained and qualified, he therefore cannot at the

1 time of trial offer the new opinion that Garvey should not have been credentialed by NNRH. Defendant
2 NNRH's Motion in Limine 3 is therefore GRANTED as to the Garvey credentialing allegations.

3
4 **4. Motion in Limine 4 to Limit Testimony of John Patton, MD.**

5 Defendant NNRH next seeks to limit the testimony of Schwartz family friend Dr. John Patton to
6 non-hearsay lay witness testimony. Specifically, NNRH wishes to preclude Dr. Patton from testifying his
7 criticisms of the decision to intubate Schwartz, and to prevent him from testifying that he heard someone
8 on NNRH hospital staff scream out that Mrs. Schwartz should sue the hospital. Plaintiff states only that Dr.
9 Patton should be allowed to testify as a lay witness to his observations and opinions rationally based on
10 those observations.

11 All parties agree that Dr. Patton has not been qualified as an expert witness in this case and so is
12 limited to testifying as to his relevant observations and opinions rationally based upon those observations.
13 NRS 48.015; NRS 48.025; NRS 50.265. Patton's opinion that Schwartz should not have been intubated
14 is an expert opinion based on Patton's medical knowledge, not on his general observations. As he has not
15 been qualified as an expert witness, he cannot give this testimony in court. Defendant's Motion in Limine
16 4 is GRANTED as to Dr. Patton's opinions as to whether Schwartz should have been intubated.

17 Dr. Patton next seeks to testify that he heard someone at the hospital scream out that Mrs. Schwartz
18 should sue. This is an out of court statement provided to prove the truth of the matter asserted and so is
19 hearsay evidence under NRS 51.035. Plaintiff has not identified any exceptions to the hearsay rule that
20 would allow in this statement from an unknown declarant. Defendant's Motion in Limine 4 is therefore also
21 GRANTED as to the hospital scream.

22
23 **5. Motion in Limine 5 to Preclude Discussion Regarding the Residence of Defense Counsel.**

24 Defendant NNRH next seeks to preclude as irrelevant any discussion of the fact that Defense
25 Counsel and/or their firms are not local to Elko County and/or the state of Nevada. Plaintiff does not oppose
26 this motion and only asks that it be reciprocal. The Court agrees that the fact that none of the attorneys or

1 firms in this case are local to Elko, and that some of the attorneys and firms in this case are not local to
2 Nevada, does not make any fact at issue in this case more or less probable. This information is therefore
3 irrelevant pursuant to NRS 48.015. Defendant's Motion in Limine 5 is therefore GRANTED, as is
4 Plaintiff's request that the prohibition against discussion of attorney/firm locations be made reciprocal to
5 all parties.

6
7 **6. Motion in Limine 6 to Preclude Reference to Pretrial Motion Practice and/or Discovery Disputes.**

8 Defendant next asks this Court to preclude any reference to discovery disputes in this case as they
9 are issues which have already been resolved and rehashing them in front of the jury will only serve to
10 confuse the jury and waste time. Plaintiff argues that these disputes may become relevant at trial; that the
11 parties' representations of facts in those discovery motions remain relevant to the parties' ability to argue
12 this case; and that, to the extent that this motion is seeking to preclude reference to this Court's prior orders,
13 it is inappropriate and must be denied.

14 The Court agrees with Defendant that the existence of prior, already-resolved, discovery disputes
15 is not relevant to this case; it does not make the existence of a fact at issue more or less probable. NRS
16 48.015. Referencing disputes that this Court has already resolved is obviously different from referencing
17 relevant facts, or the parties' different interpretation of facts, so long as those facts are not ones which this
18 Court has specifically excluded from presentation at trial. This is also obviously different from asking not
19 to be bound by the Court's previous orders, neither of which requests is actually being made by Defendant
20 NNRH. Defendant's Motion in Limine 6 is GRANTED.

21
22 **7. Motion in Limine 7 to Preclude Plaintiff from Arguing that Defendant did not Call All or Any of**
23 **its Witnesses.**

24 Defendant NNRH next asks the Court to prohibit Plaintiff from suggesting a negative inference
25 should Defendant not call every one of its eighty disclosed witnesses. Plaintiff argues that NRS 47.250(3)
26 allows for the rebuttable presumption that evidence willfully suppressed is adverse to be presented to the

1 jury; Plaintiff argues that a witness disclosed but not presented is such willfully-suppressed evidence.

2 In order for Plaintiff's presumption to apply, the Court must find that "the witness is available to
3 testify and the circumstances create a suspicion that the failure to call the witness has been a willful attempt
4 to withhold competent evidence." Langford v. State, 95 Nev 631, 637 (1979). The mere fact of failure to
5 call a witness on its own thus does not suffice. At trial, should Plaintiff believe that she has evidence that
6 a witness was not called in an attempt to withhold evidence, the Court will excuse the jurors and allow the
7 parties to present this evidence and argue as to whether the NRS 47.250 presumption applies. Outside of
8 the Court granting such a motion, however, Plaintiff shall not argue that a witness not-called is indicative
9 of suppressed evidence. Defendant's Motion in Limine 7 is therefore GRANTED.

10
11 **8. Motion in Limine 8 to Preclude Argument or Evidence Regarding Negligent or Inadequate**
12 **Staffing.**

13 Defendant NNRH next seeks to prevent Plaintiff from stating that the NNRH emergency room was
14 understaffed, or making any other mention of staffing shortages or staffing shortage complaints made by
15 NNRH nurses. Defendant argues that none of Plaintiff's experts have stated that understaffing caused or
16 contributed to Schwartz's death. Allowing Plaintiff to make this argument unsupported by any expert
17 testimony would therefore be unduly prejudicial and outweigh any probative value of any proposed
18 understaffing evidence. Plaintiff argues that her expert witness, Dr. Burroughs, is qualified as a hospital
19 administrative expert to talk about hospital staffing issues and whether those issues caused or were related
20 to Schwartz's death.

21 Although Burroughs is an expert witness who is qualified to talk about hospital administrative
22 issues, such as internal hospital policies and possibly even staffing issues, Burroughs may not provide
23 testimony at trial outside of what he disclosed in his expert reports. NRCP 16.1(2)(B)(i). Burroughs has
24 never opined that any staffing issues at NNRH caused or were in any way related to Schwartz's death.
25 Burroughs may therefore not produce a totally previously-undisclosed causation opinion at trial. Defendant
26 NNRH cannot be held liable for professional negligence "unless evidence consisting of expert medical

1 testimony, material from recognized medical texts or treatises or the regulations of the licensed medical
2 facility [...] is presented to demonstrate the alleged deviation from the accepted standard of care in the
3 specific circumstances of the case and to prove causation of the alleged personal injury or death." NRS
4 41A.100. As Plaintiff has no expert medical testimony, recognized medical texts or treatises, or NNRH
5 regulations to show that NNRH understaffing deviated from the standard of care and caused Schwartz's
6 death, Plaintiff cannot now place her unsupported understaffing argument before the jury. Plaintiff therefore
7 is precluded from offering argument or evidence of NNRH understaffing now. Defendant's Motion in
8 Limine 8 is GRANTED.

9
10 **9. Motion in Limine 9 Regarding Reference to Defendant's Corporate Status.**

11 Defendant asks this Court to preclude any reference to the fact that NNRH, a Nevada corporation,
12 is affiliated with LifePoint Health, Inc., f/k/a LifePoint Hospitals, Inc., a Tennessee corporation. LifePoint
13 has never been a named party in this matter; Defendant believes that Plaintiff will attempt to use NNRH's
14 connection to LifePoint to imply that Defendant is a wealthy corporation and/or that it places profit above
15 patient health. Plaintiff argues that Defendant's corporate status is relevant to whether its conduct was
16 reasonable, meaning whether it had the resources such that it was unreasonable for it not to better protect
17 its patients.

18 Evidence is relevant if "it has any tendency to make the existence of any fact that is of consequence
19 to the determination of the action more or less probable than it would be without the evidence." NRS
20 48.015. The Court agrees with NNRH that its size, corporate structure, and wealth do not make the
21 existence of any fact of consequence in this case more or less probable; they have no bearing on its duties
22 to Plaintiff or any other party, or on whether it breached those duties, or whether that breach caused Plaintiff
23 harm. Bringing NNRH's corporate structure in would only serve to confuse the jury and waste court time.
24 NNRH's Motion in Limine 9 is GRANTED.

25 ///

26 ///

1 **10. Motion in Limine 10 Regarding Cumulative Expert Testimony.**

2 Defendant NNRH next argues that Dr. Burroughs' standard of care and causation opinions should
3 be barred as cumulative to the opinions of Drs. Womack and Grey, respectively. NNRH argues that both
4 Womack and Burroughs opine that Schwartz was at a high risk of aspiration because of his full stomach;
5 that Schwartz should have been removed from the rigid backboard and positioned differently; that the
6 proper equipment needed to be at Schwartz's bedside; and that Garvey should have performed the
7 cricothyrotomy earlier. Defendant argues that Burroughs and Grey both testify that the cause of Schwartz's
8 death was the aspiration event and not blunt-force trauma. Plaintiff argues that Dr. Burroughs' testimony
9 is mainly aimed at addressing systemic hospital-level policy failures on the part of NNRH, whereas Drs.
10 Grey and Womack focus primarily on the causes of Schwartz's death (Dr. Grey) and the negligence of Dr.
11 Garvey (Womack). Plaintiff thus argues that although Burroughs' testimony overlaps with that of Drs.
12 Womack and Grey in parts, it is not needlessly cumulative such that it needs to be excluded.

13 Where evidence is relevant, as it appears all parties agree the testimony of Drs. Womack,
14 Burroughs, and Grey is, it may still be excluded if "its probative value is substantially outweighed by
15 considerations of undue delay, waste of time or needless presentation of cumulative evidence." NRS
16 48.035(2). The Court does not find the partial overlap between Burroughs and Grey, and between
17 Burroughs and Womack, to be "needlessly cumulative." Defendant NNRH's Motion in Limine 10 is
18 DENIED.

19
20 **11. Motion in Limine 11 to Bar Certain Opinions of Plaintiff's Retained Hospital Administration**
21 **Expert Dr. Burroughs.**

22 Defendant NNRH next seeks to exclude the following testimony from Dr. Burroughs: 1) whether
23 Schwartz's death was reported to a medical board or to the Schwartz family; 2) Dr. Burrough's now-
24 retracted opinion that NNRH should have been designated as a Level III or IV Trauma Center; 3) Dr.
25 Burroughs' opinions on the nursing standard of care or chain of command; 4) Dr. Burroughs' opinions
26 relating to the profitability of NNRH; 5) Dr. Burroughs' opinions relating to NNRH's CMS Rating or

1 Medicare stars; and 6) Dr. Burroughs' opinions relating to a lack of unspecified equipment or policies
2 causing Schwartz's death.

3 Evidence is relevant when it tends to make the existence of a fact at issue more or less probable.
4 NRS 48.015. Events that occurred after Schwartz's death, such as reporting the fact of the death to a
5 medical board or the Schwartz family, does not make any parties' negligence more or less probable and is
6 thus not relevant. The same is true for NNRH's Trauma Center Level, its profitability, its CMS Rating, or
7 its Medicaid stars. None of these measures of hospital success relate to Mr. Schwartz's death, or make
8 negligence leading to that death any more or less likely. The Court therefore finds that none of these issues
9 are relevant and GRANTS NNRH's Motion in Limine 11 as to all of these opinions.

10 Dr. Burroughs' opinions on the nursing standard of care, chain of command, and whether lack of
11 policies and equipment caused Schwartz's death could make facts at issue more or less likely and thus are
12 relevant; the Court thus addresses these two categories of opinion separately.

13
14 **a. Nursing Standard of Care and Chain of Command.**

15 NNRH argues that Dr. Burroughs does not have the specialized knowledge to testify as an expert
16 about the nursing standard of care or the hospital's chain of command policy. Plaintiff argues that
17 Burroughs' experience as a physician and as a hospital administrator have given him the specialized
18 knowledge to discuss the nursing standard of care and the hospital's chain of command policy. To
19 determine whether an expert has the requisite specialized knowledge to testify in a given area, "a district
20 court should consider the following factors: (1) formal schooling and academic degrees, (2) licensure, (3)
21 employment experience, and (4) practical experience and specialized training. We note that these factors
22 are not exhaustive, may be accorded varying weights, and may not be equally applicable in every case."
23 Hallmark v. Eldridge, 124 Nev 492, 499 (2008). Although Burroughs has training and experience as a
24 licensed physician and as a hospital administrator, he does not have training or experience as a nurse. He
25 therefore may not testify as to the nursing standard of care; Defendant NNRH's Motion in Limine 11 is
26 GRANTED as to the nursing standard of care. As a hospital administrator who helped prepare hospital

1 policies, Burroughs is qualified to testify as to hospital chain of command policies. Defendant NNRH's
2 Motion in Limine 11 is therefore DENIED as to hospital chain of command policies.

3
4 **b. Whether Lack of Certain Policies or Equipment Caused Schwartz's Death.**

5 Defendant NNRH next argues that Burroughs should be prohibited from testifying that unspecified
6 policies or equipment issues were the cause of Schwartz's death. Plaintiff argues that, as a hospital
7 administrator, Burroughs is qualified to discuss the policy and equipment failures that led to Schwartz's
8 death. Plaintiff identifies specific opinions of Burroughs towards this end, such as the lack of a "trauma
9 team" procedure, which could have brought more skilled professionals into the emergency room to assist
10 in Schwartz's care when it became clear that Garvey et al. were unable to do so on their own. NNRH's
11 Motion in Limine 11 is therefore DENIED as to hospital policies.

12 Similarly, as both a physician and hospital administrator who has created policies and procedures
13 for hospitals, Burroughs is qualified to know and testify to what items should be in a trauma cart. As
14 Burroughs' expert reports do not identify any missing item from the trauma carts, and as Burroughs'
15 deposition testimony indicates that Burroughs did not believe any item used or missing from the trauma
16 cart caused Schwartz's death, Burroughs may not contradict that opinion now. Thus, with the caveat that
17 Burroughs does have the specialized knowledge to testify as to what items should be part of a trauma cart,
18 Defendant NNRH's Motion in Limine to exclude trauma cart testimony that contradicts his expert reports
19 and/or depositions is GRANTED.

20
21 **12. Motion in Limine 12 to Preclude Plaintiff from Using the "Reptile Method" to Indoctrinate**
22 **Jurors.**

23 Defendant NNRH next ask the Court to preclude Plaintiff from asking questions or making
24 arguments based on "reptile theory" as it believes these arguments violate the Golden Rule against asking
25 jurors to place themselves in Plaintiff's shoes. Defendant defines "reptile theory" arguments as appealing
26 to jurors' primitive self-preservation and community safety instincts to overpower their higher cognitive

1 and emotional functions. The “reptile theory” encourages jurors to act as the conscience of the community
2 and send a message to Defendants. Plaintiff argues that “reptile theory” arguments do not violate the
3 Golden Rule, as they only ask the jurors to consider the safety of the community and/or send a message to
4 a defendant where those goals are supported by the evidence presented.

5 Plaintiff is correct that the Nevada Supreme Court has stated that arguments asking jurors to act as
6 the conscience of the community and/or send a message to Defendant are allowable in civil cases so long
7 as Plaintiff does not ask the jury to ignore the evidence to do so. Lioce v. Cohen, 124 Nev 1 (2008); El
8 Dorado Hotel v. Brown, 100 Nev 622, 629 (1984); Pizarro-Ortega v. Cervantes-Lopez, 133 Nev 261, 269
9 (2017). Plaintiff can thus appeal to jurors’ “reptilian brain” by asking them to focus on these questions of
10 community safety and/or whether it is appropriate to “send a message” to Defendant so long as Plaintiff
11 does not ask the jurors to ignore the evidence to do so, and so long as Plaintiff does not extend the “reptile
12 theory” into asking the jury to place itself in Plaintiff’s shoes, in violation of the Golden Rule. Aidini v.
13 Costco Wholesale Corp., No. 2:15-cv-00505-APG-GWF, 2017 U.S. Dist. LEXIS 55863 (D. Nev. Apr. 12,
14 2017). Defendant has failed to show any specific problematic argument that should be prevented other than
15 arguing that Plaintiff should be prevented from providing incorrect or misleading versions of the standard
16 of care to the jury; Plaintiff shall not misstate the standard of care to the jury, regardless of whether she does
17 or does not use “reptile theory” arguments. Should Defendant object to any specific statements by Plaintiff
18 at trial as being violative of the Golden Rule, misstating the standard of care, or as encouraging jury
19 nullification, the Court will rule on those objections as they come. Defendant’s Motion in Limine 12 is thus
20 DENIED.

21 ///

22 ///

23 ///

1 **13. Motion in Limine 13 to Preclude Argument or Evidence Regarding Negligence/Criticism of**
2 **Nursing or Other Hospital Staff.**

3 Defendant NNRH next seeks to exclude any criticisms of NNRH nurses and other staff as not being
4 supported by expert testimony which can tie any allegations of negligence to the harm suffered by
5 Schwartz. NNRH further alleges that none of Plaintiff's experts have disclosed any written or oral
6 testimony criticizing NNRH nursing staff. Plaintiff argues that her experts have disclosed opinions
7 criticizing NNRH nursing care. Specifically, Plaintiff cites to page 12 of Dr. Womack's expert report,
8 which states that NNRH "breached the applicable standard of care by not completely stocking the trauma
9 cart that was used in the care of Mr. Schwartz." Plaintiff argues that, as nursing staff are responsible for
10 stocking the trauma cart, and as the nurses are employees of NNRH, NNRH is vicariously liable for its
11 nurses' negligence under the theory of respondeat superior.

12 Dr. Womack refers to the trauma cart and/or crash cart in two separate places in his expert report:
13 initially on page 12, and in more depth on pages 26 and 27. He cites to Nurse Kevitt's occurrence report
14 stating that equipment unavailability was a contributing factor to Schwartz's death as his reason for stating
15 that the hospital, through its nursing personnel, was reckless. Womack cannot identify what was missing
16 or how what was missing caused or contributed to Schwartz's death. Pursuant to NRS 41A.100(1),
17 "Liability for personal injury or death is not imposed upon any provider of health care based on alleged
18 negligence in the performance of that care unless evidence consisting of expert medical testimony [...] is
19 presented to demonstrate the alleged deviation from the accepted standard of care in the specific
20 circumstances of the case and to prove causation of the alleged personal injury or death." Womack's trauma
21 cart testimony, the only testimony that Plaintiff alleges relates to NNRH nursing staff negligence, therefore
22 does not establish a basis for finding professional negligence liability against NNRH. As it does not make
23 the existence of a fact at issue, in this case, NNRH negligence in the death of Douglas Schwartz, more or
24 less probable, the nursing trauma cart testimony is therefore not relevant under NRS 48.015. Defendant's
25 Motion in Limine 13 is therefore GRANTED.

1 **14. Motion in Limine 14 Regarding Anonymous Call.**

2 Defendant NNRH next asks the Court to bar testimony regarding a phone call that Plaintiff received
3 as inadmissible hearsay. Plaintiff alleges that the phone call shows Plaintiff's state of mind, and explains
4 why Plaintiff began investigating into her husband's death. Essentially, the phone call at issue is actually
5 a chain of three phone calls, to wit: 1) an anonymous caller to Amber Miller, a woman who attends the
6 same stake¹ of the Church of Jesus Christ of Latter-Day Saints ("LDS Church") as Plaintiff; 2) Amber
7 Miller to Marie Johnson, the Relief Society President of Plaintiff's ward in the LDS Church; 3) Marie
8 Johnson to Plaintiff. Ms. Miller indicated that the anonymous caller told her that Plaintiff should request
9 Douglas Schwartz's medical records from NNRH because Schwartz "shouldn't have died." Amber Miller
10 Dep., 11:7-8.

11 Pursuant to NRS 51.035 and NRS 51.065, an out-of-court statement offered to prove the truth of
12 the matter asserted in that statement is inadmissible hearsay evidence. Where an out-of-court statement is
13 not offered for its truth value, however, the hearsay rule is not invoked. McCallister v. State, 130 Nev 1215
14 (2014). A statement offered for its effect on the listener is therefore not hearsay. Wallach v. State, 106 Nev
15 470, 473 (1990). As each of the three phone calls is being offered to show its effect on the listener of that
16 call, i.e., the effect of the anonymous call was to make Miller call Johnson, and the effect of that call was
17 to make Johnson call Plaintiff, none of these phone calls is inadmissible hearsay. Defendant's Motion in
18 Limine 14 is therefore DENIED.

19
20 **15. Motion in Limine 15 Regarding Financial Motive.**

21 Defendant NNRH next seeks to exclude any reference to the wealth of the hospital, or any argument
22 that NNRH was financially motivated to profit from Schwartz's death, as irrelevant and unduly prejudicial
23 under NRS 48.015 and NRS 41A.100. Plaintiff argues that NNRH's financial status and financially-caused
24 staffing issues are relevant to questions of bias, and that Dr. Burroughs' expert report links NNRH's
25 financial issues to policy and staffing failures that led to Schwartz's death. Plaintiff also argues that if the

26

¹A stake in the LDS Church is a collection of wards. A ward is essentially a local congregation.

1 Court allows punitive damages to be assessed, NNRH's wealth will become relevant.

2 Plaintiff has not sought leave to amend to impose punitive damages against NNRH; the hospital's
3 wealth is therefore not relevant to a punitive damages calculation at this point in time. Plaintiff has also
4 failed to explain any rational link between the hospital's wealth or financial distress and the hospital
5 providing biased testimony; likewise, there has been no rational argument made that NNRH somehow
6 profited more from its patient's death than it would have from saving his life. Lastly, the Court notes that
7 while Dr. Burroughs has many criticisms of NNRH's administration and policies, he never states that
8 NNRH's financial problems led the hospital to cut corners in such a way that patients were endangered.
9 Plaintiff has tried to shoehorn this opinion into Dr. Burroughs' reports by referencing an Elko Daily Free
10 Press article about nursing staff shortages in 2016. Again, there has been no evidence or expert testimony
11 provided to show that either nursing staff shortages, financial issues, or both at NNRH caused Schwartz's
12 death. The Court therefore finds that NNRH's wealth, financial distress, or budget-related staff shortages
13 are not relevant to the question of Schwartz's death. Defendant NNRH's Motion in Limine 15 is therefore
14 GRANTED.

15
16 **16. Motion in Limine 16 Regarding Reckless Conduct.**

17 Defendant NNRH next seeks to prohibit Plaintiff from arguing that the hospital "acted with reckless
18 conduct or was otherwise grossly negligent." NNRH argues that, as the Court has already prohibited
19 Plaintiff from amending the Complaint to add punitive damages against the hospital, Plaintiff is also
20 prohibited from arguing reckless conduct and gross negligence. Plaintiff argues that the Court may
21 reconsider its decision denying Plaintiff's motion to impose punitive damages against the hospital at any
22 time prior to appeal; regardless of punitive damages, however, Plaintiff states that nothing in the law
23 prevents her from arguing that NNRH was more culpably negligent than the mere negligence that would
24 suffice to make NNRH liable.

25 The Court has already ruled as to the imposition of punitive damages on NNRH and will not
26 reconsider that Order now; as to the question of arguing a higher level of culpability against Defendants,

1 however, the Court agrees with Plaintiff. There is no reason that Plaintiff cannot argue that NNRH was
2 more negligent than is strictly necessary for a jury to find the hospital liable, so long as that argument is
3 supported by admissible evidence in the form of "expert medical testimony, material from recognized
4 medical texts or treatises or the regulations of the licensed medical facility wherein the alleged negligence
5 occurred." NRS 41A.100. Defendant's Motion in Limine 16 is DENIED.

6
7 **17. Motion in Limine 17 Regarding Dr. Burroughs as a Fact Witness.**

8 Lastly, Defendant NNRH asks that this Court prevent Plaintiff's expert witness, Dr. Burroughs,
9 from referring to himself as a "fact" or "lay" witness, or from stating or implying that he has "special
10 knowledge" of this case or from stating or implying that he has special knowledge of the lay witnesses
11 being called in this case or opinions relating to the character of those witnesses. Defendant argues that Dr.
12 Burroughs is simply providing opinions about other experts' opinions, and that Burroughs has made clear
13 that those opinions are not stated to a reasonable degree of medical probability. Plaintiff argues that Dr.
14 Burroughs is aware that he is an expert witness and not a lay witness and that all of his opinions are expert
15 opinions stated to a reasonable degree of medical probability under NRS 50.275.

16 As a preliminary matter, all parties agree that Dr. Burroughs has been brought in to testify based
17 on his training and experience as a physician and hospital administrator; he is not testifying to his own
18 personal knowledge or observations of the persons or events involved in this case. Burroughs is therefore
19 an expert witness under NRS 50.275 and his opinions are limited pursuant to NRS 50.260—NRS 50.350.
20 To avoid confusing the jury, then, Dr. Burroughs shall avoid referring to himself as a "fact" witness or "lay"
21 witness. NRS 48.035(1).

22 Defendant further argues that Burroughs should not be allowed to opine on other witnesses'
23 testimony because those opinions are not given to a reasonable degree of medical probability, and so are
24 neither relevant nor the product of a reliable methodology. Defendant bases this on Burroughs' deposition
25 testimony where he indicated that, during previous court cases, he has been allowed to testify that he
26 disagreed with other witness' opinions based on his training, background, and experience. As an expert

1 witness, Burroughs' role is to provide opinions to the fact-finder about relevant issues in the case, where
2 those opinions are based on his specialized knowledge, training, and experience, those opinions are limited
3 to the scope of that knowledge, training, and experience, and where those opinions will assist the trier of
4 fact to understand the evidence or determine a fact in issue. NRS 50.275. That is exactly what Burroughs
5 has stated that he is doing when he agrees or disagrees with other expert witnesses. As Defendant has based
6 its objection to Burroughs' testimony on this quote about Burroughs' general practices when testifying,
7 Defendant has not shown how these opinions would be irrelevant or the product of an unreliable
8 methodology. Should a specific unreliable or irrelevant opinion be produced at court, Defendant may of
9 course object to it then. Other than prohibiting Burroughs from referring to himself as a "fact" or "lay"
10 witness, then, Defendant's Motion in Limine 17 is DENIED.

11 IT IS SO ORDERED this 12th day of July, 2022.

12
13 
14 KRISTON N. HILL
15 DISTRICT JUDGE - DEPARTMENT 1
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CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I hereby certify that I am an employee of the Fourth Judicial District Court, Department 1, and that on this 4th day of July, 2022, I deposited for mailing in the U.S. mail at Elko, Nevada, postage prepaid, a true file-stamped copy of the foregoing order addressed to:

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FILED

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IN THE FOURTH JUDICIAL DISTRICT COURT OF THE
STATE OF NEVADA, IN AND FOR THE COUNTY OF ELKO

DIANE SCHWARTZ, individually and as Special
Administrator of the Estate of DOUGLAS R.
SCHWARTZ, deceased;

Plaintiff,

v.

DAVID GARVEY, M.D., an individual; TEAM
HEALTH HOLDINGS, INC., dba RUBY CREST
EMERGENCY MEDICINE; PHC-ELKO, INC.,
dba NORTHEASTERN NEVADA REGIONAL
HOSPITAL, a domestic corporation duly authorized
to conduct business in the State of Nevada; REACH
AIR MEDICAL SERVICES, L.L.C., DOE
BARRY, R.N., DOES I through X; ROE
BUSINESS ENTITIES XI through XX, inclusive,

Defendants.

Case No. CV-C-17-439

Dept. No. 1

**NOTICE OF ENTRY OF ORDER
REGARDING ALL PARTIES' MOTIONS
FOR SUMMARY JUDGMENT**

PLEASE TAKE NOTICE that the Order Addressing All Parties' Motions for Summary Judgment was entered on July 12th, 2022, a true and correct copy of which is attached hereto.

DATED this 8th day of August, 2022.

KIRTON McCONKIE

By: /s/ James T. Burton
James T. Burton
Austin Westerberg
*Attorneys for Defendant REACH Air Medical Services,
LLC*

AFFIRMATION PURSUANT TO NRS 239B.030

Pursuant to NRS 239B.030, the preceding document does not contain the social security number of any individual.

DATED this 8th day of August 2022.

KIRTON McCONKIE

/s/ James T. Burton

James T. Burton

Austin D. Westerberg

KIRTON McCONKIE

*Attorneys for Defendant REACH Air Medical
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this ____ day of August 2022, I caused to be served a true copy of the foregoing by the method indicated below, to the following:

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