ADKT 0522

**Reese, Todd**



**From:** Douglas Cohen <DCohen@wrslawyers.com>
**Sent:** Wednesday, October 10, 2018 9:06 AM
**To:** NRCP Committee
**Subject:** NRCP Committee/ Proposed Rule 35 changes

Dear NRCP Committee,

I have concerns about potential changes to NRCP 35 that include the potential for the Court's disapproval of my clients' audio recording of their physical and mental examinations. In Nevada, my clients have a right to audio record an in-person conversation under the one party consent rule, whether or not the audio recording is known to the other person in the conversation. My clients should not have less of a right to make an audio recording when a defense examination is being paid for by the opposing side (inherently biased), than they would otherwise have. Please remember, the Rule 35 examinations are not independent medical examinations and that phrase is not found in the rule.

Thank you,

Doug

Douglas Cohen, Esq.
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18-40979

## Reese, Todd

**From:** Douglas Cohen <DCohen@wrslawyers.com>
**Sent:** Tuesday, October 16, 2018 3:56 PM
**To:** NRCP Committee
**Subject:** RE: NRCP Committee/ Proposed Rule 35 changes
**Attachments:** MINUTES EXAMINERS.pdf; Hoopes v. Hammargren_ 102 Nev. 425.docx

Dear Todd,

I have an addition to the below email.

According to the Nevada Board of Medical examiners, "independent medical examinations are the practice of medicine." Either the physician examining/diagnosing the litigant (practicing medicine) must be licensed in Nevada, or conduct the physical or mental examination under the auspices of a Nevada licensed physician. [See attached]. The examining physician is a "fiduciary" and, *ipso facto*, must be open and honest. [See *Hoopes v. Hammargren* attached]. It would be inconsistent with the concept of an open and honest examination by a licensed physician to disallow audio recording of the examination by the examinee.

Thank you,

Douglas Cohen

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# Nevada State Board of Medical Examiners

# ***MINUTES***

## OPEN SESSION BOARD MEETING

**Held in the Conference Room at the offices of the Nevada State Board of Medical Examiners**
**1105 Terminal Way, Suite 301, Reno, NV 89502**
**and videoconferenced to**
**the conference room of the Nevada State Board of Dental Examiners**
**6010 S. Rainbow Boulevard, Building A, Suite 1, Las Vegas, Nevada 89118**

***FRIDAY, SEPTEMBER 14, 2007 – 8:30 a.m.***

*Board Members Present*

Javaid Anwar, M.D., President
Sohail U. Anjum, M.D., Vice President
Charles N. Held, M.D.
Jean Stoess, M.A.
S. Daniel McBride, M.D.
Benjamin J. Rodriguez, M.D.
Renee West

*Board Members Absent*

Donald H. Baepler, Ph.D., D.Sc., Secretary-Treasurer

*Staff Present*

Drennan A. Clark, J.D., Executive Director/Special Counsel
Laurie L. Munson, Deputy Executive Director/
Information Systems Administrator/Chief of Administration
Bonnie S. Brand, J.D., General Counsel
Edward O. Cousineau, J.D., Deputy General Counsel
Douglas C. Cooper, Chief of Investigations
Lynnette L. Daniels, Chief of Licensing
Jerry C. Calvanese, M.D., Medical Reviewer

*Also Present*

Christine M. Guerci-Nyhus, J.D., Chief Deputy Attorney General
Peter A. Mansky, M.D., Director, Nevada Health Professionals Assistance Foundation (in Las Vegas)
John Lanzillotta, P.A.-C, Physician Assistant Advisory Committee Member (in Las Vegas)
Peggy Alby, R.R.T., Practitioner of Respiratory Care Committee Member (in Las Vegas)

*Agenda Item 25*
**APPEARANCES FOR CONSIDERATION OF ACCEPTANCE OF APPLICATIONS FOR LICENSURE**

**25(a) Pankaj Bhatnagar, M.D.**

Pankaj Bhatnagar, M.D. appeared before the Board on his application for licensure.

Dr. Anwar asked Dr. Bhatnagar whether he wanted his application to be considered in closed session, with the public being excluded, and he said he did not.

Dr. McBride questioned Dr. Bhatnagar, who appeared before the Board to respond to questions concerning his affirmative response to Question 12 on his application for licensure.

Dr. Bhatnagar explained the circumstances surrounding the malpractice claims against him.

Dr. McBride moved that the Board grant Dr. Bhatnagar's application for licensure. Dr. Rodriguez seconded the motion, and it passed unanimously, with the Chair voting in favor of the motion.

**25(b) Joshua Jewell, M.D.**

Joshua Jewell, M.D. appeared before the Board on his application for limited license to attend residency training.

Dr. Anwar asked Dr. Jewell whether he wanted his application to be considered in closed session, with the public being excluded, and he said that he did.

Dr. Rodriguez moved to go into Closed Session. Dr. Anwar seconded the motion and it passed.

Upon returning to Open Session, Dr. Anjum moved that the Board grant Dr. Jewell's application for a limited license to attend residency training, contingent upon successful participation in the Nevada Health Professionals Assistance Foundation program. Dr. Rodriguez seconded the motion, and it passed unanimously, with the Chair voting in favor of the motion.

Agenda Item 23
**PETITION FOR ADVISORY OPINION FROM THE BOARD REGARDING THE SCOPE AND DEFINITION OF THE PRACTICE OF MEDICINE IN NRS 630.020**
- Bonnie S. Brand, J.D., General Counsel; John Hunt, J.D.; Clive Segil, M.D.

John Hunt, Esq., attorney for Clive Segil, M.D., stated that courts have long held that independent medical examinations are not the practice of medicine. Nevada has a tremendous opportunity to have a renowned surgeon, Dr. Segil, who is seeking licensure in the state of Nevada. However, Dr. Segil performed an independent medical examination and presented testimony which was critical in a case, in which the party for whom he testified prevailed, and

the attorney of the non-prevailing party filed a complaint against Dr. Segil with the Board based upon his performing that independent medical examination. Dr. Segil's application for licensure is being held in abeyance until such time as he receives a ruling from the Board as to whether an independent medical examination is the practice of medicine in the state of Nevada. This is obviously critical to Dr. Segil because he wants to know the Board's position on this prior to it ruling on his application. Beyond this, there is a bigger picture, in that independent medical examinations are critical in assisting citizens in obtaining the best ruling possible based upon the best testimony possible. They are asking the Board to issue an opinion that indicates an independent medical examination is not the practice of medicine as it is defined in NRS 630.

Ms. Brand stated that Nevada law states that "diagnosis" is the practice of medicine, and Mr. Hunt used the word "diagnosis" in his petition and stated that what Dr. Segil had done was "diagnosis."

Mr. Hunt stated that if one looks at the way in which he used the term, the question becomes whether the diagnosis is for the purpose of treatment. This is not an examination; it is an assessment, and anything that is done by the independent medical examination doctor is not being done for the purpose of treatment, and therefore it does not violate the statute.

Dr. Anwar stated the term "independent medical examination" is problematic because in the practice of medicine an independent medical examination is considered an independent medical examination for the purpose of treatment, and Nevada law requires that if someone is going to take an action that directly or indirectly affects patient care, he or she has to have a Nevada license.

Ms. Guerci-Nyhus advised the Board that the attorney has asked for a declaratory order or advisory opinion, and under NRS 233B, the Board is required to respond, and under NRS 630, the Board is required to respond within 30 days. The Board is deemed to be the proper interpreter of its own statutes, so the Board is required to hold a discussion towards issuing an opinion within 30 days.

Ms. Brand suggested that Mr. Hunt review NRS 630.047 in conjunction with NAC 630.225.

Dr. Lamerson stated it is her understanding that these physicians are coming from out of state, examining Nevada residents in the state of Nevada, and making a diagnosis.

Mr. Clark added that the physician takes a history and does a physical, then writes a report which goes to the attorneys and the doctor testifies at the trial.

Ms. Brand added that the doctor generally testifies about his findings, i.e., his diagnosis, and his recommendations as to what the person needs based upon that diagnosis.

Dr. Anjum moved that the Board respond to the petition by declaring that independent medical examinations are the practice of medicine. Dr. McBride seconded the motion, and it passed unanimously, with the Chair voting in favor of the motion.

LexisNexis

**User Name:** Douglas Cohen
**Date and Time:** Tuesday, October 16, 2018 3:27:00 PM PDT
**Job Number:** 75646762

## Document (1)

1. *Hoopes v. Hammargren, 102 Nev. 425*
   **Client/Matter:** LV9999-021
   **Search Terms:** physician fiduciary
   **Search Type:** Natural Language
   **Narrowed by:**

| Content Type | Narrowed by |
| --- | --- |
| Cases | Sources: NV Supreme Court Cases, Combined; Content Type: Cases |

# Hoopes v. Hammargren

Supreme Court of Nevada

September 19, 1986, Filed

No. 15394

**Reporter**
102 Nev. 425 *; 725 P.2d 238 **; 1986 Nev. LEXIS 1577 ***

ROBERTA HOOPES aka ROBERTA JONES, Appellant, v. LONNIE LEE HAMMARGREN, M.D., Respondent

**Prior History: [***1]** Appeal from order granting summary judgment in favor of respondent. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

**Disposition: Affirmed in part, reversed in part.**

## Core Terms

***physician***-patient, sexual, drugs, multiple sclerosis, district court, patient, sexual relations, malpractice, encounters, summary judgment, prescriptions, exploitation, misdiagnosis, mistreatment, ***fiduciary***, grant summary judgment, deposition, asserts

## Case Summary

**Procedural Posture**
Plaintiff patient brought a medical malpractice suit against defendant ***physician*** in the Eighth Judicial District Court, Clark County (Nevada), alleging that he took sexual advantage of their relationship, mistreated her by prescribing improper drugs, and misdiagnosed her as having multiple sclerosis. The trial court granted the ***physician***'s motion for summary judgment, and the patient appealed.

**Overview**
The court upheld the grant of summary judgment on the misdiagnosis claim, because the patient's own expert testified that it was reasonable for the ***physician*** to have considered a diagnosis of multiple sclerosis. The court held that the ***physician*** was not entitled to summary judgment on the mistreatment claim, because he failed to introduce evidence to show that the prescriptions for various drugs were consistent with the applicable standard of care. Nor was he entitled to summary judgment on the patient's claim of breach of ***fiduciary*** duty. The court held that the ***physician*** was a ***fiduciary*** of the patient. To prove her claim, the patient would have to show that the ***physician*** was in a superior authoritative position in the professional relationship and that, as a result of her illness, she was vulnerable. She would have to prove that the ***physician*** exploited her vulnerability, and that it was the proximate cause of any claimed harm.

**Outcome**
The court reversed the order of the district court granting summary judgment in favor of ***physician*** as to patient's claims of mistreatment and sexual advantage of the ***physician***-patient relationship. The court affirmed the grant of summary judgment to ***physician*** on patient's claim of misdiagnosis.

## LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Torts > Malpractice & Professional Liability > Healthcare Providers

Civil Procedure > Appeals > Summary Judgment Review > General Overview

Civil Procedure > Appeals > Standards of Review > General Overview

*HN1*[] **Summary Judgment, Entitlement as Matter of Law**

In a medical malpractice action (as in any court action), summary judgment is appropriate only where the moving party has shown no genuine issue of material fact. The moving party claims that he is entitled to judgment as a matter of law. *Nev. R. Civ. P. 56(c)*. In reviewing an order granting summary judgment, the appellate court will consider all evidence in a light most favorable to the party against whom the motion is granted.

Evidence > Privileges > Doctor-Patient Privilege > Scope

Governments > ***Fiduciaries***

Healthcare Law > Medical Treatment > Patient Confidentiality > General Overview

Torts > Malpractice & Professional Liability > Healthcare Providers

*HN2*[] **Privileges, Doctor-Patient Privilege**

A ***fiduciary*** relationship is deemed to exist when one party is bound to act for the benefit of the other party. Such a relationship imposes a duty of utmost good faith. The essence of a ***fiduciary*** or confidential relationship is that the parties do not deal on equal terms, since the person in whom trust and confidence is reposed and who accepts that trust and confidence is in a superior position to exert unique influence over the dependent party. The ***physician***-patient relationship is ***fiduciary*** in nature. The ***physician***-patient relationship is based on trust and confidence. Society has placed ***physicians*** in an elevated position of trust, and, therefore, the ***physician*** is obligated to exercise utmost good faith. The ***fiduciary*** relationship and the position of trust occupied by all ***physicians*** demands that the standard apply to all ***physicians***.

Healthcare Law > Healthcare Litigation > Actions Against Healthcare Workers > Doctors & ***Physicians***

Torts > Malpractice & Professional Liability > Healthcare Providers

Healthcare Law > Healthcare Litigation > Actions Against Healthcare Workers > General Overview

*HN3*[] **Actions Against Healthcare Workers, Doctors & Physicians**

Taking sexual advantage of the ***physician***-patient relationship can constitute malpractice.

**Counsel:** *Gang & Berkley,* Las Vegas, for Appellant.

*Galatz, Earl & Catalano* and *Daniel F. Polsenberg,* Las Vegas, for Respondent.

**Judges:** Gunderson, J. Springer, C. J., and Mowbray and Young, JJ., [5] concur.

**Opinion by:** GUNDERSON

## Opinion

**[*426]** **[**239]** This is an appeal from a summary judgment granted in favor of respondent, Dr. Lonnie Hammargren. While Dr. Hammargren asserts that his alleged conduct did not constitute actionable malpractice, Ms. Hoopes contends that there are genuine issues of fact to be decided at trial relating to her claim of malpractice (which include misdiagnosis, mistreatment and sexual advantage of the ***physician***-patient relationship). Further, while Hammargren urges that Ms. Hoopes' action was untimely filed, she argues on appeal that her action is not barred by the controlling statute of limitations. We agree with Ms. Hoopes.

Our review of the record **[***2]** indicates that Ms. Hoopes' cause of action was timely filed. Additionally, we have determined Dr. Hammargren was not entitled to judgment as a matter of law on the claims of mistreatment and sexual advantage of the ***physician***-patient relationship. Accordingly, we reverse in part and affirm in part.

**[*427]** *FACTS AND PROCEDURAL HISTORY*

In March, 1972, Ms. Hoopes was referred to Dr. Hammargren (a neurosurgeon) for evaluation of numbness in the back and legs. Dr. Hammargren

[5] The Honorable Justice Thomas Steffen voluntarily disqualified himself from participation in this case.

hospitalized Ms. Hoopes for a diagnostic evaluation and, pursuant to this, informed her that she suffered from multiple sclerosis. [1] The record indicates Dr. Hammargren told Ms. Hoopes that the disease was serious and involved deterioration of the nervous system, and that Ms. Hoopes responded she would "do anything you ask me to -- just let me keep walking."

**[***3]** Dr. Hammargren continued to treat Ms. Hoopes on an outpatient basis. According to the record now before us, he recognized the emotional lability frequently associated with multiple sclerosis and told Ms. Hoopes it was important that she never be upset "because the disease will attack your nervous system." Accepting the evidence of Ms. Hoopes, Dr. Hammargren explained this was why the medications he prescribed were so important. To this end, evidently, Ms. Hoopes received numerous prescriptions for quaaludes, valium, elavil, triavil, meprobamate, chloral hydrate, phenobarbitol, seconal, and talwin, while under the care of Dr. Hammargren. [2]

**[**240]** Two to three months after Ms. Hoopes' initial visit to Dr. Hammargren, the record indicates **[***4]** he phoned her at home and invited her to have dinner, saying his wife was out of town and he was lonely. After dinner he invited her into his office "to see his iguanas," and they had sexual intercourse. Ms. Hoopes claims this sexual relationship continued until 1977 (with the exception of a six-month period when Ms. Hoopes was married and was residing out-of-state). There were never any other social engagements. Dr. Hammargren always came to Ms. Hoopes' home. She claims the relationship was based solely on sex and Dr. Hammargren visited on an average of once monthly. Although Ms. Hoopes admitted Dr. Hammargren never told her that the sexual intercourse constituted a part of any treatment plan, she claims she feared to object. She asserts she felt that Dr. Hammargren might become angry and terminate their ***physician***-patient relationship and that "he was the reason I was alive and I didn't want **[*428]** to upset this man or make him feel like I didn't like him or anything."

Dr. Hammargren admits having had a sexual relationship with Ms. Hoopes, but contends it began in 1976 and involved only three or four encounters. Although Ms. Hoopes testified that Dr. Hammargren would **[***5]** usually bring quaaludes or chloral hydrate when he came to her home for sexual gratification, Dr. Hammargren was unable to recall whether he provided drugs during these encounters.

Dr. Hammargren claims he considered Ms. Hoopes a girl friend rather than a patient. Their sexual encounters were social and he did not intend therapeutic benefit. Dr. Hammargren says he did not feel this sexual relationship would affect Ms. Hoopes emotionally although he conceded that emotional lability is generally increased in patients suffering from multiple sclerosis.

Dr. Hammargren claims that after his initial evaluations of Ms. Hoopes, he concluded that she probably abused drugs. In spite of this, his office records reflect that Ms. Hoopes was provided numerous prescriptions for various tranquilizers and sedatives (many with the potential for abuse and acquired dependence). Dr. Hammargren claims that many refills were provided by his office staff without his approval. He monitored the drugs provided to his patients "to a degree only." He also admits having "a select few group of patients that were sort of the people that get special favors because they were there in 1971 or '72 right when I **[***6]** got started."

Ms. Hoopes acknowledges that she did not try to avoid taking the drugs prescribed for her. She claims she believed "that was the reason I was not laying out in a wheelchair, the way other people with multiple sclerosis were." In the fall of 1977, Ms. Hoopes moved to Louisville, Kentucky, in order to be married. After requesting these medications from a doctor there, she was told that "he didn't write prescriptions like that." According to Ms. Hoopes, this caused her to suspect that perhaps Dr. Hammargren's treatment was not an acceptable treatment for multiple sclerosis. In 1979, as she continued to experience some numbness, she chose to be evaluated by experts at the Sansum Clinic in Santa Barbara, California. There, Dr. James B. Connors told her she exhibited no signs or symptoms consistent with a diagnosis of multiple sclerosis. Follow-up examinations confirmed this finding.

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[1] "A slowly progressive disease of the central nervous system characterized pathologically by disseminated patches of demyelinization [destruction of the sheath surrounding nerve tissue] in the brain and spinal cord, and clinically by multiple symptoms and signs with remissions and exacerbations." Common symptoms include visual disturbances, weakness, interference with walking, difficulties with bladder control, and mild emotional disturbances. *The Merck Manual* at 1339-40 (12th ed. 1972).

[2] Most of these drugs are potent central nervous system depressants with recognized potential for physical and psychological dependence. Many produce withdrawal symptoms when taken for a period of time and then abruptly stopped. ***Physician***'s Desk Reference (39th ed. 1985).

At the hearing on his motion for summary judgment, Dr. Hammargren presented no expert testimony in support of his position. Rather, he relied on his own testimony given through a deposition. Ms. Hoopes relied on the deposition of Dr. Connors to oppose Dr. Hammargren's motion for summary **[***7]** judgment. As to the alleged misdiagnosis, Dr. Connors testified that he thought **[*429]** it was reasonable for Dr. Hammargren to have considered a diagnosis of multiple sclerosis (among other diagnoses), but that repeated evaluations at Sansum Clinic never revealed any evidence of the disease. **[**241]** Dr. Connors had obtained very little history concerning drug usage by Ms. Hoopes; thus, he rendered no opinion on the alleged mistreatment.

The district court issued an order granting summary judgment but failed to explain its reasoning. At the hearing on the motion, however, the court had indicated a belief that the diagnosis rendered by Dr. Hammargren was not unreasonable, that there was no evidence of improper prescription, and that Dr. Hammargren did not maintain a standard of care below that expected of him as a ***physician***. The court appeared to recognize there were ethical considerations which might warrant attention, but deemed the district court to be an improper forum to address such issues. The court did not address the statute of limitations bar raised by Dr. Hammargren.

*STANDARD OF REVIEW*

*HN1*[↑] In a medical malpractice action (as in any court action), summary judgment **[***8]** is appropriate only where the moving party has shown no genuine issue of material fact. The moving party claims that he is entitled to judgment as a matter of law. NRCP 56(c). In reviewing an order granting summary judgment, this court will consider all evidence in a light most favorable to the party against whom the motion is granted. *Mullis v. Nevada National Bank, 98 Nev. 510, 512, 654 P.2d 533, 535 (1982)*; *Orcutt v. Miller, 95 Nev. 408, 411, 595 P.2d 1191, 1193 (1979)*.

The issue before us is whether the district court erred in granting the summary judgment motion. In light of the facts of this case, we must decide if the district court properly concluded that, as a matter of law, Dr. Hammargren's conduct did *not* fall below the acceptable standard of care. [3]

**[***9]** **[*430]** *CLAIM OF MISDIAGNOSIS*

Ms. Hoopes claims that Dr. Hammargren negligently misdiagnosed her illness. At the hearing on the motion for summary judgment, Dr. Hammargren relied on his own deposition. He did not produce other expert evidence to support compliance with the applicable standard of care. Ms. Hoopes' expert, however, acknowledged via his deposition that although he found no evidence to show Ms. Hoopes suffered from multiple sclerosis, it was not unreasonable for Dr. Hammargren to have reached this diagnosis.

Therefore, based on the testimony of Ms. Hoopes' own expert, there is no genuine issue of material fact related to the claim of negligent misdiagnosis. Hence, on this claim for relief, the district court correctly ruled that Dr. Hammargren was entitled to judgment as a matter of law.

*CLAIM OF MISTREATMENT*

Ms. Hoopes next claims that Dr. Hammargren was negligent in his treatment modalities. She asserts that the prescriptions for various drugs on a frequent basis was improper.

The fact that Dr. Hammargren prescribed various drugs to Ms. Hoopes is not in dispute. Dr. Hammargren admitted that he monitored drugs prescribed from his office "to a degree **[***10]** only." Ms. Hoopes claimed that when Dr. Hammargren would come to her home for a sexual encounter, he would bring a number of drugs. Most often, she says, he brought quaaludes. Dr. Hammargren admitted that he was unable **[**242]** to recall whether or not he provided any drugs during these encounters.

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[3] Utilizing the criteria established in *Massey v. Litton, 99 Nev. 723, 726, 728, 669 P.2d 284, 251, 252 (1983)*, we have determined this cause of action to be timely filed. The date of discovery of the injuries (for purposes of calculating the statute of limitations) is July 23, 1979. This was the date Ms. Hoopes was told she was *not* suffering from multiple sclerosis. As required by NRS 41A.070 (repealed July 1, 1981), Ms. Hoopes filed a petition with Nevada's medical-legal screening panel on May 21, 1981 (twenty-two months after discovery of the injuries). Subsequent to the filing of the petition, the screening panel requirement was abolished. In abolishing this prerequisite to the filing of a civil complaint, however, the legislature provided a six-month tolling period effective July 1, 1981. 1981 Nev. Stats. ch. 327 § 16 at 599. Thus, Ms. Hoopes had six months from the date of repeal to file her claim. A complaint was filed on September 14, 1981, and was well within the tolled period of time.

On appeal, Dr. Hammargren asserts that Ms. Hoopes' expert testified that his "methods [of treatment] were appropriate." Our review of the record, however, reveals that Dr. Connors (Hoopes' expert) addressed only the issue of negligent misdiagnosis. Additionally, Dr. Hammargren failed to introduce evidence to show that the prescriptions for various drugs were consistent with the applicable standard of care. Therefore, the record is devoid of evidence to support the district court's ruling that Dr. Hammargren's treatment modality was appropriate.

Accordingly, we cannot say that the district court's ruling was correct. We feel there are genuine issues of material fact related to the claim of mistreatment.

*CLAIM OF SEXUAL ADVANTAGE*

Ms. Hoopes next claims that Dr. Hammargren used the ***physician***-patient relationship to induce her into a sexual relationship **[*431]** and that **[***11]** such conduct constitutes malpractice. While Dr. Hammargren does not dispute the existence of the sexual relationship, he asserts it cannot constitute a basis for a cause of action grounded upon professional malpractice. We disagree.

*HN2*[↑] A ***fiduciary*** relationship is deemed to exist when one party is bound to act for the benefit of the other party. Such a relationship imposes a duty of utmost good faith. *Barbara A. v. John G., 193 Cal.Rptr. 422, 431 (Ct.App. 1983)*. "The essence of a ***fiduciary*** or confidential relationship is that the parties do not deal on equal terms, since the person in whom trust and confidence is reposed and who accepts that trust and confidence is in a superior position to exert unique influence over the dependent party." *Id. at 432*.

This court has recognized that the ***physician***-patient relationship is "***fiduciary*** in nature." *Massey v. Litton, 99 Nev. 723, 728, 669 P.2d 248, 252 (1983)* (citation omitted). The ***physician***-patient relationship is based on trust and confidence. Society has placed ***physicians*** in an elevated position of trust, and, therefore, the ***physician*** is obligated to exercise utmost good faith. While Dr. Hammargren urges this court to limit this **[***12]** type of claim to ***physicians*** practicing psychiatry, we believe the ***fiduciary*** relationship and the position of trust occupied by *all* ***physicians*** demands that the standard apply to all ***physicians***. *See also Lochett v. Goodill, 430 P.2d 589, 591 (Wash. 1967)*.

A patient generally seeks the assistance of a ***physician*** in order to resolve a medical problem. The patient expects that the ***physician*** can achieve such resolution. Occasionally (due to illness), the patient is emotionally unstable and often vulnerable. There is the hope that the ***physician*** possesses unlimited powers. It is at this point in the professional relationship that there is the potential and opportunity for the ***physician*** to take advantage of the patient's vulnerabilities. To do so, however, would violate a trust and constitute an abuse of power. This court would condemn any such type of exploitation. Such conduct would fall below the acceptable standard for a ***fiduciary***.

Historically, the ***physician***'s primary obligation has been, above all, to do no harm. It is Ms. Hoopes' contention that Dr. Hammargren abused the ***physician***-patient relationship by instigating a sexual relationship.

First, we note that the district **[***13]** court deemed the judiciary an improper forum to address such issues. We disagree. While Dr. Hammargren may also be subject to professional sanctioning, Ms. Hoopes has the right to seek redress in the courts. *Cotton v. Kambly, 300 N.W.2d 627, 629 (Mich.App. 1980)*; *Roy v. Hartogs, [*432] 366 N.Y.S.2d 297, 301 (Civ.Ct. 1975)*. *HN3*[↑] Sexual advantage of the ***physician***-patient relationship can constitute malpractice.

Next, having concluded that Ms. Hoopes is entitled to include exploitation of the ***physician***-patient relationship in her malpractice action, we shall examine the **[**243]** criterion upon which such an allegation may be based. It is incumbent upon Ms. Hoopes to prove, by a preponderance of the evidence, that Dr. Hammargren violated his ***fiduciary*** responsibilities. In order to do so, Ms. Hoopes must show that Dr. Hammargren held a superior authoritative position in the professional relationship and that, as a result of her illness, she was vulnerable. Additionally, Ms. Hoopes must show that Dr. Hammargren exploited the vulnerability. The nature and extent of the circumstances surrounding the alleged exploitation must be carefully examined. For example, we will not presume **[***14]** that Ms. Hoopes was incapable of giving consent. The sexual relationship which admittedly existed could have been personal and unrelated to the parameters of treatment. Additionally, a jury might determine that the ***physician***-patient relationship had terminated prior to certain of the alleged sexual encounters. We also caution that Ms. Hoopes not only is required to prove exploitation, but also that it was the proximate cause of any claimed

harm. [4]

Here, in support of his motion for summary judgment, Dr. Hammargren offered no evidence (other than his deposition) to show that he did not exploit the ***physician***-patient relationship. In fact, we note that Dr. Hammargren conceded that sexual encounters during the course of such a professional relationship "is not good medical practice." Accordingly, **[***15]** it was error for the district court to grant summary judgment in favor of Dr. Hammargren on this claim.

The order of the district court granting summary judgment in favor of Dr. Hammargren is reversed as to Ms. Hoopes' claims of mistreatment and sexual advantage of the ***physician***-patient relationship. As to Ms. Hoopes' claim of misdiagnosis, the order of the district court is affirmed. Additionally, we find the filing of the civil action to be timely.

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End of Document

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[4] Within the foregoing parameters, it will be incumbent on the trial judge to develop an appropriate set of jury instructions compatible with established legal principles that govern the ***physician***-patient relationship.