IN THE SUPREME COURT OF THE STATE OF NEVADA

PHC-ELKO, INC., D/B/A NORTHEASTERN NEVADA REGIONAL HOSPITAL,

Petitioner,

vs.

THE FOURTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF ELKO; AND THE HONORABLE KRISTON N. HILL, DISTRICT JUDGE,

Respondents,

and

DIANE SCHWARTZ, INDIVIDUALLY AND AS SPECIAL ADMINISTRATOR OF THE ESTATE OF DOUGLAS R. SCHWARTZ,

Real Party in Interest.

No. 85588

ANSWER TO PETITION FOR WRIT OF MANDAMUS

Sean K. Claggett, Esq.
sean@claggettlaw.com
Nevada Bar No. 8407
Jennifer Morales, Esq.
jmorales@claggettlaw.com
Nevada Bar No. 8829
Shirley Blazich, Esq.
shirley@claggettlaw.com
Nevada Bar No. 8378

Micah S. Echols, Esq.
micah@claggettlaw.com
Nevada Bar No. 8437
David P. Snyder, Esq.
david@claggettlaw.com
Nevada Bar No. 15333
Charles L. Finlayson, Esq.
charlie@claggettlaw.com
Nevada Bar No. 13685

CLAGGETT & SYKES LAW FIRM
4101 Meadows Lane, Suite 100
Las Vegas, Nevada 89107
(702) 655-2346 – Telephone
Attorneys for Real Party in Interest, Diane Schwartz

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the Justices of this Court may evaluate possible disqualification of recusal.

1. Diane Schwartz is an individual.

2. Claggett & Sykes Law Firm represents Diane Schwartz in the District Court and in this Court.

Dated this 4th day of January 2023.

CLAGGETT & SYKES LAW FIRM

/s/ Charles L. Finlayson

Sean K. Claggett, Esq.
Nevada Bar No. 8407
Jennifer Morales, Esq.
Nevada Bar No. 8829
Shirley Blazich, Esq.
Nevada Bar No. 8378
Micah S. Echols, Esq.
Nevada Bar No. 8437
David P. Snyder, Esq.
Nevada Bar No. 15333
Charles L. Finlayson, Esq.
Nevada Bar No. 13685

Attorneys for Real Party in Interest

TABLES OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

I. ROUTING STATEMENT

Although the Petitioner PHC-ELKO, Inc., d/b/a Northeastern Nevada Regional Hospital ("NNRH") argues that the Nevada Supreme Court should retain this matter because it involves a matter of statewide importance (the interpretation and application of NRS 41.503), NNRH does not ask this Court to newly interpret the statute and simply disputes the lower court's factual findings. And although NNRH argues that the outcome of this case will affect every hospital, doctor, and dentist, the lower court's findings have no broader implication beyond this case. There is no basis for the Nevada Supreme Court to retain this matter and it should be routed to the Nevada Court of Appeals. *See* NRAP 17.

II. RELIEF SOUGHT

NRS 41.503 limits the damages a plaintiff can recover against certain health care providers who were forced to make split-second decisions during an ongoing medical emergency. Below, NNRH filed a motion for partial summary judgment on the limited issue of whether NRS 41.503 applies in this case. The lower court noted that the statute includes numerous parts, subparts, and exceptions, and the parties disputed nearly every one of them. The lower court denied NNRH's

motion after finding there was ***at least*** one genuine issue of material fact—whether the victim's injuries qualified as "traumatic injuries" as defined by the statute—and declined to consider the remaining issues.

In its petition for a writ of mandamus or prohibition, NNRH argues that the lower court erred because the parties allegedly agreed that the victim's injuries were "traumatic injuries." NNRH therefore requests an order directing the lower court to vacate its order denying partial summary judgment and find that the victim's injuries qualified as "traumatic injuries." And because the lower court declined to consider the other parts, subparts, and exceptions in NRS 41.503, NNRH requests an order directing the lower court to address those issues.

This Court should reject NNRH's petition. A writ of mandamus is an "extraordinary" remedy that is only supposed to be given in extraordinary circumstances. Yet, NNRH merely asks this Court to correct a lower court's alleged error in denying its motion for partial summary judgment. This Court has consistently held that it will not intervene in cases where the NNRH has a remedy by way of appeal, especially when other factual disputes remain, and NNRH provides no meaningful explanation as to why those principles should not apply here.

In addition, NNRH's allegation that the parties "agreed" that the victim's injuries qualified as traumatic injuries is belied by the record. Accordingly, Real Party in Interest Diane Schwartz ("Diane") respectfully request that this Court reject NNRH's petition for a writ of mandamus.

III. ISSUES PRESENTED

A. Whether this Court should grant extraordinary relief when the NNRH fails to cogently explain why this Court should ignore its general rules precluding application of the writ.

B. Whether the lower court manifestly abused its discretion in finding there was at least one genuine issue of material fact.

IV. RELEVANT FACTUAL BACKGROUND

Douglas Schwartz ("Douglas") was struck by a car. But his tragic death had nothing to do with that collision. Douglas was stable and dealing with relatively minor injuries, which did not present any real risk of complications, when the Defendants recklessly botched a series of intubations, causing Douglas to vomit into his airway and die from asphyxiation.

A. DOUGLAS SUSTAINS MINOR INJURIES AND IS TAKEN TO NNRH IN A NON-EMERGENCY TRANSPORT.

Douglas was struck by a car on June 22, 2015, while leaving a restaurant in Elko, Nevada. 1 PA 5; 3 PA 482, 526. An ambulance arrived, and after treating Douglas on-site, medical personnel transported him to NNRH. 3 PA 483, 531. The transportation was non-emergent and did not involve lights or sirens. *Id.*; 526.

At NNRH, Dr. Garvey conducted an initial assessment and concluded that Douglas was in pain but did not suffer any major injuries. Specifically, he assessed Douglas as follows:

1. Appears awake, in obvious pain, uncomfortable

2. Abrasions that are mild to the forehead

3. Moderate chest tenderness to palpation of the right lateral posterior chest

4. Moderate back pain that is moderate of the left scapular and subscapular area

5. Abrasion to the right knee, elbow, and bicep

6. Normal external neck

7. No cervical midline tenderness, not intoxicated, normal mental status, no focal

neurological deficits, and no painful distracting injuries are present

8. Normal heart rate and regular rhythm

9. Does not display signs of respiratory distress; normal respirations, breath sounds are normal and clear throughout

10. Normal appearance of abdomen, normal bowel sounds, abdomen is soft and nontender in all quadrants

11. Normal appearance of skin except for affected areas

12. Normal orientation to person, place, and time; immediate and remote memory is intact; recent memory is impaired.

13. Behavior/mood is pleasant and cooperative.

3 PA 482-83; 1 PA 82-84. Dr. Garvey noted that, "at their worst, the symptoms were moderate." 1 PA 83; 3 PA 542.

B. DOUGLAS DIES AFTER MULTIPLE FAILED INTUBATIONS CAUSE HIM TO ASPIRATE STOMACH CONTENTS INTO HIS AIRWAY.

According to Dr. Garvey, additional testing showed (among other things) a partial pneumothorax, rib fractures, and a flail chest segment. 1 PA 85-86, 136. Dr. Garvey decided to transport Douglas to Utah for further treatment, including possible surgery. 1 PA 85-86. REACH Air

Medical Services (REACH) was notified of the request and arrived at NNRH. 3 PA 543.

Dr. Garvey informed Douglas' family that they intended to intubate Douglas before his departure. *Id.* at 544. After sedating Douglas and paralyzing him, 1 PA 85, a REACH paramedic initiated the intubation. *Id.* at 520.

Douglas immediately began aspirate large amounts of vomit from his mouth and nose. 3 PA 545; 1 PA 85. Medical personnel attempted to clear the airway, but were unsuccessful due to his gastric contents. *Id.* at 85-86. As Douglas' oxygen levels dropped, they attempted to intubate him again, and again, and again—roughly 11 times over the course of an hour. 3 PA 520; 1 PA 85. Douglas' stomach contents kept filling the "ET tube" as soon as it was placed. *Id.*

Eventually, personnel attempted to create a surgical airway. *Id.*; 3 PA 520. But the "trach tube . . . quickly became occluded with Douglas' gastric contents." 1 PA 85. Then, personnel accidentally dislodged the trach tube while attempting to clear the gastric contents. *Id.*

Tragically, Douglas died from cardiac arrest due to asphyxiation. 1 PA 87. He was pronounced dead at 1:33 a.m. on June 23, 2015. *Id.*

C. DIANE SUES, AND NNRH MOVES TO LIMIT HER RECOVERY.

Diane sued various entities and individuals involved in Douglas' death. 3 PA 446 (third amended complaint). Later, various defendants filed motions for partial summary judgment, requesting that the District Court find as a matter of law that the "trauma cap" outlined in NRS 41.530 applied in this case. 2 PA 442. As to Dr. Garvey and NNRH, the lower court rejected the motions, finding there was at least one genuine issue of material fact. *Id.* The lower court entered the order on June 2, 2021. *Id.*

On September 16, 2021, NNRH filed a renewed motion for partial summary judgment. 3 PA 530. The District Court heard argument on the motion in November 2021 and took the matter under advisement. 5 PA 1129.

While the lower court was considering NNRH's renewed motion, Dr. Garvey filed a petition for a writ of mandamus in this Court, asserting that the lower court erred when it denied its motion for partial summary judgment. *See Garvey v. Fourth Jud. Dist. Ct.*, Docket No. 83533, 2022 Nev. Unpub. LEXIS 360 (Nev. May 12, 2022). The Nevada Supreme Court denied the petition on May 12, 2022. *Id.*

The District Court denied NNRH's renewed motion for partial summary judgment on July 14, 2022. 5 PA 1129. In the order, the lower court outlined the various factors that it would have to find for NRS 41.503 to apply:

> Putting all of the above together, the Court would need to find all of the following as a matter of law before it could grant summary judgment to Defendant NNRH as to the application of the trauma cap to Plaintiff's claims: that NNRH, (1) in good faith and in a matter not amounting to (1)(a) gross negligence or (1)(b) reckless, willful, or wanton conduct; (2) rendered care or assistance necessitated by a (3) traumatic injury which demanded (4) immediate medical attention. The Court would also have to find that NNRH's act (5) did not occur after the decedent was (5)(a) stabilized and 5(b) capable of receiving treatment as a non-emergency patient[,] or that NNRH's act was (6) unrelated to the original traumatic injury.

5 PA 1131.

The lower court found that "there still remain serious questions" precluding summary judgment. 5 PA 1131. Specifically, the Court explained that the parties disputed "the nature of Decedent's injuries at the time he arrived at the hospital and whether he was stabilized before the attempted cricothyrotomies and intubations that led to him aspirating his vomit and dying." *Id.*

The Court declined to address the parties' disputes on each of the statute's parts, subparts, and exceptions. 5 PA 1132, n.5. Instead, the Court explained that there was at least one genuine issue of material fact: whether Douglas' injuries qualified as "traumatic injures" as defined by NRS 41.503. *Id*. at 1132. Specifically, the lower court explained that the statutory definition for traumatic injury required the movant to show a significant risk of death or precipitation of complications or disabilities, and the plaintiff's experts concluded there was no such risk. *Id*. Thus, the District Court denied summary judgment. *Id*.

V. POINTS AND LEGAL AUTHORITIES

A. RELEVANT LEGAL STANDARDS.

NNRH's petition for a writ of mandamus[4] involves the interplay between NRS 41.503 and the review standards for a petition seeking a writ of mandamus challenging the lower court's denial of summary judgment. Diane therefore discusses those issues in turn before addressing NNRH's specific arguments.

1. Nevada's "Trauma Cap": NRS 41.503.

[4] Although NNRH styles its petition as requesting a writ of mandamus or prohibition, NNRH provides no argument regarding a writ of prohibition and therefore this Court need not consider that contention.

NRS 41.503 caps liability for certain health care providers who are forced to act in the heat of the moment during an emergency medical situation. Specifically, the statute states that certain health care providers:

> that in good faith renders care or assistance necessitated by a traumatic injury demanding immediate medical attention, for which the patient enters the hospital through its emergency room or trauma center, may not be held liable for more than $50,000 in civil damages, exclusive of interest computed from the date of judgment, to or for the benefit of any claimant arising out of any act or omission in rendering that care or assistance[.]

NRS 41.503(1)(e)(2).

The statute includes numerous parts, subparts, and exceptions. For example, the statute does not apply to any act or omission in rendering care:

> (a) Which occurs after the patient is stabilized and is capable of receiving medical treatment as a nonemergency patient, unless surgery is required as a result of the emergency within a reasonable time after the patient is stabilized, in which case the limitation on liability provided by subsection 1 applies to any act or omission in rendering care or assistance which occurs before the stabilization of the patient following the surgery; or
>
> (b) Unrelated to the original traumatic injury.

NRS 41.503(2).

Similarly, the statute does not apply to care "amounting to gross negligence or reckless, willful or wanton conduct." NRS 41.503(1)(e)(2). The statute defines such conduct as that "which the [provider] knew or should have known at the time the [provider] rendered the care or assistance would be likely to result in injury so as to affect the life or health of the [patient]." NRS 41.503(4)(a). In evaluating such conduct, the finder of fact must consider:

> (1) [t]he extent or serious nature of the prevailing circumstances;
>
> (2) [t]he lack of time or ability to obtain appropriate consultation;
>
> (3) [t]he lack of a prior medical relationship with the patient;
>
> (4) [t]he inability to obtain an appropriate medical history of the patient; and
>
> (5) [t]he time constraints imposed by coexisting emergencies.

Id.

2. Standard for writs of mandamus and motions for summary judgment.

A writ of mandamus is a form of extraordinary relief, and as such, is only granted in extraordinary circumstances. *Walker v. Second Jud. Dist. Ct.*, 136 Nev., Adv. Op. 80, 476 P.3d 1194, 1195 (2020). As a general matter, mandamus relief is restricted to instances where a state officer refuses to perform an act required by law, "to control an arbitrary or capricious exercise of discretion," or to clarify an important issue of law in service of "public policy or sound judicial economy and administration." *Int'l Game Tech., Inc. v. Second Jud. Dist. Ct.*, 122 Nev. 132, 142, 127 P.3d 1088, 1096 (2006); NRS 34.160. Furthermore, mandamus relief is usually unavailable if the petitioner has an "adequate, sufficiently speedy remedy available at law." *Walker*, 136 Nev., Adv. Op. 80, 476 P.3d at 1198; NRS 34.170.

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." NRCP 56(a). When considering a motion, the court reviews "the evidence, and any reasonable inferences drawn from it, . . . in a light most favorable to the [nonmovant]." *Wood v. Safeway, Inc.*, 121 Nev. 724, 728-31, 121 P.3d 1026, 1029-31 (2005).

This Court has consistently declined to consider petitions for writs of mandamus challenging a lower court's denial of summary judgment. This Court explained that it "adopted this policy because very few writ petitions warrant extraordinary relief, and this Court expends an enormous amount of time and effort processing these petitions." *Smith v. Eighth Jud. Dist. Ct.*, 113 Nev. 1343, 1344, 950 P.2d 280, 281 (1997). However, this Court will sometimes "exercise its discretion with respect to certain petitions where no disputed factual issues exist and, pursuant to clear authority under a statute or rule, the district court is obligated to dismiss an action," or, if this Court concludes that doing so is necessary to clarify controlling law. *Id.*

The petitioner bears the burden of demonstrating that this Court's extraordinary intervention is warranted. *Pan v. Eighth Jud. Dist. Ct.*, 120 Nev. 222, 228, 88 P.3d 840, 840 (2004). To meet that burden, this Court requires a petitioner to cogently explain how the relevant factors governing this Court's consideration of the writ apply to the circumstances of the case at hand. *Walker*, 136 Nev., Adv. Op. 80, 476 P.3d at 1198.

B. NNRH FAILS TO DEMONSTRATE THAT THIS COURT SHOULD GRANT ITS PETITION.

NNRH seeks a writ of mandamus directing the lower court to reverse its ruling on whether Douglas' injuries qualify as "traumatic injuries" under NRS 41.503.[5] And because the lower court denied partial summary judgment without addressing the many other factual disputes between the parties, NNRH seeks a writ of mandamus directing the lower court to amend its order and address those issues.

[5] As indicated above, this Court rejected a nearly identical argument made in a companion case initiated by Dr. Garvey. *See Garvey*, 2022 Nev. Unpub. LEXIS 360. NNRH acknowledges this, but asserts that this Court's denial of Dr. Garvey's petition is irrelevant because discovery continued after Dr. Garvey filed his petition. Pet. at 3. NNRH's apparent suggestion that the circumstances of this case meaningfully changed after Dr. Garvey filed his petition is inaccurate. The expert depositions which NNRH relies on in proceeding were taken in February and March of 2021—more than six months before Dr. Garvey filed his petition in this Court on September 21, 2021. And NNRH filed its partial motion for summary judgment in the lower court on September 16, 2021—which was also before Dr. Garvey filed his petition in this Court.

1. NNRH does not meaningfully address this Court's caselaw precluding issuance of the writ.

The Nevada Supreme Court has consistently held that it will only consider petitions for a writ of mandamus challenging a lower court's denial of summary judgment in rare circumstances. NNRH makes almost no effort to explain why this Court should ignore this longstanding principle and instead take the extraordinary step of intervening now, rather than requiring NNRH to raise its legal issues through an appeal in the regular course.

Notably, the Nevada Supreme Court recently published an opinion reiterating factors it considers when determining whether to grant a petition or a writ of mandamus that challenges the denial of a motion for summary judgment. *See* W*alker*, 136 Nev., Adv. Op. 80, 476 P.3d at 1197. NNRH does not cite to that case, address the factors discussed in that case, or meaningfully address any of the Court's other precedent discussing the writ of mandamus in the summary judgment context.

NNRH's entire argument as to why this Court should grant mandamus is to simply quote language from *County of Clark ex rel. University Medical Center v. Upchurch*, 114 Nev. 749, 752-53, 961 P.2d 754, 757 (1998)—with no accompanying explanation or argument. Pet.

at 20. It is not apparent how *Upchurch* is relevant given that *Upchurch* involved an appeal from a judgment seeking declaratory relief rather than a petition for a writ of mandamus, and NNRH does not explain the connection. This Court should decline to consider NNRH's bare, unsupported argument. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006).

Notably, the Nevada Supreme Court rejected the petition in *Walker*, in part, because the petitioner failed to cogently discuss the mandamus factors and apply them to the circumstances presented. 136 Nev., Adv. Op. 80, 476 P.3d at 1197 (denying the petition because "petitioners fail to analyze [the issue presented] under the proper standard"). The same result should follow here. NNRH's failure to meaningfully argue the relevant issues at hand deprived Diane of a chance to adequately traverse those arguments and explain why they lack merit.

This Court should reject NNRH's petition based on its failure to satisfy its burden of demonstrating that this Court's extraordinary relief is warranted. *See Republican Nat'l Comm. v. Eighth Jud. Dist. Ct.*, 138 Nev., Adv. Op. 88, ___ P.3d ___ (2022) ("As a petitioner, it is NRC's burden

to demonstrate a clear legal right to the relief requested."). Despite NNRH's failure to meaningfully address the mandamus standard, every single factor that this Court typically considers weighs against NNRH.

2. NNRH's petition presents a routine challenge to the lower court's application of the facts, which can be adequately reviewed on appeal.

As explained above, this Court will only consider petitions challenging the denial of summary judgment if there are no disputed facts and summary judgment was required as a matter of law, or alternatively, to clarify controlling authority. The latter exception clearly does not apply because NNRH's petition does not raise any questions regarding the proper statutory construction of NRS 41.530 or ask this Court to interpret the statute in a new or different way. And while NNRH attempts to frame the issue as one where summary judgment was required as a matter of law, thus fitting the former exception, NNRH unmistakably challenges the lower court's interpretation of the facts, which is not a legal question.

Even accepting NNRH's framing, this Court has reiterated that it will not grant a writ of mandamus to correct mere errors, as doing so upsets the normal appellate process:

> Were we to issue traditional mandamus to "correct" any and every lower court decision, we would substitute our judgment for the district court's, subverting its "right to decide according to its own view of the facts and law of a case which is still pending before it"" and ignoring that there would almost always be "an adequate remedy for any wrongs which may be done or errors which may be committed, by appeal or writ of error."

Walker, 136 Nev., Adv. Op. 80, 476 P.3d at 1197.

The same logic applies here. NNRH's challenge to the lower court's decision asks for routine error correction, which does not justify this Court's extraordinary intervention. NNRH can easily argue that Douglas's injuries qualify as "traumatic injuries" at trial, and if unsuccessful, can easily raise that issue on appeal at a time when this Court would have a complete record to review. This Court's immediate intervention would not meaningfully change the evidence or arguments presented at trial, and would amount to ordinary correction of an alleged error that can be reviewed on appeal, rather than the "extraordinary" circumstances necessary for this Court to grant a writ of mandamus.

Again, NNRH provides no real argument to the contrary, even though this Court has consistently indicated that an appeal in the regular course almost always warrants rejection of a petition for

extraordinary relief. *See*, *e.g.*, *Smith v.*, 113 Nev. at 1344, 950 P.2d at 281. NNRH provides one cursory statement that this Court's intervention would "promote judicial economy," but the lower court denied NNRH's renewed motion for partial summary judgment on July 14, 2022, and NNRH did not file its petition until months later. This unexplained and unnecessary delay belies NNRH's feigned interest in judicial economy. Moreover, as explained more fully below, NNRH's piecemeal approach would delay resolution of this case rather than expedite it and waste judicial resources rather than conserve them. This Court should decline NNRH's invitation to complicate these proceedings and instead require NNRH to raise all its legal issues on appeal, just as this Court requires of almost every other party.

3. NNRH concedes there are remaining factual disputes.

Nevada Supreme Court precedent also establishes that mandamus is only appropriate if there are ***no*** remaining factual issues—*i.e.*, if the Court's immediate intervention would require summary judgment to be issued and thus resolve the case. But NNRH only challenges the lower court's ruling on one limited issue: whether the statutory trauma cap would limit Diane's recovery. There will be a trial on the underlying

claims regardless, so intervening now would be an unnecessary waste of this Court's resources.

What is more, intervening now would not even resolve the limited issue of whether the trauma cap applies—a point NNRH concedes. As the lower court explained, to find that the trauma cap applied it had to find that NNRH:

> (1) in good faith and in a matter not amounting to (1)(a) gross negligence or (1)(b) reckless, willful, or wanton conduct; (2) rendered care or assistance necessitated by a (3) traumatic injury which demanded (4) immediate medical attention. The Court would also have to find that NNRH's act (5) did not occur after the decedent was (5)(a) stabilized and 5(b) capable of receiving treatment as a non-emergency patient[,] or that NNRH's act was (6) unrelated to the original traumatic injury.

5 PA 1131. And as the lower court recognized, there were "serious questions" remaining on almost each of these parts, subpart, and exceptions. *Id.* The lower court declined to address these questions because it concluded that <u>at least</u> one genuine issue of material fact existed, which precluded summary judgment.

NNRH acknowledges that the lower court will have to answer these questions even if this Court grants its petition, which is why NNRH also asks this Court to issue a writ of mandamus ordering the lower court to

answer those questions. Pet. at 1 (requesting that this Court "direct Respondent to address whether NNRH met the other requirements for NRS 41.503 trauma cap to apply and/or whether its application was precluded by one or more of its enumerated exceptions").[3] Because the lower court will have to address the many other parts, subparts, and exceptions in NRS 41.503 regardless of whether this Court agrees that Douglas' injuries qualify as "traumatic injuries," NNRH cannot demonstrate that there are no remaining factual disputes and summary judgment was required as a matter of law. Indeed, NNRH's own petition demonstrates that there are remaining factual disputes precluding application of the writ.

NNRH's strange approach of having this Court address the "traumatic injuries" issue now, then have the lower court address the remaining issues, would be far less effective and economical than the regular appellate process—especially because NNRH will inevitably file

[3] Although NNRH's petition asks this Court to order the lower court to address these issues, NNRH does not provide any cogent argument indicating that the lower court had a duty to address those issues, nor any cogent argument indicating that the lower court manifestly abused its discretion in declining to consider those issues. This Court should decline to consider NNRH's unsupported legal argument.

yet another petition in this Court if the lower court resolves any of the remaining issues against it. Moreover, this approach would thwart Diane's own appellate rights. As NNRH notes, the lower court granted certain motions against Diane, in favor of NNRH and other defendants. Pet. at 8-9. NNRH partially relies on those orders to support its assertion that there are no genuine issues of material fact in this case. *Id.* But Diane has not yet had a chance to seek appellate review of those orders. This Court should not allow NNRH to circumvent Diane's right to appellate review of lower court errors by considering an extraordinary petition partially premised on those errors before Diane has a chance to address them through her own appeal.

4. This Court should reject NNRH's petition.

In sum, NNRH's petition challenges the lower court's factual determination on one part of a statute with numerous parts, subparts, and exceptions. NNRH provides no real argument as to why this Court should intervene now and grant extraordinary relief rather than requiring NNRH to appeal in the normal course. Moreover, the lower court will have to address the other parts, subparts, and exceptions before it can conclude that the statute applies, which makes mandamus

inappropriate under this Court's longstanding precedent. And whether the statute applies has no broader implication beyond the parties, which is yet another reason to reject NNRH's petition. *Walker*, 136 Nev., Adv. Op. 80, 476 P.3d at 1199 ("And petitioners have not cogently argued for the broader importance of the seemingly singular, fact-based issue they ask us to resolve."). For all the aforementioned reasons, this Court should decline to consider NNRH's petition.

C. NNRH FAILS TO DEMONSTRATE THAT THE LOWER COURT ERRED WHEN IT FOUND THERE WAS A GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER DOUGLAS' INJURIES CONSTITUTED "TRAUMATIC INJURIES" UNDER THE STATUTE.

If this Court opts to consider the merits of NNRH's petition, it should reject that petition.

According to NNRH, there was no genuine issue of material fact in this case because "the parties' expert witnesses continued to dispute whether Mr. Schwartz suffered a flail chest injury, but Plaintiff's liability experts (Seth Womack, M.D., Jonathan Burroughs, M.D., and Paramedic John Everlove) agreed that Mr. Schwartz suffered other traumatic injuries which required immediate treatment, including that he be airlifted to a higher-level care facility where he could be seen by a trauma

surgeon." Pet. at 2-3. This assertion is belied by the record and is exclusively based on misreading statements from various experts in the light most favorable to NNRH, rather than the light most favorable to Diane.

1. NNRH does not accurately describe the experts' use of the term "traumatic injury."

NNRH's assertion that these experts agreed that Douglas' injuries were traumatic injuries is false. While it is true that various experts used that term, they did so in a completely different context. As some experts explained, they used the term "trauma" to describe "an exchange of force between an external object or inertia between that source and the human body." 2 PA 285. And they used the term "traumatic injury" to describe "an injury that is secondary to trauma"—*i.e.*, an injury resulting from an exchange of force between an object and the human body. 1 PA 178. Douglas's pre-intubation injuries were traumatic injuries in this context because they resulted from an external object hitting his body.

But NRS 41.503 does not define "traumatic injury" as an injury resulting from an exchange of force between an object and a body. The statute provides a completely different and unrelated definition. Under NRS 41.503, a traumatic injury "means any acute injury which,

according to standardized criteria for triage in the field, involves a significant risk of death or the precipitation of complications or disabilities." NRS 41.503(4)(b).

Despite NNRH's repeated statement to the contrary, none of the plaintiff's experts stated that the victim's injuries met the statutory definition for traumatic injuries. They simply used the term to explain that Douglas's pre-intubation injuries resulted from him being hit by a car. The lower court recognized this distinction. 5 PA 1132 ("The Court is not convinced that the word 'trauma' in the parties' medical experts' reports equates to a traumatic injury as used by NRS 41.503."). Yet, NNRH improperly ignores the experts' explanation of their use of the term and the lower court's discussion of that issue, apparently hoping this Court will not actually look at the record.

2. NNRH fails to show that the plaintiff's experts all agreed that the victim's injuries implicitly constituted "traumatic injury."

NNRH seemingly acknowledges that Dr. Womack, Dr. Everlove, and Dr. Burroughs did not actually agree that Douglas' injuries qualified as traumatic injuries under NRS 41.503. NNRH nevertheless argues that those experts implicitly agreed that his injuries qualified because

they agreed that his injuries "required immediate treatment, including that he be airlifted to a higher-level care facility where he could be seen by a trauma surgeon." Pet. at 2-3. According to NNRH, this means the experts thus agreed that Douglas' injuries created a "significant risk of . . . the precipitation of complications," and therefore the lower court erred when it found a genuine issue of material fact.

The lower court properly rejected NNRH's strained argument. 5 PA 1132 (finding that the plaintiff's experts concluded that "whatever the nature of [Douglas's] pre-hospital injury, it did not create a significant risk of death, complications, or disabilities"). In context, neither Dr. Womack, Dr. Burroughs, nor Dr. Everlove agreed that Douglas's injuries required immediate treatment or transfer, let alone that his injuries created a "significant risk" of precipitation of complications.

Dr. Womack testified during his deposition that Schwartz's injuries were not life-threatening, did not require emergency action, were not getting worse, and were not likely to get worse. 2 PA at 277-78, 286, 288. And Dr. Womack was clear that the risk or precipitation of complications was "extremely rare"— not "significant":

> [Counsel]: But in – for instances where there has been severe trauma to the thoracic area, for

> example, and where there are pulmonary contusions, where there is a pneumothorax, where there are other chest injuries, it needs to be assumed by the emergency-medicine physician that the nature of those injuries are that they may progress. Do you agree or disagree with that?
>
> [Dr. Womack]: I agree, but keeping in mind, especially in this situation, if Mr. Schwartz's conditions would have progressed, it would have been extremely rare and they would have happened hours after his stay with Dr. Garvey.

2 PA 290 (emphasis added). Overall, Dr. Womack was adamant that Douglas' injuries were relatively mild and posed no immediate emergency.

Similarly, Dr. Everlove agreed that Douglas was stable, his injuries did not create a significant risk of the precipitation of complications, and did not require immediate treatment:

> [Counsel]: Yes. My question, though, is with those -- I mean in your report, you use the phrase "traumatic injury. "You also use the phrase "critical injury." Are those different?
>
> [Everlove]: Yes. Any injury can be a traumatic injury. In this case, this was an injury secondary to traumatic event. And in this case, the denotation between what was critical and not critical, as far as Mr. Schwartz's presentation, secondary to the trauma event.

> [Counsel]: So you would agree that Mr. Schwartz's injuries were secondary to trauma?
>
> [Everlove]: Yes.
>
> [Counsel]: But your report says they were not critical, is that right, not critical injuries?
>
> [Everlove]: Yes.
>
> [Counsel]: Why were Mr. Schwartz's injuries not critical?
>
> [Everlove]: Based on his presentation, he was in stable condition, ***not in a critical condition that required immediate intervention by the paramedics that transported Mr. Schwartz to the hospital.*** And his condition did not change while he was at the hospital.

1 PA 180 (emphasis added).

Dr. Everlove also stated in his report that Mr. Schwarz was at a low risk for deterioration, and deterioration was not probable. 3 PA 523. Nowhere did he implicitly suggest, let alone conclude to a reasonable degree of reasonable certainty, that Douglas's injuries created a significant risk of the precipitation of complications.

The same is true for Dr. Burroughs, who expressly stated that Schwartz's injuries did not require immediate intervention. 2 PA 420-21.

While it is accurate that Dr. Womack did not "take issue" with Dr. Garvey's decision to transfer Douglas for further evaluation, NNRH once again conflates separate concepts. As Dr. Womack explained, he agreed that it was appropriate for Douglas's doctors to treat Douglas as if his injuries would get worse out of an abundance of caution, even if the risk of his injuries getting worse was extremely unlikely:

> [Counsel]: [I]s it fair to say one of your mantras is that if an emergency-medicine physician can't rule out a potentially life-threatening condition, the physical has a duty to treat the condition as if its potentially life threatening?
>
> [. . .]
>
> [Dr. Womack]: In general I believe that is a duty of an emergency-medicine physician.

2 PA 278.

An expert's agreement that it is appropriate to treat a patient as if the worst-case scenario might occur does not equate to an agreement the patient has an injury involving a significant risk of death or the precipitation of complications according to standardized criteria for triage in the field. NRS 41.503(4)(b).

Importantly, NNRH seems to ignore that NRS 41.503 also only applies to a "traumatic injury demanding immediate medical attention."

NRS 41.503(d)(1)(2) (emphasis added). None of the cited plaintiff's experts believed that Douglas's injuries demanded immediate medical attention. NNRH also seems to ignore that the record before the court when considering its partial motion for summary judgment also included reports from other experts outside of those referenced by NNRH, who similarly agreed that Douglas's injuries did not present a significant risk of precipitation of complications demanding immediate medical treatment. *See, e.g.*, 3 PA 526-27 (Dr. Scissors' report).

Taking all the experts' reports and statements in the light most favorable to NNRH, at best some of the experts merely agreed that transfer for further review was appropriate. But because NNRH moved for summary judgment, the lower court was required to read those statements and resolve competing inferences in the light most favorable to Diane, not NNRH. *See Wood*, 121 Nev. at 728-31, 121 P.3d at 1029-31. And when considering the totality of the statements, there is no reasonable way for a reviewing court to conclude that the experts universally agreed that Douglas's injuries created a significant risk of precipitation of complications requiring immediate medical treatment, such that there was no genuine issue of material fact.

3. NNRH fails to demonstrate that the lower court abused its discretion in denying summary judgment.

In sum, the lower court correctly recognized that the experts concluded, "whatever the nature of [Douglas's] pre-hospital injury, it did not create a significant risk of death, complications, or disabilities." 5 PA 1132. NNRH's assertion to the contrary is entirely based on taking various statements out of context, then reading those out-of-context statements in the light most favorable to NNRH. But this case was at the summary judgment stage, meaning that the lower court was required to conduct the exact opposite analysis. The lower court properly considered the evidence in the light most favorable to Diane and concluded that there was a genuine issue of material fact as to whether the victim's injuries qualified as traumatic injuries.

VI. CONCLUSION

NNRH asks this Court to exercise its extraordinary authority to resolve a discrete factual dispute between the two parties that can be raised on appeal, even though this Court's intervention will not meaningfully change the progress of this case. NNRH provides no real explanation as to why this Court should discard its longstanding

authority indicating that this Court will not consider petitions seeking writs of mandamus under these circumstances. But even if this Court decides to consider the petition, it should deny that petition because the lower court correctly concluded that there was at least one genuine dispute of material fact.

Dated this 4th day of January 2023.

CLAGGETT & SYKES LAW FIRM

/s/ Charles L. Finlayson

Sean K. Claggett, Esq.
Nevada Bar No. 8407
Jennifer Morales, Esq.
Nevada Bar No. 8829
Shirley Blazich, Esq.
Nevada Bar No. 8378
Micah S. Echols, Esq.
Nevada Bar No. 8437
David P. Snyder, Esq.
Nevada Bar No. 15333
Charles L. Finlayson, Esq.
Nevada Bar No. 13685

Attorneys for Real Party in Interest

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type-style requirements of NRAP 32(a)(6) because I prepared this brief in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Century Schoolbook font.

I further certify that this brief complies with the page – or type volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

☒ proportionally spaced, has a typeface of 14 points or more and contains 6,102 words; or

☐ does not exceed _____ pages.

Finally, I hereby certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires a reference to the page and volume number, if any, of the transcript or appendix where the court will find the matter relied on to support every assertion in the brief.

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

Dated this 4th day of January 2023.

CLAGGETT & SYKES LAW FIRM

/s/ Charles L. Finlayson

Sean K. Claggett, Esq.
Nevada Bar No. 8407
Jennifer Morales, Esq.
Nevada Bar No. 8829
Shirley Blazich, Esq.
Nevada Bar No. 8378
Micah S. Echols, Esq.
Nevada Bar No. 8437
David P. Snyder, Esq.
Nevada Bar No. 15333
Charles L. Finlayson, Esq.
Nevada Bar No. 13685

Attorneys for Real Party in Interest

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **ANSWER TO PETITION FOR WRIT OF MANDAMUS** with the Supreme Court of Nevada on the 4th day of January 2023. I will electronically serve the foregoing documents in accordance with the Master Service List as follows:

Tyson J. Dobbs, Esq.
tdobbs@hpslaw.com
Richard D. De Jong, Esq.
rdejong@hpslaw.com
HALL PRANGLE & SCHOONVELD, LLC
1140 North Town Center Drive, Ste. 350, Las Vegas, Nevada 89144
(702) 889-6400 – Telephone
Attorneys for Petitioner, PHC-ELKO, Inc., d/b/a Northeastern Nevada Regional Hospital

I further certify that I mailed the foregoing documents to the following:

Hon. Kriston N. Hill, D.J.
Fourth Judicial District Court, Department 1
571 Idaho Street, Elko, Nevada 89801

/s/ Anna Gresl

Anna Gresl, an employee of
CLAGGETT & SYKES LAW FIRM