IN THE SUPREME COURT OF THE STATE OF NEVADA

ERRYS DEE DAVIS, a minor, through her parents TRACI PARKS and ERRICK DAVIS; THOMAS ZIEGLER; FREDERICK BICKHAM; and JANE NELSON;

Petitioners

v.

EIGHTH JUDICIAL DISTRICT COURT IN AND FOR CLARK COUNTY, NEVADA, HON. SUSAN JOHNSON AND HON. VERONICA BARISICH , Presiding;

Respondents

STEPHANIE A. JONES, D.O.; DANIEL M. KIRGAN, M.D.; IRA MICHAEL SCHNEIER, M.D.; MUHAMMAD SAEED SABIR, M.D.; and JAYSON AGATON, APRN;

Real Parties in Interest

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SUPREME COURT CASE NO.

ORIGINAL PETITION FOR WRIT OF MANDAMUS OR, IN THE ALTERNATIVE, WRIT OF PROHIBITION

ADAM J. BREEDEN, ESQ.
Nevada Bar No. 008768
BREEDEN & ASSOCIATES, PLLC
376 E. Warm Springs Road, Suite 120
Las Vegas, Nevada 89119
Phone (702) 819-7770
Fax (702) 819-7771
Adam@breedenandassociates.com
Attorney for Petitioner

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Petitioners ERRYS DEE DAVIS, a minor, through her parents TRACI PARKS and ERRICK DAVIS; THOMAS ZIEGLER; FREDERICK BICKHAM; and JANE NELSON hereby seek a Writ of Mandamus or, in the alternative, a Writ of Prohibition. This original Writ Petition is submitted pursuant to NRS § 34.160 and NRS § 34.330, NRAP 32 and the Nevada Constitution Art. 6, Sec. 4, and seeks issuance of a Writ to direct the Eighth Judicial District Court to re-instate certain causes of action in Petitioner's complaints against their health care providers that were dismissed for failure to state a claim upon which relief can be granted.

Dated this 30th day of July, 2021.

BREEDEN & ASSOCIATES, PLLC

ADAM J. BREEDEN, ESQ.
Nevada Bar No. 008768
376 E. Warm Springs Road, Suite 120
Las Vegas, Nevada 89119
Phone: (702) 819-7770
Fax: (702) 819-7771
Adam@breedenandassociates.com
Attorneys for Petitioners

ROUTING STATEMENT

The Petitioners request that the Nevada Supreme Court retain this Writ Petition under NRAP 17(a)(11) & (12) because this Petition contains a pleading issue in medical malpractice cases that presents a "question of first impression involving the United States or Nevada Constitutions or common law" interpreting NRS Chapter 41A and "a principal issue a question of statewide public importance" given that hundreds if not thousands of medical malpractice victims each year will be affected by the outcome of the legal issue set forth in this Petition.

DISCLOSURE STATEMENT PURSUANT TO NRAP 26.1

Pursuant to NRAP 26.1, Petitioners' counsel Adam J. Breeden, Esq. hereby discloses the following: There are no corporations or business entities involved in this Petition and, therefore, there are no related or parent companies to disclose. The only counsel appearing or expected to appear for the Petitioners is Adam J. Breeden, Esq. of the Breeden & Associates, PLLC law firm. The Petitioners are not using a pseudonym. The full name of the minor is used instead of initials with permission of the parents.

I. STATEMENT OF ISSUES IN WRIT/RELIEF SOUGHT

The legal issue presented by this Writ Petition is whether a patient's exclusive remedy against a provider of health care is one for "professional negligence" under NRS Chapter 41A *or* whether other, alternate causes of action such as breach of contract, battery, breach of fiduciary duty and neglect of a vulnerable person under NRS § 41.1395 may still be pleaded by a patient against a provider of health care. Petitioners request issuance of a Writ of Mandamus or Writ of Prohibition directing the judicial officers at the District Court level to re-instate Petitioners' alternatively pleaded causes of action in their underlying cases, which were dismissed for failure to state a claim as "subsumed" into professional negligence.

II. STATEMENT OF FACTS

This Writ Petition addresses four separate Complaints filed in the Eighth Judicial District Court and which were dismissed in part for failure to state a claim.

Petitioner, Thomas Ziegler, is a 56-year-old quadriplegic.[1] He underwent a procedure by Real Party in Interest, Daniel Kirgan, M.D., to have a permanent colostomy bag placed.[2] During the procedure, Dr. Kirgan mistakenly connected the wrong end of the large intestine to the colostomy and stapled shut the correct end.[3]

[1] Ziegler Complaint at APPX.000003.

[2] Ziegler Complaint at APPX.000003-000004.

[3] Ziegler Complaint at APPX.000003-000004.

This left Mr. Ziegler without a functioning way to expel solid body waste. Over the course of days, digestive juices and feces backed up in Mr. Ziegler, some of which had to be drained through his nose before the error was diagnosed and corrected.[4] Ziegler filed suit and alleged causes of action for (1) professional negligence/ medical malpractice, (2) breach of contract, (3) unjust enrichment, (4) negligent infliction of emotional distress, and (5) neglect of a vulnerable person under NRS § 41.1395.[5] Although alternative causes of action were pleaded, the complaint was filed in compliance with the statute of limitations and supporting medical expert affidavit requirements of NRS Chapter 41A. The Defense filed a pre-answer motion to dismiss all causes of action except professional negligence under NRCP 12(b)(5) for failure to state a claim, arguing that NRS Chapter 41A subsumed all other causes of action against a physician and was the exclusive remedy of an injured patient.[6] The Eighth Judicial District Court, Hon. Susan H. Johnson, granted the motion, dismissing all causes of action except professional negligence for failure to state a claim.[7]

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[4] Ziegler Complaint at APPX.000003-000004.

[5] Ziegler Complaint at APPX.000001-000011.

[6] Ziegler Defendant Motion to Dismiss at APPX.000012-000021, specifically at APPX.000018 Line 25 referring to "subsumed"; Ziegler Opposition at APPX000022-000048; Ziegler Defendant Reply at APPX.000049-000059.

[7] Ziegler Transcript of Hearing at APPX.000060-000070; Order Granting Motion at APPX.000071-000076.

Petitioner, Jane Nelson, is a 70-year-old woman.[8] While in a rehabilitation hospital recovering from surgery, her blood laboratory results showed a sudden, alarming drop in platelet count (a sign of serious blood clotting issues).[9] These results were simply never noticed by her health care providers, Real Parties in Interest, Muhammad Sabir, M.D. and Jayson Agaton, APRN, and she was left without any diagnosis or treatment.[10] The blood clots eventually caused dual pulmonary emboli and but for emergency surgery she would have died. Nelson filed suit and alleged causes of action for (1) professional negligence/medical malpractice, (2) ordinary negligence, (3) breach of contract, (3) unjust enrichment, and (4) neglect of a vulnerable person under NRS § 41.1395.[11] Although alternative causes of action were pleaded, the complaint was filed in compliance with the statute of limitations and supporting medical expert affidavit requirements of NRS Chapter 41A. The Defense filed a pre-answer motion to dismiss all causes of action except professional negligence under NRCP 12(b)(5) for failure to state a claim, arguing that NRS Chapter 41A subsumed all other causes of action against a physician and was the exclusive remedy of an injured patient.[12] The Eighth Judicial District Court,

[8] Nelson Complaint at APPX.000083.

[9] Nelson Complaint at APPX.000079-000080.

[10] Nelson Complaint at APPX.000079-000080.

[11] Nelson Complaint at APPX.000079-000084.

[12] Nelson Defendant Sabir Motion to Dismiss at APPX.000092-APPX000099,

Hon. Susan H. Johnson, granted the motion and dismissed all causes of action except professional negligence for failure to state a claim.[13]

Petitioner, Errys Davis, was a four-month-old child when she was operated on by Real Party in Interest, Stephanie Jones, D.O., to repair an inguinal hernia.[14] During the operation, the doctor mistook Davis' bladder for the hernia and removed most of it, leaving her without a functioning urinary system and free spillage of urine into her abdomen.[15] The infant has had to undergo numerous corrective surgeries and it remains to be seen whether she will ever have a functioning urinary system. Davis filed suit and alleged causes of action for (1) professional negligence/medical malpractice, (2) breach of contract, (3) battery, (4) neglect of a vulnerable person under NRS § 41.1395.[16] Although alternative causes of action were pleaded, the complaint was filed in compliance with the statute of limitations and supporting

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specifically at APPX.000094, Lines 14-15 "these claims must be dismissed as they are subsumed by Plaintiff's claim for professional negligence."; Nelson Opposition at APPX.000100-000128; Nelson Defendant Agaton Motion to Dismiss at APPX.000129-000147; Nelson Opposition to Agaton Motion to Dismiss at APPX.000151-000159; Nelson Defendant Agaton Reply at APPX.000180-000194; Nelson Defendant Sabir Reply at APPX.000195-000204.

[13] Nelson Transcript of Hearing at APPX.000208-000221; Nelson Order at APPX.000222-000233.

[14] Davis Complaint at APPX.000236 Paragraph 10 and APPX000241 Paragraph 50. NOTE: The minor's full name is used with parental permission.

[15] Davis Complaint at APPX.000236-000237.

[16] Davis Complaint at APPX.000237-000241.

medical expert affidavit requirements of NRS Chapter 41A. The Defense filed a pre-answer motion to dismiss all causes of action except professional negligence under NRCP 12(b)(5) for failure to state a claim, arguing that NRS Chapter 41A subsumed all other causes of action against a physician and was the exclusive remedy of an injured patient.[17] The Eighth Judicial District Court, Hon. Veronica Barisich, granted the motion and dismissed all causes of action except professional negligence for failure to state a claim.[18] Prominently cited to Judge Barisich as the basis for her ruling was Judge Johnson's new opinion on the legal issue.[19]

Petitioner, Frederick Bickham, is a 50-year-old man.[20] In December 2019, he was unable to walk and needed emergency decompression surgery at his T10-11 spine level to avoid further spinal cord damage.[21] He was operated on by Real Party in Interest, Ira Michael Schneier, M.D.[22] Dr. Schneier misidentified Mr. Bickham's

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[17] Davis Defendant Jones Motion to Dismiss at APPX.000248-000257; Davis Opposition at APPX.000258-000284; Davis Defendant Jones Reply at APPX.000285-000302.

[18] Davis Order Granting Motion at APPX.000303-000308, specifically using the word "subsumed" at APPX.000304 at Lines 3-13.

[19] Davis Defendant Jones Reply at APPX.000286 at Lines 3-11 and APPX.000296-000299.

[20] Bickham Complaint at APPX.000309-000323 specifically at APPX.000311, Paragraph 13.

[21] Bickham Complaint at APPX.000311-000312, Paragraphs 17-25.

[22] Bickham Complaint APPX.000311-000312, Paragraphs 17-25.

spinal vertebrae and operated on the wrong level of the spinal cord.[23] Even when Dr. Schneier realized his error, he said nothing to his patient in an apparent attempt to conceal his malpractice.[24] This left Bickham unable to walk and in great pain. It was not until five months later after permanent spinal cord damage occurred that Mr. Bickham was diagnosed and properly treated by another surgery.[25] Bickham filed suit and alleged causes of action for (1) medical malpractice, (2) breach of contract, (3) battery, (4) breach of fiduciary duty, and (5) neglect of a vulnerable person under NRS § 41.1395.[26] Although alternative causes of action were pleaded, the complaint was filed in compliance with the statute of limitations and supporting medical expert affidavit requirements of NRS Chapter 41A. The Defense filed a pre-answer motion to dismiss all causes of action except professional negligence under NRCP 12(b)(5) for failure to state a claim, arguing that NRS Chapter 41A subsumed all other causes of action against a physician and was the exclusive remedy of an injured patient.[27] The District Court, again Hon. Susan Johnson, granted the motion in part, dismissing

[23] Bickham Complaint at APPX.000312 Paragraph 19.

[24] Bickham Complaint at APPX.000312 Paragraph 19, 22; APPX.000316 paragraphs 56-59

[25] Bickham Complaint at APPX.000312 Paragraphs 23-25.

[26] Bickham Complaint at APPX.000313-000319.

[27] Bickham Defendant Schneier Motion to Dismiss at APPX.000324-000333; Bickham Opposition at APPX.000334-000361; Bickham Defendant Schneier Reply at APPX.000362-000384.

the breach of contract, battery and neglect of an older person causes of action.[28] A First Amended Complaint was then filed, followed by another motion to dismiss after which the Court also dismissed the breach of fiduciary duty claim for failure to state a claim.[29] This Order is perhaps the most important to this Writ Petition because Judge Johnson expressly stated at oral argument[30] and in the subsequent written order[31] that the basis for her ruling was simply that all breach of fiduciary claims against a physician are "subsumed" in professional negligence claims and therefore fail to state a claim upon which relief can be granted. All prior orders had been brief and contained little legal analysis. This made clear that the District Court felt all causes of action against a health care provider were simply abolished except for an action for "professional negligence" under NRS Chapter 41A.

Each Petitioner raised common law and statutory causes of action against their providers of health care in addition to claims for "professional negligence" under NRS Chapter 41A. Each Petitioner completely complied with all requirements of

[28] Bickham Transcript of Original Hearing at APPX.000385-000396; Order from Original Hearing at APPX.000397-000402

[29] Bickham First Amended Complaint at APPX.000403-000415; Bickham Defendant Second Motion to Dismiss at APPX.000416-000421; Bickham Opposition at APPX.000422-000439; Bickham Defendant Reply at APPX.000440-000444; Transcript of Hearing for Second Hearing at APPX.000445-000454; Bickham Order Granting Second Motion at APPX.000455-000460.

[30] Bickham Transcript of Second Motion Hearing at APPX.000453 Line 19.

[31] Bickham Order Granting Second Motion to Dismiss at APPX.000456 Line 8-10.

NRS Chapter 41A (statute of limitations and supporting expert affidavit) yet had all of their claims dismissed except for "professional negligence" under NRCP 12(b)(5) for failure to state a claim. Petitioners now seek writ relief to re-instate their additional causes of action.

III. LEGAL STANDARD FOR WRIT RELIEF

It is well-established that Writ relief is an extraordinary remedy, and it is within the Court's discretion whether to entertain a petition seeking that relief. *Renown Reg'l Med. Ctr. v. Second Judicial Dist, Court*, 130 Nev. 824, 827, 335 P.3d 199, 201 (2014). However, the Court may exercise its discretion to consider a petition regarding a motion to dismiss when "an important issue of law needs clarification and considerations of sound judicial economy and administration militate in favor of granting the petition." *Id*. at 197-98, 179 P.3d at 559, *City of Mesquite v. Eighth Judicial Dist. Court of Nev.*, 445 P.3d 1244, 1248 (Nev. 2019).

In this case, one judge in the Eighth Judicial District Court has found that NRS Chapter 41A is the exclusive remedy for persons injured by a physician, contrary to this Court's controlling precedent in *Szekeres v. Robinson*, 102 Nev. 93 (1986) (recognizing a breach of contract theory by a patient against a doctor), *Humboldt Gen. Hosp. v. Sixth Judicial Dist. Court of Nev.*, 132 Nev. 544 (2016) (recognizing battery claims against doctors), *Estate of Curtis v. S. Las Vegas Med. Inv'rs, LLC*, 466 P.3d 1263, 1270 (Nev. July 9, 2020) (recognizing a neglect of a vulnerable

person under NRS § 41.1395 against a provider of health care) and *Hoopes v. Hammargren*, 102 Nev. 425, 431, 725 P.2d 238, 242 (1986) (recognizing fiduciary duty cause of action between a doctor to a patient). At least one other judge has followed the lead of Judge Johnson, creating an urgent need for relief.

Petitioners have no adequate remedy at law because they will not be permitted pleadings, discovery, jury instructions, other available measures of damages or trials on these recognized, alternate causes of action at trial. The outcome of this Writ Petition presents an important issue of state law applicable to hundreds of medical malpractice cases and it will promote judicial economy by avoiding years of trial, appeal and re-trial on a simple procedural issue as to failure to state a claim and non-compliance with binding authority of the Nevada Supreme Court. Therefore, Petitioners request the Court entertain this Writ Petition and clarify Nevada law.

IV. ARGUMENT

A. Writ Relief is Appropriate Because Recognized Causes of Action were Asserted and "Professional Negligence" is not the Exclusive Remedy of a Person Injured by a Provider of Health Care

The legal issue present by this Writ Petition is whether an injured patient's exclusive cause of action against his/her provider of health care is a cause of action for "professional negligence" under NRS § 41A.015 *or* whether other common law and statutory causes of action against a health care provider such as breach of contract, battery, breach of fiduciary duty and neglect of a vulnerable person continue to exist and may also be pleaded.

Nevada's medical malpractice laws were greatly changed by a 2004 ballot initiative referred to as KODIN ("Keep Our Doctors in Nevada"). Among many provisions, KODIN sought to cap pain and suffering damages, limit claimant attorney fees, shorten the statute of limitations to sue a provider of health care, require that all complaints against a provider of health care attach a supporting medical expert affidavit, allow for the introduction of collateral source payments, and eliminate joint and several liability for providers of health care. After it was approved by the voters, KODIN was mostly codified under NRS Chapter 41A, which applies to actions for "professional negligence" committed by a "provider of health care" as those terms are defined by KODIN and later statutory amendments. *See, Thomas v. Hardwick*, 126 Nev. 142, 146 n.2, 231 P.3d 1111, 1114 (2010) (explaining KODIN and its codification mostly into NRS Chapter 41A). KODIN's provisions were based on a similar California law called the Medical Injury Compensation Reform Act (MICRA), passed in 1975. Most of KODIN's provisions are strikingly similar, if not verbatim, to MICRA (more on MICRA later).

Almost immediately after KODIN was passed, the Nevada Supreme Court began to consider how KODIN affected and applied to causes of action pleaded against a provider of health care *other than* professional negligence. The Nevada Supreme Court determined in *Turner v. Renown Reg'l Med. Ctr*., 461 P.3d 163 (Nev. 2020) (unpublished) that where the "gravamen" of a cause of action is medical

malpractice, it is subject to the medical malpractice statute of limitations set forth in NRS § 41A.097. The "gravamen" of the action is for medical malpractice when a cause of action "involve[s] medical diagnosis, judgment, or treatment." *Szymborski v. Spring Mt. Treatment Ctr.*, 133 Nev. 638, 403 P.3d 1280 (Nev. 2017). In addition to such an action having to be filed within the medical malpractice statute of limitations under *Turner*, the complaint must also be supported by a medical expert affidavit under *Szymborski* pursuant to NRS § 41A.071. Therefore, this Court's post-KODIN jurisprudence is filled with cases that in effect say if a patient sues a provider of health care for causes of action *other than* professional negligence, the patient's complaint must still satisfy certain provisions of KODIN/NRS Chapter 41A. **However, the Nevada Supreme Court has *never* found that the effect of an alternate cause of action having the "gravamen" of medical malpractice is an *immediate dismissal for failure to state a claim under NRCP 12(b)(5)*, only that the pleading must satisfy the expert affidavit requirement and statute of limitations in KODIN/NRS Chapter 41A to assure the law is not circumvented.**

Petitioners and their counsel were well-aware of *Turner*, *Szymborski* and similar Nevada Supreme Court rulings and, therefore, filed all causes of action within one year of the injury under NRS § 41A.097 *and* attached a supporting medical expert declaration to the Complaint under NRS § 41A.071. Petitioners completely complied with KODIN/NRS Chapter 41A. Nevertheless, all causes of

action apart from professional negligence were dismissed for failure to state a claim.

The Real Parties in Interest in the cases below, who were mostly represented by the same defense law firm, urged to the District Court a much stronger reading of *Turner* and *Szymborski* that requires *all* causes of action relating to "medical diagnosis, judgment, or treatment" *other than* professional negligence to be dismissed for failure to state a claim, even if those causes of action complied with KODIN/NRS Chapter 41A. This is an improper reading of *Turner* and *Szymborski*. The Nevada Supreme Court has never held that all causes of action against a doctor are abolished accept medical malpractice and nowhere in NRS Chapter 41A did the legislature state its intent to do so. Therefore, even if alternate causes of action depend on the "medical diagnosis, judgment, or treatment" of the defendants, Petitioners' causes of action for Breach of Contract, Battery, Breach of Fiduciary Duty and Neglect of a Vulnerable Person/NRS § 41.1395 are valid causes of action and should not have been dismissed.

Indeed, the Nevada Supreme Court has already repeatedly found that a claimant may plead a cause of action against a doctor for <u>both</u> professional negligence and another cause of action. In *Egan v. Chambers*, 129 Nev. 239, 241 n.2 (2013) the court discussed a breach of contract claim filed against a physician along with a medical malpractice action. In *Goldenberg v. Woodard*, 130 Nev. 1181 (2014) a fraud claim in addition to a medical malpractice action was permitted. In

Johnson v. Egtedar, 112 Nev. 428, 430 (1996) a battery and medical malpractice action were permitted. And lastly in *Estate of Curtis*, 466 P.3d at 1270 n.5 the court discussed an elder abuse cause of action for violation of NRS § 41.1395 accompanying a medical malpractice case, the very statute the Petitioners pleaded. There is simply no legal authority that all causes of action that might be brought against a physician are "subsumed" into NRS Chapter 41A. Indeed, both common sense and numerous Nevada Supreme Court cases state otherwise. Plaintiff's additional causes of action should not have been dismissed.

B. The Petitioners Properly Alleged Recognized, Alternate Causes of Action against Their Providers of Health Care

In Nevada, a plaintiff is free to plead alternative causes of action. NRCP 8(a)&(e) states that "[r]elief in the alternative or of several different types may be demanded," "[a] party may set forth two or more statements of a claim or defense alternately or hypothetically" and "[a] party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal or on equitable grounds or on both."

1. *Petitioners' Claims for Breach of Contract were Improperly Dismissed for Failure to State a Claim*

All Petitioners alleged a cause of action for breach of a contract to provide medical services. Like any other professional or provider of services, a physician may be sued for breach of contract. *Szekeres v. Robinson*, 102 Nev. 93 (1986) (patient of botched procedure is allowed to recover damages under breach of contract

theory against doctor).[32]

The Nevada Supreme Court most directly discussed the ability of a patient to sue a health care provider for breach of contract in the case of *Szekeres v. Robinson*, 102 Nev. 93 (1986). In that case, the plaintiff hired the defendant doctor to perform a sterilization medical procedure so she could no longer have children. The procedure was incorrectly performed, and the plaintiff became pregnant and gave birth to a healthy, albeit unplanned child. Although the Nevada Supreme Court found that delivery of a healthy baby is not actionable damages for a medical malpractice case (rejecting a so-called "wrongful birth" cause of action), it supported a theory of contract recovery from a physician, stating that "failure to carry out the [surgical] process in the manner promised would result in an award, at least, of the costs of medical, surgical and hospital care associated with the failed surgery. In such a case, damages could be awarded in accordance with what was contemplated by the parties at the time the contract was made." *Id*. at 98.

Although *Szekeres* is an unusual case factually, its core holding that a breach of contract action may be filed against a physician was not limited to the facts of that case. More recently, the Nevada Supreme Court discussed in passing actions simultaneously tried for professional negligence and breach of contract against a

[32] Some states have found that to sue a physician for breach of contract, the physician must *guarantee* a particular result. However, Nevada has never followed that approach.

physician in *Egan v. Chambers*, 129 Nev. 239, 241 n.2 (2013), *Busick v. Trainor*, 437 P.3d 1050 (Nev. 2019) and, as recently as 2020, *Parminder Kang v. Eighth Judicial Dist. Court of Nev.*, 460 P.3d 18 (Nev. 2020). Far from being barred, the Nevada Supreme Court has repeatedly recognized and permitted a breach of contract theory of recovery from a physician.

Writ relief should be granted to allow the Petitioners to proceed on breach of contact claims. KODIN and NRS Chapter 41A simply did not abolish a breach of contract cause of action against a physician.

2. Petitioners' Claims for Medical Battery were Improperly Dismissed for Failure to State a Claim

Petitioners Bickham and Davis sued their physician for battery. Bickham alleged that he consented to an operation at the T10-11 spinal level, but his surgeon actually operated on the T9-10 level of his spine, to which he did not consent.[33] Davis sued her physician because her parents has consented to a hernia repair surgery but her physician actually removed her bladder, to which she did not consent.[34] The District Court dismissed both of Petitioners' medical battery causes of action for failure to state a claim. The rulings apparently relied on the defense argument that medical battery is subsumed into an action for "professional negligence" under NRS Chapter 41A and therefore is barred as a separate cause of action.

[33] Bickham Complaint at APPX.000315 Paragraphs 44-52.

[34] Davis Complaint at APPX.000239-000240 Paragraphs 36-43

This issue has already been clearly decided by the Nevada Supreme Court. The leading case on this issue in Nevada is *Humboldt Gen. Hosp. v. Sixth Judicial Dist. Court of Nev.*, 132 Nev. 544 (2016), in which the Nevada Supreme Court acknowledged that a physician may be sued for battery. In *Humboldt Gen. Hosp.* the plaintiff's doctor implanted her with an intrauterine device (IUD) but the plaintiff later learned that the particular IUD implanted was not FDA-approved because it came from a foreign pharmacy. The plaintiff was apparently otherwise uninjured. Nevertheless, the plaintiff sued her physician for battery because she gave no consent to implant a non-FDA approved device. However, the patient in that case did not attach a medical expert affidavit to support the Complaint. The Nevada Supreme Court made clear that "[a] battery is an intentional and offensive touching of a person who has not consented to the touching," and "[i]t is well settled that a physician who performs a medical procedure without the patient's consent commits a battery irrespective of the skill or care used." *Id*. at 549. The court went on to create two categories of physician battery cases and distinguish circumstances between (1) a total lack of consent case and (2) a partial lack of consent case. The court's explanation of the difference is a bit of a blurred line. However, the Court clearly sought to distinguish between cases where the patient gave absolutely no consent to the procedure (seemingly rare) and cases where general consent to a procedure was given but the doctor somehow exceeded that consent. In *Humboldt*

Gen. Hosp. the Court ruled that a *total* lack of consent case need not be supported by a medical expert affidavit, but a *partial* lack of consent case requires one.

An unanswered question in *Humboldt Gen. Hosp.* was whether an operation-on-the-wrong-body-part case fell into the total or partial lack of consent category, although case law from other jurisdictions highly suggests it is a *total* lack of consent case since no consent to operate on the wrong body part was ever given. *E.g.*, *Carter v. Pain Ctr. of Ariz.*, P.C., 239 Ariz. 164, 167, 367 P.3d 68, 71 (Ct. App. 2016) (a patient may sue for medical battery where "the patient consented to one procedure, and another was performed").

However, for Petitioners Bickham and Davis, *both* attached a supporting medical expert affidavit to their complaint where it was described that the physician intended to perform one procedure but actually performed another, beneath the standard of care.[35] Therefore, whether an operated-on-the-wrong-body-part case is classified as a total or partial lack of consent case under Nevada law, Bickham and Davis' pleadings could never have been dismissed for failure to attach a supporting medical expert affidavit. Regardless, it bears repeating that operating on the wrong body part appears to be a total lack of consent case, not requiring ill-intent by the physician or compliance with NRS Chapter 41A at all.

[35] Bickham Complaint at APPX.000320-000323; Davis Complaint at APPX.000243-000247

Virtually every case ever written on this subject holds that a surgeon who mistakenly but intentionally operates on the wrong body part is liable for medical battery. *Alexander v. Rask*, 90 Or. App. 379, 382, 752 P.2d 344, 346 (1988) ("A surgeon may commit a technical battery if he operates on the wrong part of the body, because he intends to operate on that part."); *Griffey v. Adams*, No. 5:16-CV-00143-TBR, 2018 U.S. Dist. LEXIS 105680, at *20 (W.D. Ky. June 22, 2018) (summary judgment against doctor who operated on the wrong foot for medical battery upheld "[b]ecause the uncontroverted evidence demonstrates that [the doctor] commenced an operation on a body part for which he did not possess consent."); *Moriarity v. Rockford Health Sys. (In re Estate of Allen)*, 365 Ill. App. 3d 378, 385, 302 Ill. Dec. 202, 210-11, 848 N.E.2d 202, 210-11 (2006) ("In a medical-battery case, an injured party can recover by establishing either that there was no consent to the medical treatment performed, that the treatment was against the injured party's will, or that the treatment substantially varied from the consent granted."). Yet, **under the approach applied by the District Court, medical battery for operation on the wrong body part fails to even state a claim upon which relief can be granted.** Indeed, the Nevada Supreme Court has already held that a battery claim is *not* subsumed into professional negligence and the two may proceed to trial together. *Johnson v. Egtedar*, 112 Nev. 428, 915 P.2d 271 (1996) (malpractice and battery action tried together where surgeon operated on wrong level of spine and injured the

colon during surgery).

Given that (1) the Nevada Supreme Court recognizes that a doctor may be sued for medical battery, (2) operating on the wrong body part is universally recognized as a medical battery claim, and (3) Petitioners had even attached a supporting medical expert affidavit supporting their claims, Petitioners and their counsel are at a loss to explain why these causes of action were dismissed under NRCP 12(b)(5) for failure to state a claim. They believe this to be error by the District Court for which they have no adequate remedy on appeal. Therefore, they seek writ relief directing the District Court to re-instate those medical battery claims.

3. *Petitioners' Claims for "Neglect of a Vulnerable Person" under NRS § 41.1395 were Improperly Dismissed for Failure to State a Claim*

Next, Petitioners Davis, Bickham, Ziegler and Nelson pled a cause of action for breach of statute under NRS § 41.1395 for "neglect of a vulnerable person."[36] A complete history of this statute, its legislative history and its intended purpose to apply against providers of health care was extensively briefed to the District Court.[37] In 1997, Nevada enacted Senate Bill 80, later codified as NRS § 41.1395, which had

[36] Bickham Complaint at APPX.000317-000319; Davis Complaint at APPX.000240-000241; Nelson Complaint at APPX.000083-000084; Ziegler Complaint at APPX.000006-000007.

[37] Bickham Opposition at APPX.000347-000350, 000356-000361; Davis Opposition at APPX.000269-000271, 000280-000284; Nelson Opposition at APPX.000111-000113, 000123-000128; Ziegler Opposition at APPX.000034-000036, 000044-000048.

the express purpose to curb abuse, exploitation and neglect of older persons and vulnerable persons with physical and mental impairments. As a remedial statute, NRS § 41.1395 must be broadly and liberally construed to provide the most protections possible for vulnerable persons. *Colello v. Adm'r of Real Estate Div.*, 100 Nev. 344, 347 (1984) ("Statutes with a protective purpose should be liberally construed in order to effectuate the benefits intended to be obtained."). NRS § 41.1395 is a powerful ally to older and vulnerable people as it allows an award of double damages and attorney's fees in addition to other recoverable compensable damages.

NRS § 41.1395 is plainly *not* limited to intentional or malicious abuse. Separate from the "abuse" definition contained in the statute, the "neglect" definition provisions of NRS § 41.1395(4)(c)[38] were broadly defined in both the statute and legislative history to include the neglect of health care professionals, including physicians as well as facilities that have undertaken the care of the vulnerable. Indeed, the legislative history of NRS § 41.1395 plainly shows that the intent of the

[38] NRS § 41.1395(4)(c): "Neglect" means the failure of a person who has assumed legal responsibility or a contractual obligation for caring for an older person or a vulnerable person, or who has voluntarily assumed responsibility for such a person's care, to provide food, shelter, clothing or services within the scope of the person's responsibility or obligation, which are necessary to maintain the physical or mental health of the older person or vulnerable person. For the purposes of this paragraph, a person voluntarily assumes responsibility to provide care for an older or vulnerable person only to the extent that the person has expressly acknowledged the person's responsibility to provide such care.

statute was meant to, for example, deal with "mistreatment in nursing homes and managed care facilities" and "certain obligations for [health] care"[39] but can apply to any provider of health care, not solely nursing or long-term care facilities.

Similar statutes in other states to curb abuse, exploitation and neglect of vulnerable persons have been held to be a separate, statutory cause of action **independent and distinct of a tort medical malpractice action**. *E.g.*, *Estate of McGill v. Albrecht*, 203 Ariz. 525, 530, 57 P.3d 384, 389 (2002) (applying abuse and neglect statute to a physician). Indeed, only recently the Nevada Supreme Court expressly recognized that a nurse provider of health care can be sued under NRS § 41.1395 along with a medical malpractice action, albeit in some cases subject to the medical expert affidavit requirement of NRS § 41.071. *Estate of Curtis v. S. Las Vegas Med. Inv'rs, LLC*, 466 P.3d 1263, 1270 (Nev. July 9, 2020) (adjudicating an elder abuse claim under NRS § 41.1395 filed against a nurse).

Despite complete compliance with KODIN and NRS Chapter 41A, the District Court dismissed Petitioners' statutory cause of action for failure to state a claim. This is especially frustrating for claimant Nelson who presents the exact fact scenario most meant to be addressed and punished by NRS § 41.1395, i.e., an elderly

[39] *See* 1997 SB 80 Leg. History, cited in briefs at Bickham Opposition at APPX.000347-000350, 000356-000361; Davis Opposition at APPX.000269-000271, 000280-000284; Nelson Opposition at APPX.000111-000113, 000123-000128; Ziegler Opposition at APPX.000034-000036, 000044-000048.

person recuperating in a nursing home type setting whose serious medical condition is simply neglected and ignored by providers of health care. Dismissal of Petitioners' causes of action for violation of NRS § 41.1395 were incorrect, causes of action under NRS § 41.1395 continue to exist, and the District Court's approach renders NRS § 41.1395 all but useless if it cannot be applied to providers of health care—the exact reason why it was enacted. Therefore, Petitioners seek writ relief directing the District Court to re-instate those causes of action under NRS § 41.1395.

4. Petitioner Bickham's Claims for Breach of Fiduciary Duty were Improperly Dismissed for Failure to State a Claim

Petitioner Bickham also sued his physician for breach of fiduciary duty. The Nevada Supreme Court first recognized that the relationship between patient and doctor is a fiduciary relationship in a psychiatry case, *Massey v. Litton*, 99 Nev. 723, 728, 669 P.2d 248, 252 (1983), and expanded that holding to all physicians in *Hoopes v. Hammargren*, 102 Nev. 425, 431, 725 P.2d 238, 242 (1986).

Bickham had alleged in his Complaint that Real Party in Interest, Dr. Schneier, had discovered that he operated on the wrong level of Bickham's spine, but then failed to disclose this fact and other facts about negligent surgical screw placement to his patient, as an apparent means to prevent a malpractice action against the doctor.[40] It was further alleged that Dr. Schneier's failure to inform his

[40] *See* Bickham Complaint at APPX.000316-000317; Bickham's First Amended Complaint at APPX.000408-000410.

patient of his medical error worsened Bickham's condition, causing additional spinal cord damage until another doctor advised Bickham of the error several months later.

Respectfully, this is the exact type of behavior that should trigger a breach of fiduciary action against a physician by a patient. A physician has a duty to advise his patient of medical errors made by the physician and failure to do so is a breach of the doctor's fiduciary duty. Breach of fiduciary duty has been recognized as a separate cause of action against a physician in Nevada and Bickham seeks writ relief directing the District Court to re-instate his cause of action.

C. This Legal Issue has been Decided In Petitioners' Favor in California when Applying its Similar MICRA Statutes

The legal issue raised in this Complaint is not unique to Nevada as many states have enacted laws to protect physicians in the face of perceived crisis. It is true that some other states that adopted legislative schemes that expressly provide an exclusive remedy to victims of health care providers. For example, the state of Wisconsin has a state-wide fund that compensates victims of medical malpractice and requires all claims to be submitted under Chapter 655 of the Wisconsin Statutes. *Phelps v. Physicians Ins. Co. of Wis., Inc.*, 319 Wis. 2d 1, 768 N.W.2d 615 (2009) ("Chapter 655 constitutes the exclusive procedure and remedy for medical malpractice in Wisconsin' against health care providers ... and their employees."). Similarly, by statute, the state of Louisiana has enacted an exclusive remedy against a provider of health care for all "unintentional tort or any breach of contract on health

care or professional services rendered." *Banister v. Day*, 13 So. 3d 229, 232 (2009) ("The Louisiana Medical Malpractice Act provides the sole remedy for medical malpractice claims in Louisiana."). However, even a state like Louisiana omits *intentional* torts from its legislative definitions. Moreover, neither Nevada statutes nor the Nevada Supreme Court's decision have ever said that an action for "professional negligence" under NRS Chapter 41A is an injured patient's exclusive remedy or that all other causes of action against a provider of health care are "subsumed" into "professional negligence," and the District Court has held.

This Petition has noted the striking similarities between KODIN/NRS Chapter 41A in Nevada and MICRA in California. California courts have acknowledged a system where alternate causes of action other than professional negligence against providers of health care **have survived MICRA and continue to exist**. California courts have long and consistently recognized that "[t]he problem [with MICRA] is that additional causes of action frequently arise out of the same facts as a medical malpractice cause of action. These may include battery, products liability, premises liability, fraud, breach of contract, and intentional or negligent infliction of emotional distress." *Smith v. Ben Bennett, Inc.*, 133 Cal. App. 4th 1507, 1514, 35 Cal. Rptr. 3d 612, 614 (2005). But the California solution to this "problem" is *not* to have found that MICRA is an exclusive remedy. Instead, California courts freely recognize that even if a cause of action is close enough to medical malpractice to

trigger having to apply MICRA's provisions, such as damage caps or statute of limitations, **the alternate causes of action still exist**. *Unruh-Haxton v. Regents of Univ. of Cal.*, 162 Cal. App. 4th 343, 352, 76 Cal. Rptr. 3d 146, 154 (2008) ("It is settled that additional causes of action may arise out of the same facts as a medical malpractice action that do not trigger MICRA."). Well-reasoned cases on this issue abound in Petitioners' favor, *E.g., Perry v. Shaw,* 88 Cal. App. 4th 658, 106 Cal. Rptr. 2d 70 (2001) (battery cause of action was upheld against a physician who exceeded his authority to operate, and the physician's liability was not even held to fall under MICRA because it was an intentional tort), *Smith v. Ben Bennett, Inc.*, 133 Cal. App. 4th 1507, 35 Cal. Rptr. 3d 612 (2005) (refusing to apply certain MICRA provisions to statutory abuse and neglect claims); *Bigler-Engler v. Breg, Inc.*, 7 Cal. App. 5th 276, 321-22, 213 Cal. Rptr. 3d 82, 121 (2017) (applying MICRA but allowing a separate breach of fiduciary duty against health care providers to stand).

Alternate causes of action survived KODIN/NRS Chapter 41A and have value. A claimant pleading causes of action other than professional negligence may have different burdens of proof, be entitled to different jury instructions, be entitled to different discovery, be entitled to different measures of damages such as punitive damages or uncapped damages for intentional torts, or may be entitled to special statutory double or treble damages. There are many reasons why a claimant may wish to robustly plead his or her case and that should not be denied.

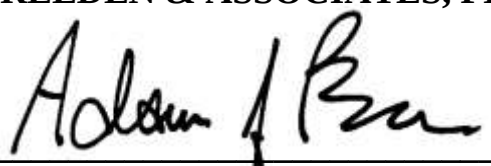
V. CONCLUSION

In closing, Petitioners must ask this question: Did KODIN and NRS Chapter 41A abolish breach of contract, battery, breach of statute and breach of fiduciary duty claims against providers of health care? Or do those causes of action continue to exist, even if subject to additional requirements by KODIN and NRS Chapter 41A?

Petitioners think their causes of action still legally exist and they have complied with all applicable notice pleading requirements. The Nevada Supreme Court's case law states that the causes of action still exist alongside professional negligence. Writ relief to reinstate those causes of action should be issued.

Respectfully submitted this 30th day of July, 2021.

BREEDEN & ASSOCIATES, PLLC



ADAM J. BREEDEN, ESQ.
Nevada Bar No. 008768
376 E. Warm Springs Road, Suite 120
Las Vegas, Nevada 89119
Phone: (702) 819-7770
Fax: (702) 819-7771
adam@breedenandassociates.com
Attorney for Petitioners

CERTIFICATION PURSUANT TO NRAP 28.2 and NRAP 32(a)(9)

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

[X] This brief has been prepared in a proportionally spaced typeface using Microsoft Word, 2020 edition in 14-point Times New Roman font; or

[ ] This brief has been prepared in a monospaced typeface using [state name and version of word-processing program] with [state number of characters per inch and name of type style].

2. 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:

[X] Proportionately spaced, has a typeface of 14 points or more, and contains approximately 6,345 words; or

[ ] Monospaced, has 10.5 or fewer characters per inch, and contains _____ words or _____ lines of text; or

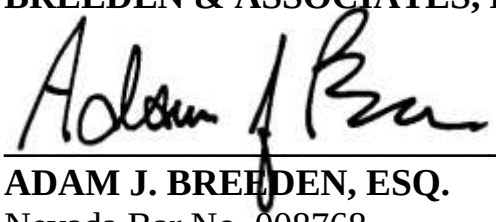
[ ] Does not exceed 15 pages.

3. 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 every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 30th day of July, 2021.

BREEDEN & ASSOCIATES, PLLC



ADAM J. BREEDEN, ESQ.
Nevada Bar No. 008768
376 E. Warm Springs Road, Suite 120
Las Vegas, Nevada 89119
Phone: (702) 819-7770
Fax: (702) 819-7771
Adam@breedenandassociates.com
Attorney for Petitioners

VERIFICATION OF PETITIONERS' COUNSEL UNDER NRAP 21(a)(5)

1. I am Adam J. Breeden, Esq., counsel for the Petitioners in this Writ Petition and in their underlying District Court cases.

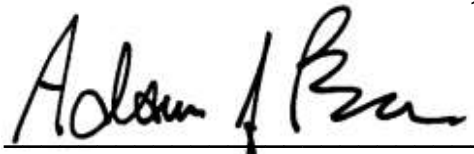
2. I hereby verify under oath that the facts set forth herein are true to my knowledge and supported with citations to the Appendix of this Petition.

3. I make this verification for my clients pursuant to NRAP 21(a)(5).

I declare under penalty of perjury that the foregoing is true under the laws of the State of Nevada.

Dated this 30th day of July, 2021.

BREEDEN & ASSOCIATES, PLLC



ADAM J. BREEDEN, ESQ.
Nevada Bar No. 008768
376 E. Warm Springs Road, Suite 120
Las Vegas, Nevada 89119
Phone: (702) 819-7770
Fax: (702) 819-7771
Adam@breedenandassociates.com
Attorney for Petitioners

CERTIFICATE OF SERVICE

Pursuant to Nev. R. App. 25, I hereby certify that on the 2nd day of August, 2021, a copy of the foregoing **ORIGINAL PETITION FOR WRIT OF MANDAMUS OR, IN THE ALTERNATIVE, WRIT OF PROHIBITION** was served via U.S. First Class Mail on all registered users as follows:

Hon. Susan Johnson, Department 22
EIGHTH JUDICIAL DISTRICT COURT
200 Lewis Avenue
Las Vegas, Nevada 89155
Respondent

Anthony D. Lauria, Esq.
LAURIA TOKUNAGA GATES & LINN
601 South 7th Street
Las Vegas, Nevada 89101
Counsel for Real Party in Interest
Ira Michael Schneier, M.D.

Hon. Veronica Barisich, Department 5
EIGHTH JUDICIAL DISTRICT COURT
200 Lewis Avenue
Las Vegas, Nevada 89155
Respondent

Sean M. Kelly, Esq.
McBRIDE HALL
8329 W. Sunset Road, Suite 260
Las Vegas, Nevada 89113
Counsel for Real Party in Interest
Muhammad Saeed Sabir, M.D.

Anthony D. Lauria, Esq.
LAURIA TOKUNAGA GATES & LINN
601 South 7th Street
Las Vegas, Nevada 89101
Counsel for Real Party in Interest
Stephanie A. Jones, D.O.

Ian M. Houston, Esq.
HALL PRANGLE & SCHOONVELD
1140 N. Town Center Drive, Suite 340
Las Vegas, Nevada 89144
Counsel for Real Party in Interest
Jayson Agaton, APRN

Anthony D. Lauria, Esq.
LAURIA TOKUNAGA GATES & LINN
601 South 7th Street
Las Vegas, Nevada 89101
Counsel for Real Party in Interest
Daniel M. Kirgan, M.D.

/s/ Kristy L. Johnson
Attorney or Employee of
Breeden & Associates, PLLC