IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MARILEE BROWN, MARILOU BROWN GREGORY J. BROWN (FOR BEVERLY M. BROWN'S FAMILY),

Appellants,

vs.

ST. MARY'S REGIONAL MEDICAL CENTER, TAMMY EVANS (ERRONEOUSLY NAMED AS TAMI EVANS); PREM REDDY, M.D.; TANZEEL ISLAM, M.D., SRIDEVI CHALLAPALLI, M.D.; and MARK McALLISTER, M.D.

Respondents.

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Case No. 81434-COA

APPEAL FROM THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE; THE HONOTABLE KATHLEEN DRAKULICH, DISTRICT JUDGE

RESPONDENTS ST. MARY'S REGIONAL MEDICAL CENTER, TAMMY EVANS, PREM REDDY, M.D., TANZEEL ISLAM, M.D., AND SRIDEVI CHALLAPALLI, M.D.'S SUPPLEMENTAL BRIEF

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Docket 81434-COA Document 2022-03739

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.l(a) and must be disclosed. These representations are made in order that the justices of this court may evaluate possible disqualification or recusal.

1. All parent corporations and publicly held companies owning 10 percent or more of the party's stock:

St. Mary's Regional Medical Center is a wholly owned company. It is not a publicly traded company.

Prime Healthcare Services, Inc. is the parent company and sole member of Prime Healthcare Services – Reno, LLC dba Saint Mary's Regional Medical Center.

Tammy Evans (erroneously named as Tami Evans), Prem Reddy, M.D., Tanzeel Islma, M.D., and Sridevi Challapalli, M.D. are individuals.

2. Names of all law firms whose attorneys have appeared for the party or amicus in this case (including proceedings in the district court or before an administrative agency) or are expected to appear in this court:

HALL PRANGLE & SCHOONVELD, LLC

If litigant is using a pseudonym, the litigant's true name: N/A

DATED this 3rd day of February, 2022.

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I. Plaintiffs' "Failure-To-Timely-Transmit-Medical-Records" Claim Against Saint Mary's Raises Numerous Questions Of Medical Judgment Beyond The Realm Of Common Knowledge And Experience.

In their Supplement Brief, Plaintiffs cite to p.5 of their Complaint and assert that the claim contained therein – alleging a failure to timely transmit "critical medical documents" to a subsequent care provider – does not require the support of an NRS 41A.071 expert affidavit because that claim "does not raise any questions of medical judgment beyond the realm of common knowledge or experience – either the documents are forwarded to the treating hospital or they are not."[1] *See* Pl. Supp. Br. at 1, 4-5. This overly simplistic view of their claim ignores both the Nevada Supreme Court's decision in *Jones v. Wilkin,* 111 Nev. 1335, 1338, 905 P.2d 166, 168 (1995)[2] wherein it held that "allegations of negligent maintenance of medical records are properly characterized as medical malpractice," and the complex questions raised by the plain language of their claim.

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[1] Plaintiffs do not dispute that their "failure-to-timely-transmit-medical-records" claim "pertains to an action that occurred within the course of a professional relationship." *See Estate of Curtis v. South Las Vegas Medical Investors, LLC,* 136 Nev. 350, 356, 466 P.3d 1263, 1268 (2020).

[2] *See also Johnson v. Incline Village Gen. Imp. Dist.,* 5 F. Supp. 2d 1113, 1115 (D. Nev. 1998) ("[t]he scope of 'medical malpractice' extends beyond the immediate provision of care, and encompasses even something as far removed from the immediate context of doctor-patient relationship as the negligent maintenance of medical records and a misrepresentation resulting therefrom").

Indeed, even ignoring the Nevada Supreme Court's clear pronouncement in *Jones,* the language of the referenced claim (Pls. Supp. Br. at 1) unequivocally raises questions of medical judgment beyond the realm of common knowledge and experience. The subject allegations of Plaintiffs' Complaint state in pertinent part:

> "On/About: March 3, 2019 – March 5, 2019: St. Mary's Hospital Failed to *timely fax vital documentation* requested by Renown *for assisting in care and treatment of patient* until 3/5/19; with *said delinquency impacting vital care/treatment and contributed to patient's death* on 3/5/19 (***All Led to Patient Beverly M. Brown's deteriorating medical condition, suffering and preliminary death on March 5, 2019***)"

(AA. V2, 5) (emphasis added; bolding in original).

Contrary to Plaintiffs' assertions, these allegations raise numerous "questions of medical judgment beyond the realm of common knowledge and experience," including, but not limited to, what records were responsive to the provider's request; whether the patient's acuity required an immediate response; whether practice standards required an immediate response or within some other amount of time; what state/federal rules and regulations apply to the transmission of medical records to/between care providers; and whether the transmission of the medical record could be accomplished at an earlier time without violating the applicable state/federal law, standards of care, and facility protocols governing communications between providers of health care and the transfer of patient records from one provider to another. *See e.g.,* NRS 629.061 (requiring custodian of medical records to make health care records available only under specified circumstances and to specified

individuals); NRS 433B.200 and 449A.103 (requiring the forwarding of medical records on or before date a patient is transferred from one facility to another); C.F.R. 160 and 164 (A) and (E) (requiring appropriate administrative, physical, and technical safeguards to ensure the confidentiality, integrity, and security of electronic protected health information, including the establishment of limits and conditions on the uses and disclosures that may be made of such information without an individual's authorization).

In *Montanez v. Sparks Family Hospital, Inc.,* 499 P.3d 1189, 1193, 137 Nev. Adv. Op. 77 (Nev. December 9, 2021) (unpublished disposition), the Nevada Supreme Court recently rejected the plaintiff's assertion that her premises liability claim against hospital for failing to keep its facility clean sounded in ordinary negligence rather than medical malpractice. The supreme court explained that "the level of cleanliness that a medical provider must maintain in *inherently linked* to the provision of medical treatment" and that this conclusion is "reflected in the statutes enacted by the Nevada Legislature that regulate medical infection prevention protocol." *Id.* (emphasis in original).

The Nevada Legislature's enactment of statutes regulating the handling of patient medical records, *see supra,* similarly "reflects" that the manner and method through which they are transferred and made available for use by the patient and another providers is also "*inherently linked*" to the provision of medical treatment.

Given the enactment of these various state and federal statutory provisions regulating the handling of patient medical records, including the manner, method, circumstances and to whom they can be transmitted, the decisions involved in transferring a patient's medical records from one provider to another necessarily involve some degree of professional knowledge and judgment, and thus do not sound in ordinary negligence. *See Szymborski v. Spring Mountain Treatment Ctr.,* 133 Nev. 638, 403 P.3d 1280 (2017) (a claim is for professional negligence "if the jury can only evaluate the plaintiff's claims after presentation of the standards of care by a medical expert.")

Moreover, Plaintiffs' allegations also raise the additional questions of whether the requested records were in fact immediately necessary for her care and treatment at Renown Hospital and whether any delay in transferring them impacted that care, and/or caused or contributed to cause her death. A lay juror could not properly evaluate these allegations without the assistance of a medical expert. Indeed, without adequate medical knowledge, training, and experience, a lay juror would not be able to understand the contents of those records, how that content would have (if at all) been used in directing her care and treatment at Renown, and how (if at all) the absence of those medical records caused or contributed to cause Mrs. Brown's death.

It is unclear whether the "common knowledge" exception to NRS 41A.071's affidavit requirement can still apply to claims where the causal link between the

negligence and the injury falls outside the realm of a lay juror's common knowledge and experience. The closest the supreme court has apparently come to addressing this issue was in *Montanez* wherein it appeared to suggest plaintiff's premises liability claim could not be severed from her separate medical malpractice claim based on an application of the "common knowledge" exception because in addition to the need for expert testimony establishing compliance with cleanliness protocols and regulations, expert testimony would also be required to establish a causal link between that negligence and the plaintiff's injuries. *Montanez,* 499 P.3d at 1193 fn2.

Limiting the application of the "common knowledge" exception to only those cases where the causal link also falls within the common knowledge of a lay juror would be consistent with the purposes underlying NRS 41A.071's enactment, including deterring frivolous lawsuits, and ensuring such actions are brought in good faith based on expert testimony where required. *See Szydel v. Markman,* 121 Nev. 453, 459, 117 P.3d 200, 204 (2005). Moreover, it would be consistent with the holdings of many of the Nevada's sister state courts, including some of the sister state courts the supreme court relied upon in *Estate of Curtis* when it decided to adopt the exception. *See e.g., Ruiz v. Killebrew,* 459 P.3d 1005, 1009 fn4, 2020 UT 6, 11 (Utah 2020) (stating that Utah's "common knowledge" exception only applies when the causal link between the negligence and the injury would be clear to a lay

juror who has no medical training); *Summers v. Syptak,* 801 S.E.2d 422, 426, 293 Va. 606, 614 (Va. 2017) (rejecting plaintiffs argument that Virginia's "common knowledge" exception applies to her medical malpractice claim because causal connection was not within the understanding of a lay person); *Woodard v. Custer,* 702 N.W.2d 522, 526, 473 Mich. 1, 9 (Mich. 2005) (rejecting plaintiff's argument that Michigan's "common knowledge" exception applied to medical negligence claim because cause of injury was "not within the common understanding of the jury"). Lastly, it would also be consistent with the Nevada Supreme Court's pronouncement in *Estate of Curtis* that the exception's application is "extremely narrow and only applies in rare situations." *Estate of Curtis,* 136 Nev. at 356. Such rare situations necessarily include those where neither the issues of negligence nor causation require guidance from a qualified medical expert.

Thus, while the "common knowledge" exception does not apply to Plaintiffs' claims based on their allegations of negligence alone, it also should not apply because those allegations also raise numerous questions of medical judgment on the issue of causation that fall beyond the realm of a lay jury's common knowledge and experience. Accordingly, this Court should rejected Plaintiffs assertion that the "common knowledge" exception to NRS 41A.071's affidavit requirement applies to their failure-to-timely-transmit-medical-records claim.

CONCLUSION

For the foregoing reasons, Defendants-Respondents Saint Mary's Regional Medical Center, Tammy Evans (erroneously named as Tami Evans), Prem Reddy, M.D., Tanzeel Islam, M.D., and Sri Challapalli, M.D. respectfully request that this Court affirm the district court's order granting their motions to dismiss and dismissing Plaintiffs' Complaint with prejudice pursuant to NRS 41A.071 and 41A.097.

DATED this 3rd day of February, 2022.

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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 this brief has been prepared in a proportionally spaced typeface using Word in 14 point Times New Roman type style.

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 proportionately spaced, has a typeface of 14 points, and contains 1,311 words.

I further certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I also certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: February 3, 2022

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of HALL PRANGLE & SCHOONVELD, LLC; that on the 3rd day of February, 2022, a true and correct copy of the foregoing ***Respondents St. Mary's Regional Medical Center, Tammy Evans, Prem Reddy, M.D., Tanzeel Islam, M.D. and Sridevi Challapalli, M.D.'s Supplemental Brief*** was electronically filed with the Clerk of the Court of Appeals for Nevada Supreme Court by using the Nevada Supreme Court's E-filing system (E-Flex). Below participants in the case who are registered with E-flex as users will be served by the E-Flex system.

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