

**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

SUPREME COURT CASE NO.

Electronically Filed
Aug 02 2021 01:50 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

**APPENDIX OF PETITIONERS FOR ORIGINAL PETITION FOR WRIT
VOLUME II**

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DESCRIPTION OF DOCUMENT	DATE	VOL.	PAGE(S)
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Ziegler v. Kirgan - Case No. A-20-821720-C

Complaint	09/23/2020	I	000001 – 000011
Defendant Daniel M. Kirgan, M.D.’s Motion to Dismiss Certain Causes of Action of Plaintiffs Complaint	11/04/2020	I	000012 – 000021
Plaintiff’s Opposition to Daniel M. Kirgan, M.D.’s Motion to Dismiss Certain Causes of Action of Plaintiffs Complaint	11/25/2020	I	000013 – 000048
Defendant Daniel M. Kirgan, M.D.’s Opposition to Motion to Dismiss Certain Causes of Action of Plaintiffs Complaint	12/01/2020	I	000049 – 000059
Recorder’s Transcript of Hearing	12/08/2020	I	000060 – 000070
Order Granting Defendant Daniel M. Kirgan, M.D.’s Motion to Dismiss Certain Causes of Action of Plaintiff’s Complaint	12/18/2020	I	000071 – 000076

Nelson v. Sabir, et al - Case No. A-20-823285-C

Complaint	10/19/2020	I	000077 – 000091
Defendant Pioneer Health Care, LLC and Muhammad Saeed Sabir, MD’s Motion to Dismiss	11/16/2020	I	000092 – 000099
Plaintiff’s Opposition to Defendant Pioneer Health Care, LLC and Muhammad Saeed Sabir, MD’s Motion to Dismiss	12/03/2020	I	000100 – 000128
Jayson Paulo Alberto Agaton, APRN’s Motion for Partial Dismissal of Plaintiff’s Claims for Ordinary Negligence, Neglect of an Older Person, Breach of Contract, and Unjust Enrichment	12/07/2020	I	000129 – 000147
Defendants Pioneer Health Care, LLC and Muhammad Saeed Sabir, MD’s Joinder to Jayson Paulo Alberto Agaton, APRN’s Motion for Partial Dismissal of Plaintiff’s Claims for Ordinary Negligence, Neglect of an Older Person, Breach of Contract, and Unjust Enrichment	12/08/2020	I	000148 – 000150
Plaintiff’s Opposition to Defendant Agaton’s Motion for Partial Dismissal of Claims	12/21/2020	I	000151 – 000179

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Jayson Agaton, APRN's Reply in Support of His Motion for Partial Dismissal of Plaintiff's Claims for Ordinary Negligence, Neglect of an Older Person, Breach of Contract, and Unjust Enrichment	01/05/2021	I	000180 – 000194
Defendants Pioneer Health Care, LLC and Muhammad Saeed Sabir, MD's Rely in Support of Motion to Dismiss	01/05/2021	I	000195 – 000204
Defendants Pioneer Health Care, LLC and Muhammad Saeed Sabir, MD's Joinder to Jayson Agaton, APRN's Reply in Support of His Motion for Partial Dismissal of Plaintiff's Claims for Ordinary Negligence, Neglect of an Older Person, Breach of Contract, and Unjust Enrichment	01/06/2021	I	000205 – 000207
Recorder's Transcript of Hearing	01/12/2021	I	000208 – 000221
Order Granting Jayson Paulo Alberto Agaton, APRN's Motion for Partial Dismissal of Plaintiff's Claims for Ordinary Negligence, Neglect of an Older Person, Breach of Contract, and Unjust Enrichment and Pioneer Health Care, LLC and Muhammad Saeed Sabir, MD's Motion to Dismiss	02/01/2021	I	000222 – 000233

Davis v. Jones - Case No. A-20-826513-C

Complaint	12/16/2020	I	000234 – 000247
Defendant Stephanie A. Jones, D.O.'s Motion to Dismiss Certain Causes of Action of Plaintiffs' Complaint	01/07/2021	II	000248 – 000257
Plaintiffs' Opposition to Defendant's Motion to Dismiss Certain Causes of Action of Plaintiffs' Complaint	01/19/2021	II	000258 – 000284
Defendant Stephanie A. Jones, D.O.'s Reply to Plaintiffs' Opposition to Defendant's Motion to Dismiss Certain Causes of Action of Plaintiffs' Complaint	02/02/2021	II	000285 – 000302
Order Granting Defendant Stephanie A. Jones, D.O.'s Motion to Dismiss Certain Causes of Action of Plaintiffs' Complaint	02/17/2021	II	000303 – 000308

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Bickham v. Schneier - Case No. A-20-827155-C

Complaint	12/30/2020	II	000309 – 000323
Defendants Ira Michael Schneier, M.D. and Michael Schneier Neurosurgical Consulting P.C.'s Motion to Dismiss Certain Causes of Action of Plaintiff's Complaint	02/09/2021	II	000324 – 000333
Plaintiff's Opposition to Defendants Ira Michael Schneier, M.D. and Michael Schneier Neurosurgical Consulting P.C.'s Partial Motion to Dismiss	02/23/2021	II	000334 – 000361
Defendants Ira Michael Schneier, M.D. and Michael Schneier Neurosurgical Consulting P.C.'s Reply to Plaintiff's Opposition to Motion to Dismiss Certain Causes of Action of Plaintiff's Complaint	03/09/2021	II	000362 – 000384
Recorders Transcript of Hearing	03/16/2021	II	000385 – 000396
Order Granting Defendants Ira Michael Schneier, M.D. and Michael Schneier Neurosurgical Consulting P.C.'s Motion to Dismiss Certain Causes of Action of Plaintiff's Complaint	03/24/2021	II	000397 – 000402
First Amended Complaint	03/24/2021	II	000403 – 000415
Defendants Ira Michael Schneier, M.D. and Michael Schneier Neurosurgical Consulting P.C.'s Motion to Dismiss Certain Causes of Action of Plaintiff's First Amended Complaint	04/06/2021	II	000416 – 000421
Plaintiff's Opposition to Defendants Ira Michael Schneier, M.D. and Michael Schneier Neurosurgical Consulting P.C.'s Second Partial Motion to Dismiss	04/20/2021	II	000422 – 000439
Defendants Ira Michael Schneier, M.D. and Michael Schneier Neurosurgical Consulting P.C.'s Reply to Plaintiff's Opposition to Motion to Dismiss Certain Causes of Action of Plaintiff's First Amended Complaint	05/11/2021	II	000440 – 000444
Recorders Transcript of Hearing	05/18/2021	II	000445 – 000454
Order Granting in Part and Denying in Part Defendants' Motion to Dismiss Certain Causes of Action of Plaintiff's First Amended Complaint	07/14/2021	II	000455 – 000460

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Breeden & Associates, PLLC, and on the 2nd day of August, 2021, a true and correct copy of the foregoing document was e-filed and e-served on all registered parties to the Supreme Court's electronic filing system. Additionally, a hard copy of the Appendix with all documents on CD-ROM was served on Respondents by placing a copy in the US Mail, postage pre-paid, on the same date to:

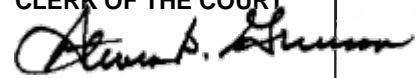
Hon. Susan Johnson, Department 22 EIGHTH JUDICIAL DISTRICT COURT 200 Lewis Avenue Las Vegas, Nevada 89155 <i>Respondent</i>	Anthony D. Lauria, Esq. LAURIA TOKUNAGA GATES & LINN 601 South 7 th Street Las Vegas, Nevada 89101 <i>Counsel for Real Party in Interest Ira Michael Schneier, M.D.</i>
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Hon. Veronica Barisich, Department 5 EIGHTH JUDICIAL DISTRICT COURT 200 Lewis Avenue Las Vegas, Nevada 89155 <i>Respondent</i>	Sean M. Kelly, Esq. McBRIDE HALL 8329 W. Sunset Road, Suite 260 Las Vegas, Nevada 89113 <i>Counsel for Real Party in Interest Muhammad Saeed Sabir, M.D.</i>
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DISTRICT COURT
CLARK COUNTY, NEVADA

ERRYS DEE DAVIS, a minor, by her parents,)
TRACI LYNN PARKS and ERRICK DAVIS;)
TRACI LYNN PARKS, individually; ERRICK)
DAVIS, individually,)

Plaintiffs,

vs.

STEPHANIE A. JONES, D.O., an individual,
DOES I through X; and ROE
CORPORATIONS XI through XX, inclusive,

Defendants.

CASE NO. A20-826513-C
DEPT. NO. 8

HEARING REQUESTED

**DEFENDANT STEPHANIE A. JONES,
D.O.'S MOTION TO DISMISS CERTAIN
CAUSES OF ACTION OF PLAINTIFFS'
COMPLAINT**

COMES NOW, Defendant, STEPHANIE A. JONES, D.O., by and through her attorney of
record, Anthony D. Lauria, Esq. of the law firm Lauria Tokunaga Gates & Linn, LLP, and hereby files
this Motion to Dismiss Certain Causes of Action of Plaintiffs' Complaint.

DEFENDANT STEPHANIE A. JONES, D.O.'S MOTION TO DISMISS CERTAIN CAUSES OF ACTION
OF PLAINTIFFS' COMPLAINT

1 This Motion is made and based upon the pleadings and papers on file herein, the attached
2 Memorandum of Points and Authorities, and any argument the Court may entertain at the hearing of
3 this matter.

4 DATED: 1/7/2021

LAURIA TOKUNAGA GATES & LINN, LLP

5 /s/ Anthony D. Lauria

6 By: _____

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14 *Stephanie A. Jones, D.O.*

15 **MEMORANDUM OF POINTS AND AUTHORITIES**

16 **I**

17 **INTRODUCTION AND BACKGROUND**

18 On December 16, 2020, Plaintiffs Errys Davis, Traci Parks and Errick Davis filed a Complaint
19 in the Eighth Judicial District Court which arises entirely from medical care and treatment provided by
20 Dr. Stephanie Jones, a Physician member of the Faculty of the University of Nevada Las Vegas School
21 of Medicine, to Errys Davis in December 2019. This treatment consisted of two surgical procedures
22 which were performed at the University Medical Center in Dr. Jones' capacity as an Assistant Professor
23 of Pediatric Surgery. Plaintiff essentially contends that Dr. Jones improperly performed hernia repair
24 surgery on 4-month old Errys on December 17, 2019 which resulted in her mistakenly removing a
25 portion of the patient's bladder. As a result, a second procedure was required a few days later to repair
26 the bladder.

27 Defendant Dr. Jones does not seek to dismiss the entire action and does not contend that
28 Plaintiffs has not stated a claim for "Professional Negligence" in the First Cause of Action which is
sufficiently plead. The First Cause of Action is also supported by a Declaration of Dr. Nicholas Saenz
which Plaintiff attached to the Complaint as required by NRS 41A.071. While Dr. Jones strongly

1 disputes the contention that she was negligent in her treatment of Errys Davis and disagrees with the
2 assertions of Dr. Saenz, the First Cause of Action has been properly plead to sufficiently state a medical
3 malpractice claim.

4 Although the facts giving rise to this lawsuit all pertain to the medical care and treatment
5 provided, Plaintiffs have not been satisfied with pleading the appropriate claim of “Professional
6 Negligence” and instead have also sought to add improper claims for “Breach of Contract”, “Battery”,
7 and “Elder Abuse” pursuant to NRS §41.1395. Defendant Dr. Jones respectfully submits that under
8 Nevada Law, Plaintiffs have failed to properly state claims for “Breach of Contract”, “Unjust
9 Enrichment”, “Negligent Infliction of Emotional Distress” and “Elder Abuse” pursuant to NRS
10 §41.1395. The Nevada Supreme Court has made clear that artful pleading is disfavored and mislabeling
11 or adding improper causes of action to a claim sounding in medical malpractice will not be permitted.
12 To permit such artful pleading to avoid the provisions enacted by the voters and Legislature in NRS
13 41A and NRS 42 would vitiate the intent in enacting those provisions in the first place. Where the
14 “gravamen” of the action sounds in tort for medical negligence, that is the claim which stands. For the
15 reasons set forth below, the Second, Third, and Fourth Causes of Action must be dismissed.

16 II

17 ARGUMENT

18 Nevada Rule of Civil Procedure 12(b)(5) provides for dismissal of a cause of action for the
19 “failure to state a claim upon which relief can be granted.” A motion to dismiss tests the legal
20 sufficiency of the claim set out against the moving party. (See *Zalk-Josephs Co. v. Wells-Cargo, Inc.*,
21 81 Nev. 163, 400 P.2d 621 (1965). Dismissal is appropriate where a Plaintiffs’ allegations “are
22 insufficient to establish the elements of a claim for relief.” (*Hampe v. Foote*, 118 Nev. 405, 408, 47
23 P.3d 438, 439 (2002), overruled in part on other grounds by *Buzz Stew, LLC v. City of N. Las Vegas*,
24 124 Nev. 224, 228, 181 P. 3d 670, 672 (2008).

25 Thus, to survive dismissal under NRCP 12(b)(5), each separate cause of action of a complaint
26 must contain “facts, which if true, would entitle the plaintiff to relief.” (*Id.*) Hence, in analyzing the
27 validity of a claim the court is to accept a plaintiff’s factual allegations “as true and draw all inference
28 in the Plaintiff’s favor.” (*Id.*) Nevertheless, the court is not bound to accept as true a plaintiff’s legal

1 conclusions, and “[t]hreadbare recitals of the elements of a cause of action, supported by mere
2 conclusory statements, do not suffice.” (*Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937 (2009)
3 (analyzing the federal counterpart to NRC 12(b)(5)). Moreover, the court may not take into
4 consideration matters outside of the pleading being attacked. (*Breliant v. Preferred Equities Corp.*,
5 Nev. 842, 847, 858 P.2d 1258, 1261 (1993).)

6 In 2004, the voters of the State of Nevada enacted Ballot Measure No. 3 because of the “health
7 care crisis” caused by “skyrocketing medical malpractice insurance costs.” As part of that enactment,
8 NRS 41A.035 and NRS 42.021 were added which capped non-economic damages in a medical
9 negligence action at \$350,000 and provided for the introduction into evidence of payments for medical
10 treatment by third parties. These provisions were renewed by the Nevada Legislature. Following its
11 enactment, Plaintiffs routinely challenged NRS 41A.035 as being unconstitutional but this contention
12 was finally put to rest by the Nevada Supreme Court in *Tam v. Eighth Judicial Dist. Court* (2015) 131
13 Nev. 792, 803 [358 P.3d 234, 242], where the Court stated unequivocally:

14 “Based on our analysis, we conclude that the district court erred in finding NRS 41A.035
15 unconstitutional. We further conclude that the district court erred when it found NRS
16 41A.035's cap for noneconomic damages applies per plaintiff and per defendant.
17 Finally, we conclude that the district court erred when it found that NRS 41A.035 did
not apply to claims for medical malpractice.”

18 Since the Nevada Supreme Court’s decision in *Tam*, Plaintiffs have sought other ways to skirt the
19 provisions of NRS 41A, including 41A.035 and to frustrate the clearly stated intent behind the
20 enactment of those provisions. This is most often done by trying to insert a variety of different labels
21 to causes of action which, at their core, are actually claims premised upon professional negligence.
22 This is precisely what Plaintiff seeks to do in this case by taking a claim which is clearly and
23 undoubtedly premised upon the provision of medical care and trying to frame it as three other causes
24 of action. Such disingenuous pleading should not be permitted by this Court to circumvent the
25 “gravamen” of the present case, the rulings of the Nevada Supreme Court, and the intent of both the
26 voters and Nevada Legislature.

27 In fact, the Nevada Supreme Court has seen fit to address attempts to circumvent the provisions
28 of NRS 41A in 4 separate recent decisions, all of which favor dismissal of the artfully plead causes of

1 action when the gravamen of the action is actually one for medical negligence. It has long been the
2 law in Nevada that the nature of the alleged wrong, not the label placed in the complaint, is the
3 controlling factor. As stated by the Nevada Supreme Court in *State Farm Mut. Auto. Ins. Co. v.*
4 *Wharton*, 88 Nev. 183, 186, 495 P.2d 359, 361 (1972):

5 “[I]t is the nature of the grievance rather than the form of the pleadings that determines
6 the character of the action. If the complaint states a cause of action in tort, and it appears
7 that this is the gravamen of the complaint, the nature of the action is not changed by
8 allegations in regard to the existence of or breach of a contract. In other words, it is the
9 object of the action, rather than the theory upon which recovery is sought[,] that is
controlling.”

10 In *Egan v Chambers*, 129 Nev. 239, 241 n.2, 299 P.3d 364, 366 (2013), the Nevada Supreme Court
11 recognized that both a battery claim and a negligence claim were subject to the requirements of NRS
12 41A.071 and noted that the affidavit requirement was equally applicable to the battery claim premised
13 upon a lack of informed consent. As stated by the Court:

14 “Egan's complaint asserted causes of action for both professional negligence and breach
15 of contract. However, because both causes of action were based on Chambers' alleged
16 “failure to perform medical care which rose to the level of compliance with the
17 established care owed to [Egan],” her entire complaint in fact sounded in tort”

18 This established legal principle was recently applied in the context of actions for medical negligence
19 in *Turner v. Renown Reg'l Med. Ctr.*, 461 P.3d 163, 2020 Nev, Unpub. LEXIS 436 (April 23, 2020),
20 where the Court stated:

21 “Allegations of breach of duty involving medical judgment, diagnosis, or treatment
22 indicate that a claim is for medical malpractice.” *Szymborski v. Spring Mountain*
23 *Treatment Ctr.*, 133 Nev. 638, 642, 403 P.3d 1280, 1284 (2017) (explaining that “if the
24 jury can only evaluate the plaintiffs claims after presentation of the standards of care by
25 a medical expert, then it is a medical malpractice claim”). To determine whether a claim
26 is for medical malpractice or negligence, “we must look to the gravamen or substantial
point or essence of each claim rather than its form.”

27 In *Turner*, the Supreme Court went on to note that because the gravamen of the claims by the plaintiff
28 in that case involved “medical judgement and treatment and require expert testimony”, the district

1 court properly determined that the claims fell within the provisions of NRS 41A. (*Id.*)

2 In a very recent opinion from July 9, 2020, the Nevada Supreme Court clarified the distinctions
3 between a claim for “professional negligence” and claims for “elder abuse”. In *Estate of Curtis v. S.*
4 *Las Vegas Med. Inv’rs, LLC*, 466 P.3d 1263, 1270 n.5 (Nev. 2020), the Court found that the Plaintiff
5 had not stated an elder abuse claim where the gravamen of the action was alleged medical negligence
6 stating:

7
8 “First, the record does not support an elder abuse claim here, where Nurse Dawson's
9 actions were grounded in negligence, rather than in willful abuse or the failure to provide
a service. See NRS 41.1395(4)(a) (defining abuse) and (4)(c) (defining neglect).”

10 Similarly, *Lewis v. Renown Regional Med. Ctr.*, 2018 Nev. Unpub. LEXIS 1165 and the case
11 upon which it relied, *Symborski v. Spring Mt. Treatment Ctr.*, 133 Nev. Op. 80 (2017), establish that
12 when the gravamen of the complaint is premised upon allegedly negligent medical care, the proper
13 cause of action is one for medical malpractice and not elder abuse. In *Lewis*, the Supreme Court
14 affirmed the dismissal of an Elder Abuse claim where the “gravamen” of the action related to allegedly
15 negligent medical care and treatment. As stated by the Nevada Supreme Court:

16
17 “In contrast to allegations of a healthcare provider's negligent performance of
18 nonmedical services, “[a]llegations of [a] breach of duty involving medical judgment,
19 diagnosis, or treatment indicate that a claim is for [professional negligence.
20 (citation.) The gravamen of Lewis' claim for abuse and neglect is that Renown failed to
adequately care for Sheila by failing to monitor her. Put differently, Renown breached
21 its duty to provide care to Sheila by failing to check on her every hour per the monitoring
22 order in place. We are not convinced by Lewis' arguments that a healthcare provider's
23 failure to provide care to a patient presents a claim distinct from a healthcare provider's
administration of substandard care; both claims amount to a claim for professional
24 negligence where it involves a “breach of duty involving medical judgment, diagnosis,
or treatment.” (citation) (*Lewis v. Renown Reg'l Med. Ctr.* (Nev. 2018) 432 P.3d 201.
25 [2018 Nev. Unpub. LEXIS 1165], quoting *Szyborski v. Spring Mt. Treatment Ctr.*,
133 Nev., Adv. Op. 80, 403 P.3d 1280, 1285 (2017)

26 Trying to creatively plead, as Plaintiff does here, that a claim is not for malpractice because the
27 Complaint uses some different terminology has been routinely rejected. Perhaps the best discussion
28 of the distinction between a claim for medical negligence and elder abuse is set forth in an opinion by

1 the Hon. Larry Hicks, U.S. District Court Judge for Nevada in *Brown v. Mt. Grant Gen. Hosp.*, No.
2 3:12-CV-00461-LRH-WGC, 2013 U.S. Dist. LEXIS 120909 (D. Nev. Aug. 23, 2013). In dismissing
3 a plaintiff's "elder abuse" cause of action, the Court noted:

4
5 "Moreover, the Nevada Supreme Court has signaled a disapproval of artful pleading for
6 the purposes of evading the medical malpractice limitations. For example, the Court
7 concluded that medical malpractice claims extend to "both intentional and negligence-
8 based" actions. (*citation.*) This means that a plaintiff cannot escape the malpractice
9 statutes' damages or timeliness limitations by pleading an intentional tort—battery,
10 say—instead of negligence."

11 The Court went on to state:

12
13 "If the Nevada Supreme Court casts a jaundiced eye on the artful pleading of intentional
14 torts, it is likely to view the artful pleading of elder abuse similarly." *Brown, supra.* 2013
15 U.S. Dist., at *23)

16 A review of the Complaint in this action clearly establishes that every one of the 4 separate causes of
17 action plead is premised upon claims of medical negligence and that expert testimony would be required
18 to establish a prima facie case. The Second Cause of Action for "Breach of Contract", in addition to
19 failing to properly plead all of the required elements of a contract claim, alleges the contract contained
20 an agreement that medical services would be provided and in this case it is alleged the "medical
21 services provided by Dr. Jones were beneath the standard of care." (Complaint at p.6:2-4, ¶30)
22 Obviously, to determine if the services provided by Dr. Jones complied with the "contract" requires
23 expert evidence of the standard of care and compliance or non-compliance with that standard. Thus,
24 the Second Cause of Action is actually premised upon medical negligence and does not state a valid
25 contract claim. Further, the Second Cause of Action alleges the "breach of contract" caused "additional
26 pain" and "discomfort" in addition to additional medical expenses. (Complaint at p. 6:8-10, ¶32). Pain
27 and suffering are clearly "tort" damages and not damages recoverable in a contract claim.

28 The Third Cause of Action is titled "Battery" but the gravamen of that claim is also professional
negligence. NRS 41A.015 provides:

1 “Professional negligence” means the failure of a provider of health care, in rendering
2 services, to use the reasonable care, skill or knowledge ordinarily used under similar
3 circumstances by similarly trained and experienced providers of health care.

4 By contrast:

5 "A battery is an intentional and offensive touching of a person who has not consented
6 to the touching . . ." (*Humboldt Gen. Hosp. v. Sixth Judicial Dist. Court of Nev.*, 132
7 Nev. 544, 549, 376 P.3d 167, 171 (2016))

8 In *Humboldt*, the patient admitted that she had consented to the procedure performed but that it was not
9 performed precisely in the way she had consented it was to be performed. The Nevada Supreme Court
10 found that this was a claim for “professional negligence” and not a claim for the Intentional Tort of
11 Battery. In this case, there is no claim or contention that consent was not given for surgery to be
12 performed on Errys Davis to attempt to repair her hernia. The claim is that the surgery that consent
13 was admittedly given for was performed negligently which resulted in injury to another structure in the
14 proximity of the intended location. This is not a proper claim for “Battery.”

15 Finally, the Fourth Cause of Action for “Neglect of a Vulnerable Person” must also be
16 dismissed. As with the cases of *Estate of Curtis, supra*, and *Lewis v. Renown Reg'l Med. Ctr.*, *supra*,
17 the allegations against Dr. Jones are grounded in negligence, not abuse or neglect. Plaintiffs allege Dr.
18 Jones “assumed a duty to care for Errys” but this duty was to provide medical treatment within the
19 applicable standard. In fact, the allegations are that Dr. Jones “breached said duty by failing to provide
20 medical care and services . . .” (Complaint at p. 8:7-12, at ¶’s 52 and 53.) These are precisely the type
21 of claims which sound in medical negligence, not “abuse” or “neglect.”

22 Dr. Jones was not a “care custodian” and this was not a long-term care facility. Further, expert
23 testimony as to whether or not this medical care and treatment was appropriately provided is required
24 for Plaintiffs to establish a prima facie case. The Nevada Supreme Court’s recent opinions and the
25 well-reasoned opinion of U.S. District Court Judge Hon. Larry Hicks in the *Brown v. Mt. Grant Gen.*
26 *Hosp.* matter clearly establish that Plaintiffs’ claims against Dr. Jones is sound in “professional
27 negligence” and that the Second, Third, and Fourth Causes of Action should be dismissed.

28 ///

III CONCLUSION

For the foregoing reasons and based upon the authorities cited herein, Defendant respectfully requests that the Court Dismiss the Second, Third, and Fourth Causes of Action of Plaintiff's Complaint for failure to state a claim upon which relief can be granted.

DATED: 1/7/2021

LAURIA TOKUNAGA GATES & LINN, LLP

/s/ Anthony D. Lauria

By: _____

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Attorney for Defendant,

Stephanie A. Jones, D.O.

CERTIFICATE OF SERVICE

Pursuant to N.R.C.P. 5(b), I certify that I am an employee of Lauria Tokunaga Gates & Linn, and that on this 7TH day of January, 2021, I served a true and correct copy of the foregoing **DEFENDANT STEPHANIE A. JONES, D.O.'S MOTION TO DISMISS CERTAIN CAUSES OF ACTION OF PLAINTIFFS' COMPLAINT:**

☐ By placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepared in Las Vegas, Nevada; and/or

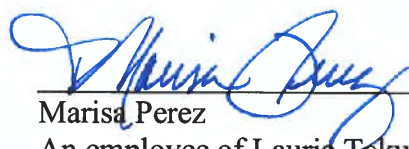
☒ By mandatory electronic service (e-service), proof of e-service attached to any copy filed with the Court; and/or

☐ By facsimile, pursuant to EDCR 7.26 (as amended); and/or

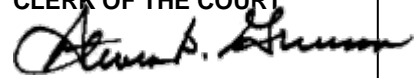
☐ By personal service

as follows:

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

ERRYS DEE DAVIS, a minor, by her parents,
TRACI LYNN PARKS and ERRICK DAVIS;
TRACI LYNN PARKS, individually;
ERRICK DAVIS, individually,

Plaintiffs,

v.

STEPHANIE A. JONES, D.O., an individual,
DOES I though X; and ROE
CORPORATIONS XI through XX, inclusive,

Defendants.

CASE NO.: A-20-826513-C

DEPT NO.: V

**PLAINTIFFS' OPPOSITION TO
DEFENDANT'S MOTION TO DISMISS
CERTAIN CAUSES OF ACTION OF
PLAINTIFFS' COMPLAINT**

Date of Hearing: February 9, 2021

Time of Hearing: 9:00 a.m.

Plaintiffs, ERRYS DEE DAVIS, a minor by her parents, TRACI LYNN PARKS and
ERRICK DAVIS, TRACI PARKS and ERRICK DAVIS individually, through their counsel, Adam
J. Breeden, Esq. of BREEDEN & ASSOCIATES, PLLC, hereby files the following Opposition to
*Defendant Stephanie A. Jones' D.O.'s Motion to Dismiss Certain Causes of Action of Plaintiff's
Complaint.*

I. INTRODUCTION

With her *Motion to Dismiss*, Defendant Stephanie Jones, D.O. asks this Court to adopt brand
new law and find that Nevada has abolished all causes of action against a physician or provider of

1 medical care with the exception of an action for professional negligence/medical malpractice¹ under
2 NRS Chapter 41A. The District Court should reject making such unfounded new law.

3 Dr. Jones has filed a pre-answer partial motion to dismiss all causes of action in the
4 Complaint apart from medical malpractice. In doing so, she cites to lines of cases from the Nevada
5 Supreme Court that if the gravamen of a cause of action is that for medical malpractice, the cause
6 of action is subject to Nevada's statute of limitations for medical malpractice actions (NRS §
7 41A.097) and Nevada's supporting physician affidavit requirement for medical malpractice actions
8 (NRS § 41A.100). However, Plaintiffs have complied with *both* of these legal requirements. Thus,
9 the Defendant's *Motion to Dismiss* completely misses the mark and apparently mistakenly believes
10 that the Nevada Supreme Court has ruled that all statutory and common law actions against a
11 physician are barred except for medical malpractice, which is incorrect. Therefore, Defendant's
12 motion should be denied at this early pleading stage.

13 II. BACKGROUND

14 In this personal injury action, Plaintiff Errys Davis, a minor, and her parents sue for injuries
15 sustained by four-month-old Errys during a hernia repair surgery performed on December 17, 2019.
16 During the surgery, Defendant Dr. Stephanie Jones mistakenly transected and removed Errys'
17 bladder, wrongly believing it to be the hernia.

18 As alleged in the Complaint, Errys Davis was one of three triplets born prematurely at 35
19 weeks on August 8, 2019 to Traci Parks and Errick Davis.² In December 2019, the young Errys
20 presented for medical care with a three-week history of a right groin bulge. A 2 cm firm mass in the
21 right groin consistent with an inguinal hernia was appreciated. The hernia was reducible. An outside
22 ultrasound reportedly showed an anechoic, fluid-filled structure in the right groin. Plans were made
23 to take the patient to the operating room for repair by Defendant, Dr. Stephanie Jones, a pediatric
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26 ¹ Although the term "professional negligence" might be more proper than "medical malpractice"
27 under NRS Chapter 41A and there may still exist slight differences in those terms, this brief will
use the term medical malpractice.

28 ² See Plaintiffs' Complaint at ¶ 10.

1 surgeon.³

2 On December 17, 2019, a standard inguinal incision was performed by Dr. Jones. The first
3 mention of a finding out of the ordinary is a hernia sac tethered medially with chronic adhesions. A
4 defect was made in the sac and serous fluid was appreciated. Again, the size and medial location are
5 described, and the defect was repaired. Reorientation to previous landmarks took place to find the
6 sac. The previous repair of the sac was again encountered. Attempt at passing a camera through the
7 sac was unsuccessful due to the redundant nature of the sac. As the sac was gathered up for ligation,
8 the medial-most portion fell away. It was re-grasped and a high ligation using 3-0 Vicryl in a
9 pursestring fashion was performed. Because Dr. Jones was unsatisfied, she elected to perform a
10 diagnostic laparoscopy. A small defect was identified, repaired, and no gas passed out of the defect.
11 No contralateral hernia was identified. No additional exploration of the abdomen or pelvis was
12 performed during laparoscopy. Given the patient's gestational age, she was kept overnight for
13 observation and monitoring.⁴

14 Unknown or undisclosed to the Plaintiffs at the time, during the surgery Dr. Jones had
15 mistakenly identified *the bladder* as the hernia. Dr. Jones had intentionally, but mistakenly, ligated
16 and excised a large portion of *the bladder* instead of the hernia sac.⁵ Needless to say, decimation of
17 her bladder led to immediate and serious injury to Errys.

18 Errys was anuric [non-passage of urine] postoperatively and an abdominal ultrasound
19 revealed free fluid. Concerned about an injury to the urinary tract, Dr. Jones took the patient back
20 to the operating room. A retrograde cystogram was performed demonstrating extravasation into the
21 peritoneal cavity. Errys was explored and a bladder injury was identified, specifically the previously
22 placed sutures which were thought to be ligating the hernia sac had in fact traversed the bladder.
23 The foley catheter was advanced into the wound confirming a bladder injury. What remained of the
24 bladder was closed in two layers around the 1cc balloon of a 6 Fr catheter. A telephone consultation
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26 ³ See Plaintiffs' Complaint at ¶ 11.

27 ⁴ See Plaintiffs' Complaint at ¶ 12.

28 ⁵ See Plaintiffs' Complaint at ¶ 13.

1 to a urologist took place intraoperatively.⁶ The pathology report labeled as “hernia sac” from the
2 original operation was, in fact, a 3.5 x 3.0 x 1.3 cm piece of bladder.⁷ Errys was managed in the
3 PICU and was seen by the Urology and Nephrology services. She required nephrostomy tube
4 placement and her future care was to be managed by the urologist. Over the past year, numerous
5 procedures have needed to be performed to provide Errys with a functioning urinary system. It
6 remains to be seen if her bladder will develop normally.⁸

7 The Complaint alleges four causes of action: (1) Professional Negligence/Medical
8 Malpractice, (2) Breach of Contract, (3) Battery, and (4) Neglect of a Vulnerable Person/Breach of
9 NRS § 41.1395. Defendants seeks to dismiss all causes of action except that of medical malpractice
10 and claim, completely without any legal authority, that the Second through Fourth cause of action
11 are somehow subsumed or abolished by Plaintiff’s claim for Professional Negligence.

12 Despite the Defense’s assertion, it is plainly *not* the law of Nevada that all causes of action
13 against a doctor or health care provider cease to exist except for medical malpractice. This has never
14 been the law. Instead, other causes of action survive but must comply with the statute of limitations
15 and supporting affidavit requirements of NRS § 41A.097. Since Plaintiffs’ Complaint plainly
16 satisfies both of those requirements, the *Motion to Dismiss* should be denied.

17 **III. LEGAL STANDARD FOR MOTIONS TO DISMISS**
18 **FOR FAILURE TO STATE A CLAIM**

19 As this Court is well aware, getting a court to grant a Motion to Dismiss for failure to state
20 a claim is a high burden in Nevada. “The standard of review for a dismissal under NRCP 12 (b)(5)
21 is rigorous” and the court “must construe the pleading liberally and draw every fair inference in
22 favor of the nonmoving party.”⁹ In ruling on a Motion to Dismiss, the District Court must
23 “recognize all factual allegations in [plaintiff’s] complaint as true and draw all inferences in its

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25 ⁶ See Plaintiffs’ Complaint at ¶ 14.

26 ⁷ See Plaintiffs’ Complaint at ¶ 15.

27 ⁸ See Plaintiffs’ Complaint at ¶ 16.

28 ⁹ *Simpson v. Mars Inc.*, 113 Nev. 188, 190 (Nev. 1997) (describing the legal standard for a NRCP 12(b)(5) motion to dismiss).

1 favor.”¹⁰ After assuming all the factual allegations are true, the Complaint “should be dismissed
2 only if it appears beyond a doubt that it could prove no set of facts, which, if true, would entitle it
3 to relief.”¹¹

4 Notably, Nevada has not even adopted the more relaxed federal “plausibility” standard for
5 assessing failure to state a claim motions but rather has continued to abide by the foregoing, plaintiff-
6 friendly and relaxed pleading standard for decades.¹² While often filed, motions to dismiss for
7 failure to state a claim rarely survive this high burden and more often serve to stall a case by a
8 defendant than assert a genuine defense at the pleading stage.

9 IV. LAW AND ARGUMENT

10 A. **No Causes of Action can be Dismissed under the *Turner* and *Szymborski* Line of Cases 11 for the “Gravamen” of the Action being Professional Negligence because the Medical 12 Expert Affidavit Requirement and NRS Chapter 41 Statute of Limitations have been 13 Satisfied**

14 The Nevada Supreme Court determined in *Turner v. Renown Reg’l Med. Center* that where
15 the “gravamen” of a cause of action is medical malpractice, it is subject to the medical malpractice
16 statute of limitations set forth in NRS § 41A.097.¹³ The “gravamen” of the action is for medical
17 malpractice when a cause of action “involve[s] medical diagnosis, judgment, or treatment”¹⁴ In
18 addition to such an action having to be filed within the medical malpractice statute of limitations
19 under *Turner*, the complaint must also be supported by a medical expert affidavit under *Szymborski*

20 ¹⁰ *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228 (2008); *Vacation Village v. Hitachi*
21 *Am.*, 110 Nev. 481, 484 (Nev. 1994) (same, “[a] complaint will not be dismissed for failure to state
22 a claim unless it appears beyond a doubt that the plaintiff could prove no set of facts which, if
accepted by the trier of fact, would entitle him [or her] to relief.”).

23 ¹¹ *Id.*

24 ¹² *Dezzani v. Kern & Assocs.*, 412 P.3d 56, 64 (Nev. 2018) (“Nevada has not adopted the federal
25 ‘plausibility’ standard for assessing a complaint’s sufficiency.”) *citing* *Ashcroft v. Iqbal*, 556 U.S.
662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570,
127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007).

26 ¹³ *E.g., Turner v. Renown Reg’l Med. Ctr.*, 461 P.3d 163 (Nev. 2020) (upholding dismissal of various
27 causes of action sounding in medical malpractice by applying the one-year statute of limitations in
NRS § 41A.097(2)).

28 ¹⁴ *Szymborski v. Spring Mt. Treatment Ctr.*, 403 P.3d 1280 (Nev. 2017).

1 v. *Spring Mt. Treatment Ctr.*¹⁵ pursuant to NRS § 41A.071.

2 Together, the *Turner* and *Szymborski* decisions act as a gatekeeper to keep untimely medical
3 malpractice cases or medical malpractice cases that could not be supported by an expert
4 masquerading as other causes or action out of court. The policy behind this rule is likely well-
5 founded, i.e. that the medical malpractice statute of limitations scheme in Chapter 41A would be
6 rendered useless if a plaintiff could simply plead substitute causes of action to evade it. Thus, if the
7 “gravamen” of the action is medical malpractice, the medical malpractice statute of limitations and
8 supporting expert affidavit requirements in Chapter 41A apply to that cause of action. **However,**
9 **the effect of an alternative cause of action having the “gravamen” of medical malpractice is**
10 **not immediate dismissal for failure to state a claim, only that the cause of action must satisfy**
11 **the expert affidavit and statute of limitations in Chapter 41A.**

12 The Plaintiffs and their counsel are well-aware of *Turner*, *Szymborski* and similar Nevada
13 Supreme Court rulings and, therefore, filed all causes of action within one year of the injury under
14 NRS § 41A.097 and attached a supporting medical expert declaration to the Complaint under NRS
15 § 41A.071. The Complaint attaches an affidavit from expert physician and pediatric surgeon
16 Nicholas Saenz, M.D. attesting to violations of the standard of care by the Defendants.¹⁶ The
17 Complaint itself also plainly alleges that “[w]ithout conceding that all or part of this action is an
18 action for professional negligence as defined by NRS § 41A.015, to the extent any allegations in
19 this Complaint need supported by a physician affidavit/declaration as to the standard of care, the
20 Declaration of Nicholas Saenz, M.D., a physician in the same or substantially similar area of practice
21 as the Defendants, is attached as Exhibit “1” to this Complaint.”¹⁷ Therefore, it is fruitless for the
22 Defense to seek dismissal of any action under those statutes or case because the Plaintiffs have
23 complied with them.

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26 ¹⁵ *Szymborski v. Spring Mt. Treatment Ctr.*, 403 P.3d 1280 (Nev. 2017).

27 ¹⁶ See Plaintiff’s Complaint, Exhibit “1” (attached hereto as **Exhibit “1”** as well to the present
28 Opposition).

¹⁷ See Plaintiffs’ Complaint at ¶ 9.

1 With her Motion, Dr. Jones seems to urge a much stronger reading of *Turner* and
2 *Szymborski*¹⁸ that requires all causes of action relating to “medical diagnosis, judgment, or
3 treatment” *other than* medical malpractice to be dismissed, even if the Complaint is filed within the
4 one-year statute of limitation and attaches a supporting expert affidavit. This is an improper reading
5 of *Turner* and *Szymborski*. The Nevada Supreme Court has never held that all causes of action
6 against a doctor are abolished except medical malpractice and nowhere in NRS Chapter 41A did the
7 legislature state its intent to do so. Similarly, NRS Chapter 41A contains no exclusive remedy
8 provisions.¹⁹ Therefore, even if alternate causes of action depend on the “medical diagnosis,
9 judgment, or treatment” of the Defendants, Plaintiff’s causes of action for Breach of Contract,
10 Battery and Neglect of a Vulnerable Person/NRS § 41.1395 are valid causes of action and should
11 not be dismissed.

12 Indeed, the Nevada Supreme Court already found that a claimant may plead a cause of action
13 against a doctor for both professional negligence and another cause of action. In *Egan v. Chambers*²⁰
14 the court discussed a breach of contract claim filed against a physician along with a medical
15 malpractice action. In *Goldenberg v. Woodard*²¹ a fraud claim in addition to a medical malpractice
16 action was permitted. In *Johnson v. Egtedar*²² a battery and medical malpractice action were
17 permitted. And lastly in *Estate of Curtis v. S. Las Vegas Med. Inv’rs, LLC*²³ the court discussed an
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19 ¹⁸ *Szymborski v. Spring Mt. Treatment Ctr.*, 403 P.3d 1280 (Nev. 2017) (actions sounding in medical
20 malpractice must attach a supporting physician affidavit).

21 ¹⁹ Compare to NRS § 616A.020 (worker’s compensation actions are the exclusive remedy for
injured workers against their employer).

22 ²⁰ *Egan v. Chambers*, 129 Nev. 239, 241 n.2 (2013) (discussing a malpractice and breach of contract
23 action against a physician).

24 ²¹ *Goldenberg v. Woodard*, 130 Nev. 1181 (2014) (permitting a fraud and malpractice action against
a physician); *see also Parminder Kang v. Eighth Judicial Dist. Court of Nev.*, 460 P.3d 18 (Nev.
25 2020) (refusing writ relief where breach of contract and fraud claims against doctor were presented
along with medical malpractice).

26 ²² *Johnson v. Egtedar*, 112 Nev. 428, 430 (1996) (discussing a battery and malpractice action against
a physician).

27 ²³ *Estate of Curtis v. S. Las Vegas Med. Inv’rs, LLC*, 466 P.3d 1263, 1270 n.5 (Nev. 2020)
28 (footnote continued)

1 elder abuse cause of action for violation of NRS § 41.1395 accompanying a medical malpractice
2 case, the very statute Plaintiffs' Complaint raises. In fact, the Nevada Supreme Court has recognized
3 that not only are alternate causes of action not subsumed into professional negligence, if they can
4 be established those causes of action, such as intentional fraud during treatment, are not subject to
5 the malpractice caps of NRS Chapter 41A.

6 There is simply no legal authority that all causes of action that might be brought against a
7 physician are "subsumed" into NRS Chapter 41A. Indeed, both common sense and numerous
8 Nevada Supreme Court cases state otherwise. Plaintiff's causes of action should not be dismissed.

9 **B. The Second (Breach of Contract), Third (Battery), and Fourth (Violation of Statute/
10 NRS § 41.1395) Causes of Action are Adequately Pleaded and should not be Dismissed
at the Pleading Stage**

11 In Nevada, NRCP 8 governs the general rules of pleading. NRCP 8(a) requires that a
12 complaint "contain a short and plain statement of the claim showing that the pleader is entitled to
13 relief."²⁴ A complaint need only "set forth sufficient facts to establish all necessary elements of a
14 claim for relief so that the adverse party has adequate notice of the nature of the claim and relief
15 sought."²⁵ The pleading of a conclusion, either of law or fact, is sufficient so long as the pleading
16 gives fair notice of the nature and basis of the claim.²⁶ "Because Nevada is a notice-pleading
17 jurisdiction, [its] courts liberally construe pleadings to place into issue matters which are fairly
18 noticed to the adverse party."²⁷ With this explanation, Plaintiffs now turn to the second through fifth
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20 _____
21 (discussing both an abuse/neglect cause of action under NRS § 41.1395 and ordinary negligence
22 claims as separate from a malpractice claim). Ultimately this cause of action was dismissed in the
23 *Estate of Curtis* case, but only because a medical expert affidavit had not been attached to the
Complaint.

24 NRCP 8(a); see also *Crucil v. Carson City*, 95 Nev. 583, 585, 600 P.2d 216, 217 (1979) (quoting
NRCP 8(a)).

25 *Hay v. Hay*, 100 Nev. 196, 198, 678 P.2d 672, 674 (1984) (internal citations omitted).

26 *Crucil v. Carson City*, 95 Nev. 583, 585 600 P.2d 216 (1979) (citing *Taylor v. State and Univ.*,
73 Nev. 151, 152, 311 P.2d 733, 734 (1957)).

27 *Hay*, 100 Nev. at 198, 678 P.2d at 674 (citing *Chavez v. Robberson Steel Co.*, 94 Nev. 597, 599,
584 P.2d 159, 160 (1978)).

1 causes of action in her complaint.

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

7 ***1. Plaintiff has Pleaded a Valid Cause of Action for Breach of Contract***

8 The Second Cause of Action alleges a breach of a contract to provide medical services. Like
9 any other professional, a physician may be sued for breach of contract.²⁸ “Under Nevada law, ‘the
10 plaintiff in a breach of contract action [must] show (1) the existence of a valid contract, (2) a breach
11 by the defendant, and (3) damage as a result of the breach.’”²⁹ There is an implied covenant in
12 service contracts that the work performed will be done in a proper and professional manner. In this
13 case, Plaintiffs present a straightforward claim that they hired the Defendants to perform medical
14 services and those services were not properly performed. As a result, minor Errys Davis sustained
15 new injuries and may recover contractual incidental and consequential damages, including what was
16 paid for the original surgery.³⁰

17 The Nevada Supreme Court most directly discussed the ability of a patient to sue a medical
18 provider for breach of contract in the case of *Szekeres v. Robinson*.³¹ In that case, the plaintiff hired
19 the defendant doctor to perform a sterilization medical procedure so she could no longer have
20 children. The procedure was incorrectly performed, and the plaintiff became pregnant and gave

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22 ²⁸ *Szekeres v. Robinson*, 102 Nev. 93 (1986) (patient of botched procedure is allowed to recover
23 damages under breach of contract theory against doctor). Some states have found that to sue a
24 physician for breach of contract, the physician must guarantee a particular result. However, Nevada
has never followed that approach.

25 ²⁹ *Rivera v. Peri & Sons Farms, Inc.*, 735 F.3d 892, 899 (9th Cir. 2013) quoting *Saini v. Int'l Game
Tech.*, 434 F. Supp. 2d 913, 919-20 (D. Nev. 2006).

26 ³⁰ *Newmar Corp. v. McCrary*, 129 Nev. 638, 646 (2013) (explaining availability of incidental and
consequential damages for breach of contract).

27 ³¹ *Szekeres v. Robinson*, 102 Nev. 93 (1986) (patient of botched procedure is allowed to recover
28 damages under breach of contract theory against doctor).

1 birth to a healthy, albeit unplanned child. Although the Nevada Supreme Court found that delivery
2 of a healthy baby is not actionable damages for a medical malpractice case, it supported a theory of
3 contract recovery from physician, stating that “failure to carry out the [surgical] process in the
4 manner promised would result in an award, at least, of the costs of medical, surgical and hospital
5 care associated with the failed surgery. In such a case damages could be awarded in accordance with
6 what was contemplated by the parties at the time the contract was made.”³² More recently, the
7 Nevada Supreme Court discussed in passing actions simultaneously tried for professional
8 negligence and breach of contract against a physician in *Egan v. Chambers*³³ and *Busick v.*
9 *Trainor*.³⁴ As recently as 2020 the Nevada Supreme Court allowed a breach of contract and fraud
10 cause of action to independently and simultaneously proceed to trial with a medical malpractice
11 claim against a Defendant doctor who used a different knee implant during surgery than the implant
12 the patient agreed on in *Parminder Kang v. Eighth Judicial Dist. Court of Nev.*³⁵ Far from being
13 barred, the Nevada Supreme Court has repeatedly recognized and permitted breach of contract
14 recovery from a physician.

15 In this case, survival of the breach of contract cause of action is critical because Dr. Jones is
16 purportedly a state employee and, thus, any tort liability for medical malpractice would be capped
17 at either \$100,000 or \$150,000 under Nevada’s governmental tort immunity cap found at NRS
18 § 41.035.³⁶ However, Plaintiffs have no less than \$656,503.35 in past medical special damages
19 alone. Therefore, if they are not permitted to seek contract damages as opposed to tort damages,
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22 ³² *Id.* at 98.

23 ³³ *Egan v. Chambers*, 129 Nev. 239, 241 n.2 (2013) (discussing a malpractice and breach of contract
action against a physician).

24 ³⁴ *Busick v. Trainor*, 437 P.3d 1050 (Nev. 2019).

25 ³⁵ *Parminder Kang v. Eighth Judicial Dist. Court of Nev.*, 460 P.3d 18 (Nev. 2020) (“We reject
26 petitioner's argument that the gravamen of the claims is professional negligence simply because
the alleged facts “involve medical diagnosis, treatment, or judgment.”).

27 ³⁶ NRS 41.035 was amended effective July 1, 2020 to raise the cap to \$150,000. It is unclear whether
28 the cap which applies will be the \$100,000 cap in effect on the date of the injury or the \$150,000
cap in effect on the date the complaint was filed. However, this issue is not raised by this motion.

1 their recovery is greatly impaired by NRS § 41.035.

2 There is simply no legal authority that all breach of contract causes of action that might be
3 brought against a physician are “subsumed” into NRS Chapter 41A. Indeed, both common sense
4 and numerous Nevada Supreme Court cases state otherwise. Plaintiff’s Second Cause of Action for
5 Breach of Contract should not be dismissed and is adequately pleaded, the damages recoverable
6 under that theory are well set forth in the *Szekeres* case.

7 **2. Plaintiff has Pleaded a Cause of Action for Battery**

8 Next, the Defendants argue that Plaintiffs have failed to adequately plead the Third Cause
9 of Action for battery. The Complaint alleges that, without consent, Dr. Jones operated on and
10 transected Errys Davis’ bladder instead of her inguinal hernia.

11 The leading case on this issue in Nevada is *Humboldt Gen. Hosp. v. Sixth Judicial Dist.*
12 *Court.*³⁷ In *Humboldt Gen. Hosp.* the plaintiff’s doctor implanted her with an intrauterine device
13 (IUD) but the plaintiff later learned that the particular IUD implanted was not FDA-approved
14 because it came from a foreign pharmacy. The plaintiff was apparently otherwise uninjured.
15 Nevertheless, the plaintiff sued her physician for battery because she gave no consent to implant a
16 non-FDA approved device yet did not attach a medical expert affidavit to support the Complaint.
17 The Nevada Supreme Court made clear that “[a] battery is an intentional and offensive touching of
18 a person who has not consented to the touching,” and “[i]t is well settled that a physician who
19 performs a medical procedure without the patient’s consent commits a battery irrespective of the
20 skill or care used.”³⁸ The court went on to distinguish circumstances between a total lack of consent
21 and partial consent. In *Humboldt Gen. Hosp.* the plaintiff was found to have been required to have
22 attached a medical expert affidavit (which she had not done) to the complaint because her lack of
23 informed consent case sounded in medical malpractice “unless a plaintiff has established that there

26 ³⁷ *Humboldt Gen. Hosp. v. Sixth Judicial Dist. Court of Nev.*, 132 Nev. 544 (2016).

27 ³⁸ *Id.* at 549, citing *Conte v. Girard Orthopaedic Surgeons Med. Grp. Inc.*, 107 Cal. App. 4th
28 1260, 132 Cal. Rptr. 2d 855, 859 (Ct. App. 2003).

1 was a complete lack of consent for the treatment or procedure performed.”³⁹ In this case, Plaintiff
2 has covered her basis and attached a supporting medical expert affidavit. Thus, even if this case
3 were viewed as a partial lack of informed consent case as opposed to a total lack of consent case,
4 Plaintiff has complied with NRS § 41A.071 so her battery/informed consent claims should not be
5 dismissed. Regardless, operating on the bladder when consent was given for operation on a hernia
6 should be a battery claim.

7 The Nevada Supreme Court has addressed several battery claims in the context of medical
8 treatment and has never held that a patient cannot plead a cause of action against a physician for
9 battery.⁴⁰ The Plaintiff has adequately pleaded this cause of action as an alternate cause of action
10 in the Complaint and it should not be dismissed at the pleading stage.⁴¹

11 ***3. Plaintiff has Properly Pleaded a Cause of Action for Neglect of a Vulnerable Person***

12 Dr. Jones lastly seeks to dismiss Plaintiffs’ Fourth Cause of Action for breach of statute
13 under NRS § 41.1395. This is commonly referred to as an “elder abuse” statute, however the history
14 and definitions in this law indicate that it applies in far greater circumstances than intentional abuse
15 and it also applies to “vulnerable” persons, not solely the elderly. The Complaint labels this as a
16 cause of action for “neglect of a vulnerable person” under NRS § 41.1395.

17 In 1997, Nevada enacted Senate Bill 80, later codified as NRS § 41.1395, which had the
18 express purpose to curb abuse, exploitation and neglect of older persons and vulnerable persons with
19 physical and mental impairments. As a remedial statute, NRS § 41.1395 must be broadly and
20 liberally construed to provide the most protections possible for vulnerable persons.⁴² NRS

22 ³⁹ *Bangalore v. Eighth Judicial Dist. Court of Nev.*, 132 Nev. 943 (2016) (explaining *Humboldt*
23 *Gen. Hosp.*).

24 ⁴⁰ *Humboldt Gen. Hosp. v. Sixth Judicial Dist. Court of Nev.*, 132 Nev. 544, 376 P.3d 167 (2016)
25 (battery cause of action permitted but sounded in malpractice so it must be supported by a
26 physician affidavit); *Johnson v. Egtegar*, 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)

27 ⁴¹ See Plaintiff’s Complaint at Paragraphs 35-43.

28 ⁴² *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.”).

1 § 41.1395 is a powerful ally to older and vulnerable people as it allows an award of double damages
2 and attorney's fees in addition to other recoverable compensable damages.

3 NRS § 41.1395 is plainly *not* limited to intentional or malicious abuse and efforts of the
4 Defendant to limit or pigeon-hole the statute to such a purpose should be rejected by this court.
5 Separate from the "abuse" definition contained in the statute, the "neglect" definition provisions of
6 NRS § 41.1395⁴³ were broadly defined in both the statute and legislative history to include the
7 neglect of health care professionals, including physicians as well as facilities that have undertaken
8 the care of the vulnerable. Indeed, the legislative history of NRS § 41.1395 plainly shows that the
9 intent of the statute was meant to, for example, deal with "mistreatment in nursing homes and
10 managed care facilities" and "certain obligations for [health] care"⁴⁴ but can apply to any provider
11 of health care, not solely nursing or long-term care facilities.⁴⁵

12 Similar statutes in other states to curb abuse, exploitation and neglect of older persons and
13 vulnerable persons with physical and mental impairments have been held to be a separate, statutory
14 cause of action **independent and distinct** of a tort medical malpractice action.⁴⁶ Indeed, only
15 recently the Nevada Supreme Court expressly recognized that a nurse provider of health care can be
16 sued under NRS § 41.1395 along with a medical malpractice action, albeit in some cases subject to
17 the medical expert affidavit requirement which has been satisfied in this case.⁴⁷

18
19 ⁴³ NRS § 41.1395(4)(c): "Neglect" means the failure of a person who has assumed legal
20 responsibility or a contractual obligation for caring for an older person or a vulnerable person, or
21 who has voluntarily assumed responsibility for such a person's care, to provide food, shelter,
22 clothing or services within the scope of the person's responsibility or obligation, which are necessary
23 to maintain the physical or mental health of the older person or vulnerable person. For the purposes
24 of this paragraph, a person voluntarily assumes responsibility to provide care for an older or
25 vulnerable person only to the extent that the person has expressly acknowledged the person's
26 responsibility to provide such care.

24 ⁴⁴ See 1997 SB 80 Leg. History attached hereto as **Exhibit "2"** (excerpt).

25 ⁴⁵ *Estate of McGill v. Albrecht*, 203 Ariz. 525, 530, 57 P.3d 384, 389 (2002) (discussing the statute
as applied to a nurse in an ordinary hospital setting).

26 ⁴⁶ *E.g.*, *Estate of McGill v. Albrecht*, 203 Ariz. 525, 530, 57 P.3d 384, 389 (2002) (applying abuse
27 and neglect statute to a physician).

28 ⁴⁷ *Estate of Curtis v. S. Las Vegas Med. Inv'rs, LLC*, 466 P.3d 1263, 1270 (Nev. July 9, 2020)
(footnote continued)

1 In this case, the Complaint plainly alleges that Plaintiff Errys Davis, a four month old infant
2 with no means to independently care for herself, is covered by the statute as defined by NRS §
3 41.1395(e).⁴⁸ The Complaint alleges that the Defendants had reason to know of Plaintiff's status as
4 an vulnerable person as they had her birthdate and her age is visibly apparent.⁴⁹ The Defendants
5 voluntarily assumed a duty to care for Errys Davis.⁵⁰ Furthermore, the Complaint alleges the
6 Defendants neglected to properly care for Errys Davis in various ways, including transection and
7 removal of her bladder.⁵¹

8 The proper allegations have been made in the Complaint. The Nevada Supreme Court has
9 recognized that a cause of action under NRS § 41.1395 may apply to a provider of health care. This
10 is not a summary judgment motion and no time for discovery has yet occurred. Given the law, the
11 Court cannot dismiss Plaintiff's neglect of a vulnerable person cause of action in the Complaint.

12 **V. ALTERNATIVELY, IF THE COURT IS INCLINED TO GRANT**
13 **DEFENDANTS' MOTION, PLAINTIFFS SHOULD BE GIVEN**
14 **LEAVE TO AMEND THE COMPLAINT**

15 Dr. Jones seeks dismissal of most of Plaintiff's causes of action at the pleading stage.
16 "[W]hen a complaint can be amended to state a claim for relief, leave to amend, rather than dismissal,
17 is the preferred remedy."⁵² "Leave to amend should be freely given when justice requires."⁵³ Here,
18 if this Court is inclined to grant Defendant's *Motion to Dismiss* for certain technical pleading reasons
19 that might be cured by an amendment to the Complaint, Plaintiff requests leave to amend the
20 Complaint to plead additional facts to support her claims.

21 ///

22 _____
(referencing an elder abuse claim under NRS § 41.1395 filed against a nurse).

23 ⁴⁸ See Plaintiff's Complaint at Paragraph 50.

24 ⁴⁹ See Plaintiff's Complaint at Paragraph 51.

25 ⁵⁰ See Plaintiff's Complaint at Paragraph 52.

26 ⁵¹ See Plaintiff's Complaint at Paragraph 53.

27 ⁵² *Cohen v. Mirage Resorts, Inc.*, 119 Nev. 1, 22, 62 P.3d 720, 734 (2003) (citing *Zalk-Josephs Co.*
v. Wells Cargo, Inc., 81 Nev. 163, 169-70, 400 P.2d 624-25 (1965)).

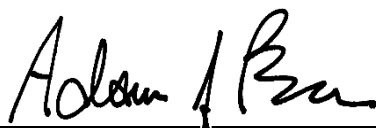
28 ⁵³ *Id.*

1 **VI. CONCLUSION**

2 This is a pre-answer and pre-discovery *Motion to Dismiss*, not a summary judgment motion.
3 The Plaintiff has properly pleaded causes of action for Breach of Contract, Battery and Breach of
4 Statute/NRS § 41.1395. These are all properly pleaded causes of action that may co-exist with each
5 other as alternative causes of action in the Complaint. Therefore, the Motion to Dismiss should be
6 denied at this stage.

7 DATED this 19th day of January, 2021.

8 **BREEDEN & ASSOCIATES, PLLC**

9 

10 **ADAM J. BREIDEN, ESQ.**

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18
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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on the 19th day of January, 2021, I served a copy of the foregoing legal
3 document **PLAINTIFF'S OPPOSITION TO DEFENDANT STEPHANIE A. JONES, D.O.'S**
4 **MOTION TO DISMISS CERTAIN CAUSES OF ACTION OF PLAINTIFFS' COMPLAINT**
5 via the method indicated below:

6

7 X	Pursuant to NRCP 5 and NEFCR 9, by electronically serving all counsel and 8 e-mails registered to this matter on the Court's official service, Wiznet 9 system.
10	Pursuant to NRCP 5, by placing a copy in the US mail, postage pre-paid to 11 the following counsel of record or parties in proper person: 12 Anthony D. Lauria, Esq. 13 LAURIA TOKUNAGA GATES & LINN, LLP 14 601 South 7 th Street Las Vegas, Nevada 891010 <i>Attorneys for Defendant Stephanie A. Jones, D.O.</i>
15	Via receipt of copy (proof of service to follow)

16

17 An Attorney or Employee of the following firm:

18 /s/ Kristy Johnson

19 **BREEDEN & ASSOCIATES, PLLC**

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EXHIBIT “1”

DECLARATION OF NICHOLAS SAENZ, M.D., FACS, FAAP

STATE OF CALIFORNIA)
) SS
COUNTY OF SAN DIEGO)

NOW COMES the Declarant, Nicholas Saenz, M.D., FACS, FAAP, who first being sworn does testify to the following under oath:

1. I am Nicholas Saenz. I am over 18 years old. I have personal knowledge of the facts set forth herein. I am a licensed physician and board certified in pediatric surgery. My medical opinions set forth herein are to a reasonable degree of medical probability. I am aware that this Declaration may be used for litigation purposes.
2. I have been asked to review the medical care of Errys Davis from December 2019 to present. I practice in an area of medicine, pediatric surgery, substantially similar to the providers of health care in this matter, specifically Dr. Stephanie Jones.
3. By way of history, in December 2019 the patient Errys Davis was a 4 month old, ex-35 week premature infant with a three-week history of a right groin bulge. A 2 cm firm mass in the right groin consistent with an inguinal hernia was appreciated. The hernia was reducible. An outside ultrasound reportedly showed an anechoic, fluid-filled structure in the right groin. Plans were made to take the patient to the operating room for repair.
4. On 12/17/19, a standard inguinal incision was performed by Dr. Stephanie Jones. The first mention of a finding out of the ordinary is a hernia sac tethered medially with chronic adhesions. A defect was made in the sac and serous fluid was appreciated. Again, the size and medial location are described and the defect was repaired. Reorientation to previous landmarks took place to find the sac. The previous repair of the sac was again encountered. Attempt at passing a camera through the sac was unsuccessful due to the redundant nature

of the sac. As the sac was gathered up for ligation, the medial-most portion fell away. It was re-grasped and a high ligation using 3-0 Vicryl in a pursestring fashion was performed. Because Dr. Jones was unsatisfied, she elected to perform diagnostic laparoscopy. A small defect was identified, repaired, and no gas passed out of the defect. No contralateral hernia was identified. No additional exploration of the abdomen or pelvis was performed during laparoscopy. Given the patient's gestational age, she was kept overnight for observation and monitoring.

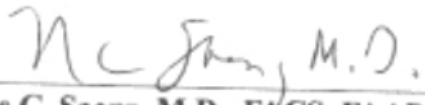
5. The patient was anuric postoperatively and an abdominal ultrasound revealed free fluid. Concerned about an injury to the urinary tract, Dr. Jones took the patient back to the operating room. A retrograde cystogram was performed demonstrating extravasation into the peritoneal cavity. The patient was explored and a bladder injury was identified, specifically the previously placed sutures which were thought to be ligating the hernia sac had in fact traversed the bladder. The foley catheter was advanced into the wound confirming a bladder injury. What remained of the bladder was closed in two layers around the 1cc balloon of a 6 Fr catheter. A telephone consultation to a urologist took place intraoperatively.
6. The pathology report labeled as "hernia sac" was, in fact, a 3.5 x 3.0 x 1.3 cm piece of bladder.
7. The patient was managed in the PICU and was seen by the Urology and Nephrology services. She required nephrostomy tube placement and her future care was to be managed by the urologist.
8. It is my opinion to a reasonable degree of medical probability that the care administered by Dr. Stephanie Jones fell below the standard of care. As explained in the following

paragraphs, during surgery Dr. Jones failed to properly identify the hernia sac and instead mistook the patient's bladder for the hernia sac and transected it.

9. An infant hernia in a female patient is typically a very straightforward procedure. The operative note dictated by Dr. Jones describes anything but straightforward. She mentions that the sac is large (which can occur) and tethered medially with what appeared to be chronic adhesions. These adhesions are not a typical finding nor is medial tethering, which should have led Dr. Jones to reassess her landmarks. She describes a hole in the sac which is "repaired" by her. She describes the sac as a "little too medial" so she went more lateral in an attempt to locate the sac but instead encountered her previous sutures. Instead of trying once again to locate familiar landmarks, she went ahead and "ligated" what she had previously thought to be a "little too medial" sac. She attempted to open the sac and pass a telescope into the peritoneum to inspect the contralateral groin but was unable to pass the telescope due to the sac being redundant. She was, in fact, passing the telescope into the bladder. She did not pass an instrument into the sac and then into the peritoneum to assure that she was, in fact, ligating a hernia sac versus something else, in this case the bladder. This is part of any infant inguinal hernia, to open the sac and inspect it to document the absence of intraabdominal contents. Had she done this, she would have seen she was not ligating a sac emanating from the peritoneum as a patent processus vaginalis but rather she had entered the bladder.
10. In addition, the bladder was actually partially excised and bladder is thicker than the thin hernia sac found in an infant hernia. The caliber of the sac she thought she was ligated should have alerted her that something was wrong and should have prevented the error.

11. To Dr. Jones' credit, she was not "happy" with the repair and she put in a telescope through the umbilicus. She could easily have done this before she ligated and removed anything and that would have prevented this unfortunate event where she mistakenly ligated and removed the patient's bladder. When she does look with the telescope, she sees the hernia is still present and repairs it. She does not take this opportunity to inspect the surrounding area and structures to see if there are any other findings or identify her previously placed sutures. She does not seem to be concerned about what she just ligated and excised which was something other than the hernia. Moreover, she did not ask a colleague for help during an operation that she knew was not straightforward.
12. When the patient was anuric with ascites, Dr. Jones was properly suspicious and correctly diagnosed a potential problem and explored the patient. The damage, however, had already been done and a large portion of the bladder had been removed.
13. This was an avoidable result. Failure of Dr. Jones to define landmarks, failure to recognize intraoperatively that something is awry, failure to visually distinguish the bladder from the hernia, failure to ask for help or a consult from another specialist, and failure to further investigate all fall beneath the standard of care and judgment that is expected of an board-certified pediatric surgeon in my opinion.
14. This does not appear to me to be a case of a known complication or an accidental perforation of the bladder during hernia repair. Instead, Dr. Jones mistook the bladder for the hernia sac and transected it. This is well below the standard of care in my opinion.

I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.



Nicholas C. Saenz, M.D., FACS, FAAP Date 12/15/20

EXHIBIT “2”

**MINUTES OF THE
ASSEMBLY COMMITTEE ON JUDICIARY**

**Sixty-ninth Session
April 15, 1997**

The Committee on Judiciary was called to order at 8:15 a.m., on Tuesday, April 15, 1997. Chairman Bernie Anderson presided in Room 3142 of the Legislative Building, Carson City, Nevada. Exhibit A is the Agenda. Exhibit B is the Guest List.

COMMITTEE MEMBERS PRESENT:

Mr. Bernie Anderson, Chairman
Ms. Barbara Buckley, Vice Chairman
Mr. Clarence (Tom) Collins
Ms. Merle Berman
Mr. John Carpenter
Mr. Don Gustavson
Mr. Dario Herrera
Mrs. Ellen Koivisto
Mr. Mark Manendo
Mr. Dennis Nolan
Ms. Genie Ohrenschall
Mr. Richard Perkins
Mr. Brian Sandoval
Mrs. Gene Segerblom

STAFF MEMBERS PRESENT:

Risa L. Berger, Committee Counsel
Juliann K. Jenson, Senior Research Analyst
Matthew Baker, Committee Secretary

OTHERS PRESENT:

John Slansky, Assistant Director, Operations, Nevada Department of Prisons
Carlos Concha, Deputy Chief, Parole and Probation Division, Department of Motor Vehicles and Public Safety
Pamela Roberts, Deputy Attorney General, Medicaid Fraud Control Unit

The floor assignment for A.B. 315 was given to Assemblywoman Ohrenschall.

Testimony commenced on S.B. 80.

SENATE BILL 80 - **Makes person liable in treble damages for abuse, neglect or exploitation of certain older persons or vulnerable persons.**

Pamela Roberts, Deputy Attorney General, Medicaid Fraud Control Unit, addressed the committee. She stated the purpose of the bill was to encourage private attorneys to take up the fight on the behalf of elder victims. The law would allow private attorneys to recover fees and costs and would award treble damages to the victim upon conclusion of the suit.

Ms. Roberts explained how difficult it was to prove criminal abuse due to the victim's inability to testify and some other evidentiary problems. She pointed out the burden of proof in a civil action was not as high as a criminal trial, so it was hoped S.B. 80 would help victims to recover their losses, both in terms of damages from abuse and neglect, but especially when financial exploitation occurred.

Since the bill was drafted, Ms. Roberts explained there had been a significant development in case law regarding employer liability for employee's actions.

She pointed out section 7, subsection b of the bill, which made the employer responsible for its employee's conduct, and jointly and civilly liable for treble damages imposed. She explained when that section was drafted it was based upon the existing case law and the interpretation of "respondeat superior," or "let the master answer," a term of the law that held an employer vicariously liable for its employee's acts.

Ms. Roberts explained the case law at the time S.B. 80 was drafted would have held the employer responsible for the acts of the employee if that action was during the course of the employee's employment. A recent case involving the State of Nevada and the Department of Human Resources Division of Mental Hygiene and Retardation, versus Julie Jimenez as guardian for John Doe, had called into question what the status of the law was regarding employer liability for employee's acts.

She commented the case had created a lack of clarity and some concern about what the original intent was, in terms of the scope of liability for S.B. 80. It was her suggestion, with the Chairman's consent, that perhaps the bill should

be put into a work session to analyze and further assess the implications of the Jimenez case, in terms of whether to keep the bill as drafted, in terms of that particular provision. It was her understanding there was a pending bill draft request to address the definition of scope of employment. Depending on its passage, it would help clarify whether S.B. 80 needed to be amended.

Assemblyman Sandoval questioned how far the bill went in helping to determine civil liability, especially as dealt with mistreatment in nursing homes and managed care facilities.

Ms. Roberts stated the potential of liability would include the detrimental conduct rumored to occur in nursing homes and managed care facilities. Most such conduct would fall under section 5, subsection 3 of the bill, dealing with certain obligations for care, making it necessary to maintain an older person's physical or mental health.

Assemblyman Carpenter questioned if the bill dealt strictly with civil actions. Ms. Roberts stated the bill dealt strictly with private civil causes of action a victim could pursue. In the event of the victim's death, the family could pursue a civil action on behalf of the victim.

Assemblyman Carpenter asked if there were criminal liabilities connected with the detrimental conduct and situations mentioned in section 5, subsection 3 of the bill. Ms. Roberts noted criminal liability already existed in statute under NRS 200.5092, which were the elder abuse statutes. She stated the reason there was a need to clarify and be specific about civil liability was that there was a difficulty in proving certain types of criminal cases against the perpetrators of fraud, abuse and neglect. The bill allowed some recourse for the family of those victimized to recover damages and losses.

Assemblyman Carpenter commented on the "mental anguish" language of the bill in section 5, subsection 1. He questioned what the actual definition of mental anguish was. Risa Berger, Committee Counsel, stated she would research the matter.

Assemblyman Carpenter questioned the language referring to the voluntary obligation of a person, spoken of in section 5, subsection 3 of the bill. He wondered how the language would apply to the "real world." Ms. Roberts noted the background of putting such language into the bill originated from the elder abuse and neglect statutes. It sought to only impose liability upon people who voluntarily assumed the obligation of taking care of an elderly person. She stated a family member volunteering to take on the obligation of taking care of a family member, for whom they were responsible and handling all their personal

affairs and having that person come into their home, was an example. Those family members had an obligation to provide care in a reasonably fair fashion, not neglecting the elderly person.

Chairman Anderson questioned if a volunteer program, such as "Meals on Wheels," that visited an elderly person and fed them and checked up on them periodically but then discontinued their help for a period of time and exposed that elderly person to potential neglect, would be held civilly liable.

Ms. Roberts explained in such a situation the volunteer organization should not be held liable because the context of the bill discussed someone who had assumed a legal responsibility, such as a nursing professional, or a contractual responsibility such as a long-term care facility, group home, family member or caregiver who had assumed responsibility for taking care of the person. It would not extend to a helpful neighbor or volunteer.

Ms. Berger informed the committee NRS 200.5092 defined terms for purposes of the elder abuse statutes. The term "mental anguish" was used under the definition of abuse of an older person and also in the definition of neglect of an older person.

Ms. Roberts said the bill's intent was not for someone to incur liability for acting in good faith in trying to help neighbors, family members and others they cared about. She suggested the bill might need to be clarified through a change in language or legislative intent.

Assemblyman Sandoval questioned if the bill would allow resentful siblings to sue one another, especially if they were not happy with how one or the other was taking care of their parents. Ms. Roberts explained the cause of civil action belonged to the victim—the older person. As long as the older person was alive, they would be the one who would be able to obtain counsel and sue on behalf of themselves, in terms of being a victim: intentional pain or injury, neglect of services, negligent failure to provide food and services. In terms of siblings suing one another, they could only do so if the elderly person died and there was a cause of action. If the elderly person was still alive and one of the siblings was appointed guardian, they would be able to litigate certain things on behalf of the older person.

Assemblyman Carpenter questioned how an elderly person would initiate a civil action if they were mentally incompetent. Ms. Roberts noted she could not fully answer that question and the subject should be addressed or looked into.

Ms. Roberts noted much of the discussion on the bill had focused on the neglect and abuse, in terms of physical harm, which might result to an older person. One of the additional intents of the bill was to bring others into the scope of liability. This dealt mainly with the financial exploitation which occurred with elderly people.

Bill Bradley, Representative, Nevada Trial Lawyer's Association (NTLA), addressed the committee. With him was Thomas Brennan, of the law firm of Durney and Brennan, located in Reno, Nevada.

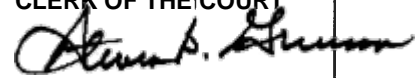
Mr. Bradley stated Mr. Brennan was one of the attorneys who represented Julie Jimenez and her son, John Doe. Mr. Bradley wished for the committee to be able to get the actual facts underlying the case because it would be greatly discussed in the future. He felt Mr. Brennan could provide information that was not contained in any of the information the committee had received so far.

Chairman Anderson noted the committee had requested for a bill draft to come forward that would, in part, deal with the Jimenez case. The impact of the case on legislation, if any, would be open to interpretation.

Mr. Bradley was in favor of the underlying policy of protecting elderly people from abuse. The questions on volunteers was very viable. A volunteer who provided medical assistance may fall under the absolute immunity of a "good samaritan." It was something to look at and the committee's concerns were valid. He had concerns with section 7 of the bill which stipulated the distribution of fees and how the award of treble damage should be distributed. It was of concern because it broached the area of regulating fees between victims and their attorneys. There was a long standing opposition by the NTLA against such policies.

The effective date of the legislation was troubling. When a new statute was implemented that affected civil litigation, it was important to know if the act applied to only acts of abuse that occurred on or after a certain date or did they apply only after a lawsuit was filed after an effective date. The effective date of the legislation needed to be clarified further.

Chairman Anderson asked Mr. Bradley if he had an opinion about mental anguish as it applied. Was it always open to judicial discretion? Mr. Bradley replied he classified "mental anguish" as humiliation, embarrassment, depression, fear, anxiety, and concern. Those were all feelings encompassed by the term "mental anguish." He was unfamiliar with any statute which actually defined "mental anguish." When someone described such emotions as previously stated, it is up to a jury to decide if they constituted "mental anguish."



[RPLY]

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Attorney for Defendant,
Stephanie A. Jones, D.O.

DISTRICT COURT
CLARK COUNTY, NEVADA

ERRYS DEE DAVIS, a minor, by her parents,	}	CASE NO. A-20-826513-C
TRACI LYNN PARKS and ERRICK DAVIS;		DEPT. NO. 5
TRACI LYNN PARKS, individually; ERRICK		
DAVIS, individually,		
Plaintiffs,	}	DEFENDANT STEPHANIE A. JONES,
vs.		D.O.'S REPLY TO PLAINTIFFS'
		OPPOSITION TO MOTION TO DISMISS
		CERTAIN CAUSES OF ACTION OF
STEPHANIE A. JONES, D.O., an individual,	}	PLAINTIFFS' COMPLAINT
DOES I through X; and ROE		
CORPORATIONS XI through XX, inclusive,		Hearing Date: 2/9/2021
Defendants.		Time: 9:00 A.M.

COMES NOW, Defendant, STEPHANIE A. JONES, D.O., by and through her attorney of record, Anthony D. Lauria, Esq. of the law firm Lauria Tokunaga Gates & Linn, LLP, and hereby submits this Reply to Plaintiffs' Opposition to the Motion to Dismiss Certain Causes of Action of Plaintiffs' Complaint.

DEFENDANT STEPHANIE A. JONES, D.O.'S REPLY TO PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS CERTAIN
CAUSES OF ACTION OF PLAINTIFFS' COMPLAINT

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A SIMILAR ATTEMPT AT ARTFUL PLEADING WAS STRUCK DOWN

NEVADA SUPREME COURT CASES ON “GRAVAMEN” OF ACTION ARE NOT LIMITED TO STATUTE OF LIMITATIONS OR EXPERT AFFIDAVIT REQUIREMENTS

As noted in the moving papers, the statute of limitations and affidavit provisions of NRS 41A, which Plaintiffs admit are applicable to their claims, were enacted at the same time as the limitation on economic damages provisions of NRS 41A.035 and the creation of the exception to the collateral source

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1 rule in NRS 42.021. Thus, under Plaintiffs' position, all of their claims are subject to the 1 year statute
2 of limitations and could be dismissed if no expert affidavit were submitted since the "gravamen" of his
3 complaint is clearly and undisputedly the medical care and treatment he received. Yet, the other
4 provisions applicable to actions for professional negligence do not apply since he has artfully plead
5 some other labels for his claims. This position is untenable. It defies logic to suggest that the Nevada
6 Supreme Court's application of statutory interpretation to NRS 41A.071 and 41A.097 does not apply
7 to NRS 41A.035 and NRS 42.021 and Plaintiff cites no legal authority to support this unique contention.
8 Yet, it is precisely the provisions of NRS 41A.035 and NRS 42.021 which Plaintiff now tries to
9 circumvent by artful pleading.

10 III

11 DEFENDANT DOES NOT SEEK DISMISSAL OF "THE COMPLAINT"

12 Plaintiffs cite to the well-established rules regarding evaluation of a 12(b)(5) Motion including
13 the language that the Complaint "should be dismissed only if it appears beyond a doubt that it could
14 prove no set of facts, which, if true, would entitle it to relief." (*Buzz Stew, LLC v. City of N. Las Vegas*
15 124 Nev. 224, 228 (2008.)) This is undoubtedly established law in Nevada where dismissal of the
16 ENTIRE Complaint is sought. In fact, in the *Buzz Stew* case cited by Plaintiff, the Court upheld the
17 dismissal of all of the various causes of actions brought against the Defendant except the one cause of
18 action it found to be appropriate. (*Id.* 124 Nev. at 231)

19 That is precisely what is sought in this Motion. Defendant does not seek dismissal of the entire
20 Complaint and agree that for purposes of pleading, Plaintiff has stated a valid claim for professional
21 negligence under NRS 41A.015. Thus, if the "set of facts" establishing negligence in the medical care
22 and treatment provided are proven, Plaintiff would be entitled to relief. The problem with this
23 Complaint is that although it is abundantly clear that all of Plaintiffs' claims arise out of the medical
24 care and treatment provided, and that expert medical testimony is required to evaluate that
25 appropriateness of that care, Plaintiffs are trying to circumvent the clear intent of the legislature by
26 artfully trying to plead other causes of action. This type of artful pleading has been repeatedly rejected.
27 (*State Farm Mut. Auto. Ins. Co. v. Wharton*, 88 Nev. 183, 186, 495 P.2d 359, 361 (1972); *Egan v*
28 *Chambers*, 129 Nev. 239, 241 n.2, 299 P.3d 364, 366 (2013); *Lewis v. Renown Reg'l Med. Ctr.* (Nev.

2018) 432 P.3d 201. [2018 Nev. Unpub. LEXIS 1165]; *Estate of Curtis v. S. Las Vegas Med. Inv'rs, LLC*, 466 P.3d 1263, 1270 n.5 (Nev. 2020); *Turner v. Renown Reg'l Med. Ctr.*, 461 P.3d 163, 2020 Nev. Unpub. LEXIS 436 (April 23, 2020).)

IV

ARTFUL PLEADING IS DISFAVORED

Plaintiffs' Opposition essentially admits that the sole purpose of pleading causes of action other than the First Cause of Action for "Professional Negligence" is to attempt to circumvent the limited waiver of sovereign immunity by the State of Nevada set forth in NRS 41.035. (Opposition at p. 10:15-11:1). In short, while admitting that the "gravamen" of the Complaint is one relating to the allegedly negligence provision of medical care, Plaintiffs seek to plead "non-tort" causes of action because they believe that those claims won't be subject to NRS 41.035's limited waiver of sovereign immunity by the State of Nevada. (*Id.*) This type of "artful pleading" is clearly disfavored.

According to the United States Supreme Court, "limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied" (*Lehman v. Nakshian*, 453 U.S. 156, 161, 101 S. Ct. 2698, 2702, 69 L. Ed. 2d 548 (1981)) and "Moreover, a waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign." (*Lane v. Pena*, 518 U.S. 187, 192, 116 S. Ct. 2092, 2096, 135 L. Ed. 2d 486 (1996); *Sossamon v. Texas*, 131 S. Ct. 1651, 1662, 179 L. Ed. 2d 700 (2011))

Further, "[A] single cause of action may not be split and separate actions maintained." *Reno Club v. Harrah et al.*, 70 Nev. 125, 260 P.2d 304 (1953).

"The cause of action, as it appears in the complaint when properly pleaded, will therefore always be the facts from which the plaintiff's primary right and the defendant's corresponding primary duty have arisen, together with the facts which constitute the defendant's delict or act of wrong."

... If the facts alleged show one primary right of the plaintiff, and one wrong done by the defendant which involves that right, the plaintiff has stated but a single cause of action, no matter how many forms and kinds of relief he may claim that he is entitled to ... (*Bond v. Thruston*, 60 Nev. 19, 25 (Nev. 1940) (Citation omitted.)

The Nevada Supreme Court has recently held that a plaintiff may only recover once for a single injury, regardless of the number of legal theories asserted. As stated by the Court in *Elyousef v. O'Reilly & Ferrario, LLC*, 126 Nev. 441, 445, 245 P.3d 547, 549 (Nev. 2010):

1 “Although we have applied the double recovery doctrine in prior cases, we have not
2 expressly adopted it. We now take this opportunity to do so. Accordingly, we hold that
3 a plaintiff can recover only once for a single injury even if the plaintiff asserts multiple
4 legal theories.”

5 In *Martinez v. Maruszczak*, 123 Nev. 433, 449-50, 168 P.3d 720, 731 (Nev. 2007), the Nevada
6 Supreme Court stated:

7 “Under this court's precedent in *Arnesano*, protecting the state treasury remains a
8 legitimate state interest, thus providing a rational basis for capping damages at \$50,000
9 for allegedly negligent acts committed within the scope of state employment. Going
10 further, capped damages also advance a legitimate state interest in encouraging qualified
11 professionals to accept state employment to serve the people of Nevada.” (citing
12 *Arnesano v. State* 113 Nev. 815 (1997))

13 The Nevada Supreme Court went on to note that the cap on damages set forth by the Legislature
14 in NRS 41.035 was constitutional and applied to the action against the physician for alleged medical
15 negligence. (*Id.*)

16 In the matter of *County of Clark ex rel. University Med. Ctr. v. Upchurch by & Through*
17 *Upchurch*, 114 Nev. 749, 751 (Nev. 1998), the Nevada Supreme Court again overturned a District
18 Court ruling which had improperly expanded the State's limited waiver of sovereign immunity. In
19 *Upchurch*, the three Plaintiffs had settled their claims for medical negligence against UNSOM and two
20 physician employees of UNSOM for the applicable amount of the statutory cap in NRS 41.035 of
21 \$50,000 each. They then sought to recover an additional \$50,000 each from another State entity,
22 University Medical Center. The District Court found that since they were separate governmental
23 entities, separate caps would apply. The Nevada Supreme Court rejected this expansion of the limited
24 waiver of sovereign immunity and reversed the District Court's ruling. As stated by the Court in
25 *Upchurch*:

26 “Furthermore, the issue of whether the \$50,000 statutory damage limitation applies
27 separately to each governmental entity and its actors or whether it applies to all
28 governmental entities in the aggregate is one of first impression and of fundamental
public importance. This issue may profoundly affect the state treasury and budgets of
other state agencies. In addition, this issue will likely arise again and its resolution might
forestall future litigation.” (*County of Clark ex rel. University Med. Ctr. v. Upchurch by*
& Through Upchurch, 114 Nev. 749, 753 (Nev. 1998))

1 The Court went on to hold that the three claimants in the *Upchurch* matter could not recover
2 another \$50,000 cap from UMC and that the cap applied to each claim for injuries regardless of the
3 number of allegedly negligent State actors. The *Upchurch* decision noted:

4 “There is no indication that the legislature intended, by this amendment, to permit
5 multiple damage awards subject to separate limitations. In fact, the only indirect
6 discussion of multiple damage awards indicates that the idea of multiple recoveries up
7 to the statutory limitation from different state actors for a single action was rejected.”
(*Upchurch*, supra, 114 Nev. at 755)

8 In yet another example of the Nevada Supreme Court overturning a District Court’s improper
9 expansion of the limited waiver of sovereign immunity, the Nevada Supreme Court in *Clark County*
10 *Sch. Dist. v. Richardson Constr., Inc.*, 123 Nev. 382, 390 (Nev. 2007), reversed an award which failed
11 to properly apply the limited damages waiver of NRS 41.035. In that action, the Court held that the
12 provisions of NRS 41.035 are not affirmative defenses and cannot be waived. It further held that a
13 claimant was entitled to a single “cap” under the limited waiver although he claimed multiple incidents
14 or occurrences of wrongdoing. As stated by the Court in *Richardson*:

15 “We have previously concluded that the \$50,000 cap applies on a per-person, per-claim
16 basis. Although Richardson asserts that there were five separate “claims” of tortious
17 interference, Richardson’s third-party complaint states only one cause of action for
18 tortious interference against CCSD. The authorities supporting the per-person, per-claim
19 rule for applying the cap clearly indicate that “claim” means “cause of action,” not each
20 instance of the wrong as Richardson contends. This conclusion is further supported by
our decision in *County of Clark v. Upchurch*, discussing, but specifically not adopting,
a “per incident or occurrence” standard for damages under NRS 41.035.” (Footnotes
omitted.)

21 Thus, the Court made clear that limited waiver of immunity would not be applied on a “per
22 incident or occurrence” basis.

23 In the instant case, Plaintiff is attempting to recover multiple “caps” under NRS 42.035 based
24 on *one course of treatment* (Dr. Jones’ hernia repair surgery) simply by pleading different legal theories
25 based upon the exact same facts and which require the exact same evidence and proof. This case is not
26 comparable to a case such as *State v. Webster*, 88 Nev. 690, 691, 504 P.2d 1316, 319 (1972), where a
27 decedent’s wife brought an action for both her own injuries and for the wrongful death of her husband.
28 In that case the court stated:

1 “Although joined in one complaint, an action for wrongful death and an action for
2 personal injuries suffered by the plaintiff in the same accident are separate, distinct and
independent. . . . They rest on different facts and may be separately maintained.”

3 In this action, all of Plaintiffs’ claims rest entirely upon the same facts and are not at all separate, distinct
4 and independent. Under Plaintiffs’ interpretation, they should have alleged 20 more separate “causes
5 of action”, none of which sound in “tort” so there would be no potential limit whatsoever on the
6 damages the State of Nevada would be subject to for a medical malpractice claim. Clearly, this is not
7 a reasonable interpretation and would vitiate the limited waiver of sovereign immunity in its entirety.

8 V

9 “CONTRACT” IS SOLELY TO PROVIDE “MEDICAL CARE”

10 According to the allegations of the Complaint itself, the only “contract” described was a contract
11 “to provide medical care” with an “implied agreement” the services would be “within the standard of
12 care.” (Complaint at p. 5:28-6:4, ¶’s 29 and 30) On its face, the entire “gravamen” and basis of the
13 action is the provision of medical care and services and expert testimony is required to determine if
14 said services were “within the standard of care.” If the treatment was not “negligent”, there was no
15 breach of contract. This is precisely the type of claim which “sounds in tort” as no determination of a
16 contractual breach can be made without reference to the tort law of medical negligence. (See e.g. *Egan*
17 *v. Chambers*, 129 Nev. 239, 241 n.2, 299 P.3d 364, 366 (2013); *Szymborski v. Spring Mountain*
18 *Treatment Ctr.*, 133 Nev. 638, 642, 403 P.3d 1280, 1284 (2017); *Turner v. Renown Reg’l Med. Ctr.*,
19 461 P.3d 163 (Nev. 2020).) Clearly it was not the intent of the voters or the Nevada legislature to
20 permit Plaintiffs to simply circumvent the provisions of NRS 41A.035 and NRS 42.021 and 42.035 by
21 simply labeling a claim as “breach of contract” which could be the only reason for pleading such a
22 cause of action.

23 VI

24 THE “BATTERY” CLAIM IS ACTUALLY ONE FOR PROFESSIONAL NEGLIGENCE

25 As with the breach of contract claim, the “battery” claim is entirely premised on a theory that
26 an error was made during the surgical procedure. There is no contention that Dr. Jones did not have
27 consent to perform the hernia repair. That consent is undisputed. Instead, the claim is that by
28 “mistakenly” injuring the bladder during the surgery, this was a battery since the consent did not

specifically cover the bladder. (Complaint at p. 6:23-27, ¶s 38 and 39) Further, the cases cited by Plaintiffs support the dismissal of the “battery” claim since there is no question or contention that consent was given for abdominal surgery to attempt repair of a sliding hernia. The claim that an error was made which led to injury to an adjacent structure does not vitiate that consent. In *Humboldt Gen. Hosp. v. Sixth Judicial Dist. Court of Nev.*, 132 Nev. 544, 551, 376 P.3d 167, 172 (2016), the Nevada Supreme Court upheld the dismissal of a battery claim where the Plaintiff did “not allege that the IUD procedure completely lacked her consent.” The Court went on to state: “Accordingly, we conclude that Barrett's battery claim is actually a medical malpractice claim governed by Chapter 41A.” (*Id.*) Further, *Johnson v Egtedar*, 112 Nev. 428, 915 P.2d. 271 (1996) provides no support for Plaintiffs’ battery cause of action in this case. While the introductory paragraph of the opinion indicates the “filed suit” on theories of “battery and medical malpractice”, there is no further discussion of a battery claim whatsoever. In fact, the Court’s opinion focused on the failure to give a Res Ipsa Loquitor instruction regarding medical malpractice. Thus, the *Johnson* case is of no benefit to Plaintiffs. Similarly, the opinion in *Bangalore v. Eighth Judicial Dist. Court of Nev.*, 2016 Nev. Unpub. LEXIS 590, 132 Nev. 943 (2016)(unpublished disposition) does not support Plaintiffs’ battery claim. In *Bangalore*, the Court found that judgement in favor of the physician was appropriate where the patient did not show she objected to “touching” by the doctor.

In fact, Plaintiffs’ Opposition admits that by pleading the breach of contract and battery claims, she simply seeks to circumvent the limited waiver of sovereign immunity and malpractice reform statutes in NRS 41A and 42.

VII

PLAINTIFFS HAVE FAILED TO STATE AN ELDER ABUSE CLAIM

It must be noted that Plaintiffs have not cited a single Nevada Supreme Court or Nevada Federal District Court case to support her contention a valid “Elder Abuse” claim has been stated. Plaintiffs cite a case from Arizona applying an entirely different statute which is irrelevant to this action. Plaintiffs also briefly references the case of *Estate of Curtis v. S. Las Vegas Med. Investors, LLC*, 466 P.3d 1263 (Nevada July, 9, 2020) (See Opposition at p. 13: 10-17, fns. 45-47) but entirely FAILS to mention that the Nevada Supreme Court held that an Elder Abuse claim was not appropriate against

1 the nurse in that case where the allegations were that the nurse “administered the wrong medication”
2 and thereafter “failed to properly monitor or treat” the patient, stating:

3
4 “First, the record does not support an elder abuse claim here, where Nurse Dawson's
5 actions were grounded in negligence, rather than in willful abuse or the failure to provide
6 a service. *See* NRS 41.1395(4)(a) (defining abuse) and (4)(c) (defining neglect).”
(*Estate of Curtis v. S. Las Vegas Med. Inv'rs, LLC*, 466 P.3d 1263, 1270 n.5 (Nev. 2020))

7 Nor does Plaintiffs’ Opposition attempt to address the recent decision in *Lewis v. Renown*
8 *Regional Med. Ctr.*, 2018 Nev. Unpub. LEXIS 1165 which affirmed the dismissal of an Elder Abuse
9 claim where the “gravamen” of the action related to allegedly negligent medical care and treatment.
10 As stated by the Nevada Supreme Court:

11 “In contrast to allegations of a healthcare provider's negligent performance of
12 nonmedical services, ‘[a]llegations of [a] breach of duty involving medical judgment,
13 diagnosis, or treatment indicate that a claim is for [professional negligence.
14 (citation.) The gravamen of Lewis' claim for abuse and neglect is that Renown failed to
15 adequately care for Sheila by failing to monitor her. Put differently, Renown breached
16 its duty to provide care to Sheila by failing to check on her every hour per the monitoring
17 order in place. We are not convinced by Lewis' arguments that a healthcare provider's
18 failure to provide care to a patient presents a claim distinct from a healthcare provider's
19 administration of substandard care; both claims amount to a claim for professional
negligence where it involves a “breach of duty involving medical judgment, diagnosis,
or treatment.” (citation) (*Lewis v. Renown Reg'l Med. Ctr.* (Nev. 2018) 432 P.3d 201.
[2018 Nev. Unpub. LEXIS 1165], quoting *Szymborski v. Spring Mt. Treatment Ctr.*,
133 Nev., Adv. Op. 80, 403 P.3d 1280, 1285 (2017))

20 A thorough and well-reasoned discussion of the distinction between a medical negligence claim and an
21 Elder Abuse claim is set forth in *Brown v. Mt. Grant Gen. Hosp.*, No. 3:12-CV-00461-LRH-WGC,
22 2013 U.S. Dist. LEXIS 120909, at *17 (D. Nev. Aug. 23, 2013). In the *Brown* decision, the Court
23 examined the Legislative History, the differing requirements of the two claims and the distinctions
24 between the provision of allegedly negligent medical care and the type of “long-term relationships”
25 envisioned by the statutes creating the Elder Abuse remedies. The Court went on to state:

26
27 “Thus, both the plain language of § 41.1395 and its legislative history suggest that the
28 statute targets the relationship between long-term caretakers and their charges. This is
in contradistinction to the type of relationship that exists between hospitals and their

patients.” (*Brown v. Mt. Grant Gen. Hosp.*, No. 3:12-CV-00461-LRH-WGC, 2013 U.S. Dist. LEXIS 120909, at *20)

The Court in *Brown* went on to hold that, under Nevada law, an Elder Abuse claim was inappropriate and subject to dismissal where the factual basis of the allegations was of medical negligence. The *Brown* decision also recognized that a plaintiff cannot evade the provisions of NRS sections 41A.035 and 42.021 pertaining to actions for medical malpractice by “artful pleading”. (*Brown* at *22).

In fact, the allegations of the Fourth Cause of Action for “Elder Abuse” show they are entirely premised upon the allegations of a failure to provide competent medical care. (See Complaint at p. 8:7-12, ¶’s 52 & 53) These are the same types of allegations which the Nevada Supreme Court found did not support Elder Abuse claims in *Estate of Curtis* and *Lewis v. Renown* cited above.

VIII CONCLUSION

For the foregoing reasons and based upon the authorities cited herein, Defendant respectfully requests that the Court Dismiss the Second, Third, and Fourth Causes of Action of Plaintiffs' Complaint for failure to state a claim upon which relief can be granted.

DATED: 2/2/2021

LAURIA TOKUNAGA GATES & LINN, LLP

/s/ Anthony D. Lauria

By: _____

Anthony D. Lauria, Esq.
Nevada Bar No.: 4114
601 South Seventh Street
Las Vegas, NV 89101
Tel. (916) 492-2000
Fax. (916) 492-2500
Attorney for Defendant,
Stephanie A. Jones, D.O.

CERTIFICATE OF SERVICE

Pursuant to N.R.C.P. 5(b), I certify that I am an employee of Lauria Tokunaga Gates & Linn, and that on this 2nd day of February, 2021, I served a true and correct copy of the foregoing **DEFENDANT STEPHANIE A. JONES, D.O.'S REPLY TO PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS CERTAIN CAUSES OF ACTION OF PLAINTIFFS' COMPLAINT:**

☐ By placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepared in Las Vegas, Nevada; and/or

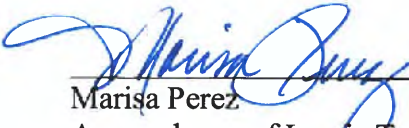
☒ By mandatory electronic service (e-service), proof of e-service attached to any copy filed with the Court; and/or

☐ By facsimile, pursuant to EDCR 7.26 (as amended); and/or

☐ By personal service

as follows:

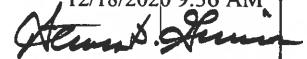
<i>Attorneys for Plaintiff</i> Adam J. Breeden, Esq. BREEDEN & ASSOCIATES, PLLC 376 E. Warm Springs Road, Suite 120 Las Vegas, NV 89119 Tel. (702) 819-7770 Fax. (702) 819-7771 Adam@BreedendAssociates.com	
--	--


Marisa Perez

An employee of Lauria Tokunaga
Gates & Linn, LLP

EXHIBIT A

EXHIBIT A


CLERK OF THE COURT

OGM

~~ORDR~~

Anthony D. Lauria, Esq.
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Fax. (702) 387-8635

Attorney for Defendant,
Daniel M. Kirgan, M.D.

DISTRICT COURT
CLARK COUNTY, NEVADA

A-20-821720-C

THOMAS ZIEGLER, an individual,

Plaintiff,

vs.

DANIEL M. KIRGAN, M.D., an individual;
CLARK COUNTY, NEVADA d/b/a
UNIVERSITY MEDICAL CENTER, a
political subdivision the State of Nevada; and
DOES I through X; and ROE
CORPORATIONS I through X, inclusive,

Defendants.

CASE NO. ~~A-20-821720-C~~
DEPT. NO. 22

**ORDER GRANTING DEFENDANT
DANIEL M. KIRGAN, M.D.'S MOTION
TO DISMISS CERTAIN CAUSES OF
ACTION OF PLAINTIFF'S COMPLAINT**

Hearing date: 12/08/2020
Time: 8:30 A.M.

COMES NOW, Defendant, DANIEL M. KIRGAN, M.D.'s Motion to Dismiss Certain Causes of Action of Plaintiff's Complaint came on for hearing on December 8, 2020, in Department 22, the Honorable Susan Johnson presiding. Plaintiff Thomas Ziegler, an individual, appearing telephonically by and through his counsel Adam J. Breeden of the law firm Breeden & Associates, PLLC. Defendant Daniel M. Kirgan, M.D. appearing telephonically by and through his counsel Anthony D. Lauria of the

ORDER GRANTING DEFENDANT DANIEL M. KIRGAN, M.D.'S
MOTION TO DISMISS CERTAIN CAUSES OF ACTION OF PLAINTIFF'S COMPLAINT


1 law firm Lauria Tokunaga Gates & Linn, LLP. The Court having reviewed the pleadings and papers
2 on file, and having heard oral argument of the parties regarding causes of action and whether or not
3 there was a failure to state a claim upon which relief could be granted, being fully advised and good
4 cause appearing therefore, finds as follows:

5 The Court finds that the gravamen of all of Plaintiff's claims is alleged Professional Negligence
6 and all of the causes of action sought to be plead would require proof by way of expert testimony to
7 establish medical malpractice. All of these claims are subject to the provisions of NRS 41A. relating
8 to actions for professional negligence and to NRS 41.035 relating to the limited waiver of sovereign
9 immunity by the State of Nevada.

10 **IT IS HEREBY ORDERED** that Defendant Daniel M. Kirgan, M.D.'s Motion to Dismiss
11 Plaintiff's Complaint as to the Second Cause of Action (Breach of Contract - All Defendants), Third
12 Cause of Action (Unjust Enrichment - All Defendants), Fourth Cause of Action (Negligent Infliction
13 of Emotional Distress - All Defendants) and Fifth Cause of Action (Neglect of a Vulnerable Person -
14 All Defendants) are GRANTED.

15 **IT IS SO ORDERED.**

16 Dated this 18th day of December, 2020

17 

18 DISTRICT COURT JUDGE

19
20 Respectfully Submitted by:

21 DATED: 12/9/2020

22 LAURIA TOKUNAGA GATES & LINN, LLP

23 /s/ Anthony D. Lauria

24 By: _____

25 Anthony D. Lauria, Esq.
26 Nevada Bar No.: 4114
27 601 South Seventh Street
28 Las Vegas, NV 89101
Tel. (916) 492-2000
Attorney for Defendant,
Daniel M. Kirgan, M.D.

97A C38 2B47 00AC
Susan Johnson
District Court Judge

1 APPROVED AS TO FORM AND CONTENT:

2 DATED: 12/9/2020

3 BREEDEN & ASSOCIATES, PLLC

4 */s/ Adam J. Breeden*

5 By: _____

6 Adam J. Breeden, Esq.
7 Nevada Bar No. 8768
8 376 E. Warm Springs Road, Suite 120
9 Las Vegas, NV 89119
10 Tel. (702) 819-7770
11 Fax. (702) 819-7771
12 *Attorney for Plaintiff,*
13 *Thomas Ziegler*

Marisa E. Perez

From: Adam Breeden <adam@breedenandassociates.com>
Sent: Wednesday, December 9, 2020 7:11 AM
To: Marisa E. Perez
Cc: Anthony D. Lauria
Subject: Re: Ziegler v. Kirgan - Proposed Order

Marisa and Anthony,

The Order language is approved, you may submit with my e signature.

Adam

On Tue, Dec 8, 2020 at 4:29 PM Marisa E. Perez <mperez@ltglaw.net> wrote:

Mr. Breeden,

Attached please find the proposed Order Granting Defendant Daniel M. Kirgan, M.D.'s Motion to Dismiss Certain Causes of Action of Plaintiff's Complaint.

Please advise if the Order is acceptable as written, or if you would like us to consider any changes to the proposed Order. If you approve as to form and content, please advise if we have permission to use your electronic signature.

Thank you for your courtesy.



Marisa Perez

Legal Assistant to Anthony D. Lauria

LAURIA TOKUNAGA GATES & LINN, LLP

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Sincerely,

Adam J. Breeden, Esq.
BREEDEN & ASSOCIATES, PLLC
(702) 819-7770

*Sent from or dictated from a mobile device. Please pardon any transcription errors.

1 CSERV

2 DISTRICT COURT
3 CLARK COUNTY, NEVADA
4

5
6 Thomas Ziegler, Plaintiff(s)

CASE NO: A-20-821720-C

7 vs.

DEPT. NO. Department 22

8 Daniel Kirgan, M.D.,
9 Defendant(s)

10
11 **AUTOMATED CERTIFICATE OF SERVICE**

12 This automated certificate of service was generated by the Eighth Judicial District
13 Court. The foregoing Order Granting Motion was served via the court's electronic eFile
14 system to all recipients registered for e-Service on the above entitled case as listed below:

Service Date: 12/18/2020

15 Adam Breeden

adam@breedenandassociates.com

16 Anthony Lauria, Esq.

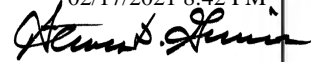
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17 Marisa Perez

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18 Kristy Johnson

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CLERK OF THE COURT

[OGM]

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Fax. (702) 387-8635

Attorney for Defendant,
Stephanie A. Jones, D.O.

DISTRICT COURT
CLARK COUNTY, NEVADA

ERRYS DEE DAVIS, a minor, by her parents, }
TRACI LYNN PARKS and ERRICK DAVIS; }
TRACI LYNN PARKS, individually; ERRICK }
DAVIS, individually, }

Plaintiffs,

vs.

STEPHANIE A. JONES, D.O., an individual, }
DOES I through X; and ROE }
CORPORATIONS XI through XX, inclusive, }

Defendants.

CASE NO. A-20-826513-C
DEPT. NO. 5

**ORDER GRANTING DEFENDANT
STEPHANIE A. JONES, D.O.'S MOTION
TO DISMISS CERTAIN CAUSES OF
ACTION OF PLAINTIFFS' COMPLAINT**

Hearing Date: 2/9/2021
Time: 9:00 A.M.

COMES NOW, Defendant, STEPHANIE A. JONES, M.D.'s Motion to Dismiss Certain Causes of Action of Plaintiffs' Complaint came on for hearing on February 9, 2021 in Department 25, the Honorable Veronica Barisich presiding. Plaintiffs appearing remotely by and through counsel Adam J. Breeden of the law firm Breeden & Associates, PLLC. Defendant STEPHANIE A. JONES M.D. appearing remotely by and through Anthony D. Lauria of the law firm Lauria Tokunaga Gates &

ORDER GRANTING DEFENDANT STEPHANIE A. JONES, M.D.'S
MOTION TO DISMISS CERTAIN CAUSES OF ACTION OF PLAINTIFFS' COMPLAINT

1 Linn, LLP. The Court having reviewed the pleadings and papers on file, and having heard oral
2 argument of the parties, being fully advised and good cause appearing therefore, finds as follows:

3 The Court finds that the gravamen of all of Plaintiffs' claims is alleged Professional Negligence
4 which arise out of medical diagnosis and treatment provided by Defendant. As such all of the causes
5 of action sought to be plead would require proof by way of expert testimony to establish medical
6 malpractice. The Breach of Contract cause of action is premised upon a purported contract to provided
7 reasonable medical care would require expert testimony to establish a breach of such contract. The
8 Court finds that the Battery claim is also subsumed within the cause of action alleging professional
9 negligence. Plaintiffs admit that consent was given for surgery as identified under NRS 41A.110 and
10 the claim that another adjacent organ was injured does not state a valid claim for battery. Similarly,
11 the cause of action for Injury to a Vulnerable Person pursuant to NRS 41.1395 is premised entirely on
12 the contention that the medical care and treatment provided by Defendant was not in accord with the
13 standard of care. This claim is also subsumed in the First Cause of Action for Professional Negligence.

14 The Court finds that all of these claims are subject to the provisions of NRS 41A relating to
15 actions for professional negligence and to NRS 41.035 relating to the limited waiver of sovereign
16 immunity by the State of Nevada. While leave to amend is to be freely granted, an exception exists
17 where it is evident that amendment would be futile and the claims would still properly addressed in the
18 context of Professional Negligence. For that reason, the dismissal of the Second, Third and Fourth
19 Causes of Action is made without leave to amend.

20 **IT IS HEREBY ORDERED** that Defendant Stephanie A. Jones, M.D.'s Motion to Dismiss
21 Plaintiffs' Complaint as to the Second Cause of Action (Breach of Contract), Third Cause of Action
22 (Battery), and Fourth Cause of Action (Neglect of a Vulnerable Person) is GRANTED without leave
23 to amend.

24 **IT IS SO ORDERED.**

Dated this 17th day of February, 2021

25 

26 _____
DISTRICT COURT JUDGE

27 CD9 A20 BE25 80F5
Veronica M. Barisich
28 District Court Judge

1 Respectfully Submitted by:

2 DATED: 2/9/2021

3 LAURIA TOKUNAGA GATES & LINN, LLP

4 /s/ Anthony D. Lauria

5 By: _____

6 Anthony D. Lauria, Esq.
7 Nevada Bar No.: 4114
8 601 South Seventh Street
9 Las Vegas, NV 89101
10 Tel. (916) 492-2000
11 *Attorney for Defendant,*
12 *Stephanie A. Jones, M.D.*

11 APPROVED AS TO FORM AND CONTENT:

12 DATED: 2/9/2021

13 BREEDEN & ASSOCIATES, PLLC

14 /s/ Adam J. Breeden

15 By: _____

16 Adam J. Breeden, Esq.
17 Nevada Bar No. 8768
18 376 E. Warm Springs Road, Suite 120
19 Las Vegas, NV 89119
20 Tel. (702) 819-7770
21 Fax. (702) 819-7771
22 *Attorney for Plaintiffs*

Marisa E. Perez

From: Adam Breeden <adam@breedenandassociates.com>
Sent: Tuesday, February 9, 2021 4:06 PM
To: Marisa E. Perez
Cc: Anthony D. Lauria
Subject: Re: Davis v. Jones - Proposed Order

You have my authority to submit the proposed order with my e-signature. Approved as to form and content only.



Adam J. Breeden
Trial Attorney, Breeden & Associates, PLLC
(702) 819-7770 | adam@breedenandassociates.com
www.breedenandassociates.com
376 E. Warm Springs Rd., Suite 120 Las Vegas, NV 89119-4262
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On Tue, Feb 9, 2021 at 2:33 PM Marisa E. Perez <mperez@ltglaw.net> wrote:

Mr. Breeden,

Enclosed is the proposed Order Granting Defendant Stephanie A. Jones, D.O.'s Motion to Dismiss Certain Causes of Action of Plaintiffs' Complaint. Please advise if the Order is acceptable as written, or if you would like us to consider any changes to the proposed Order. If you approve as to form, please advise if we have permission to use your electronic signature.

Thank you for your courtesy.



Marisa Perez

Legal Assistant to Anthony D. Lauria

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1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
6 Traci Parks, Plaintiff(s)

CASE NO: A-20-826513-C

7 vs.

DEPT. NO. Department 5

8 Stephani Jones, DO,
9 Defendant(s)

10
11 **AUTOMATED CERTIFICATE OF SERVICE**

12 This automated certificate of service was generated by the Eighth Judicial District
13 Court. The foregoing Order Granting Motion was served via the court's electronic eFile
system to all recipients registered for e-Service on the above entitled case as listed below:

14 Service Date: 2/17/2021

15 Adam Breeden

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16 Anthony Lauria, Esq.

alauria@ltglaw.net

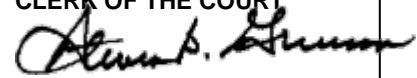
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Attorneys for Plaintiff

CASE NO: A-20-827155-C
Department 22

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

FREDERICK BICKHAM, an individual,

CASE NO.

Plaintiff,

DEPT NO.

v.

COMPLAINT

IRA MICHAEL SCHNEIER, M.D., an individual; MICHAEL SCHNEIER NEUROSURGICAL CONSULTING, P.C., a Nevada professional corporation; IMS NEUROSURGICAL SPECIALISTS LLC, a Nevada limited liability company; and DOES I through X; and ROE CORPORATIONS I through X, inclusive,

**Arbitration Exempt- Professional
Negligence/Medical Malpractice Case
Chapter 41A**

Defendants.

Plaintiff, FREDERICK BICKHAM, by and through his counsel, Adam J. Breeden, Esq. of BREEDEN & ASSOCIATES, PLLC, for his causes of actions against Defendants, IRA MICHAEL SCHNEIER, M.D., MICHAEL SCHNEIER NEUROSURGICAL CONSULTING, P.C. and IMS NEUROSURGICAL SPECIALISTS LLC, and each of them, allege as follows:

PARTIES AND VENUE

1. Plaintiff, FREDERICK BICKHAM (hereinafter referred to as "Plaintiff" and/or "Mr. Bickham") is a resident and citizen of the State of Nevada, County of Clark, and was at all times relevant to this Complaint.

2. Defendant, IRA MICHAEL SCHNEIER, M.D. (hereinafter collectively referred to as "Defendant" and/or "Dr. Schneier"), is and was a physician, with specialties in spinal and

1 craniofacial surgery, and provider of health care licensed to practice medicine within the State of
2 Nevada as defined by NRS § 630.014, NRS § 630.020 and NRS § 41A.017, and was a medical care
3 provider to Plaintiff at all times relevant to this Complaint. His state of residency and citizenship is
4 unknown.

5 3. Defendant MICHAEL SCHNEIER NEUROSURGICAL CONSULTING, P.C.
6 (hereinafter collectively referred to as “Defendant” and/or “MSNC”), is a Nevada professional
7 corporation with its principal place of business in Clark County, Nevada.

8 4. Defendant IMS NEUROSURGICAL SPECIALISTS LLC (hereinafter collectively
9 referred to as “Defendant” and/or “IMS”), is a Nevada professional corporation with its principal
10 place of business in Clark County, Nevada.

11 5. The true names and capacities, whether individual, corporate, associate, or otherwise,
12 of Defendants DOES I through X and ROE CORPORATIONS I through X, inclusive, are unknown
13 to the Plaintiff, who therefore sues these defendants by such fictitious names. Specifically, but
14 without limitation, Plaintiff does not know the exact name of the legal entity, if any, who employed
15 Dr. Schneier on the date of the incident. Plaintiff is informed and believes and thereon alleges that
16 each of the Defendants designated herein as a Does I through X, inclusive, and/or Roe Corporations
17 I through X, inclusive, is responsible in some manner for the events and happenings referred to
18 herein, and caused injury and damages proximately thereby to Plaintiff as herein alleged, and
19 Plaintiff will ask leave of this Court to amend this Complaint to insert the true names and capacities
20 of Defendants, DOES and/or ROE CORPORATIONS, when the same have been ascertained by
21 Plaintiff, together with appropriate charging allegations, and adjoin such Defendants in this action.

22 6. More specifically, Defendant DOE I, is an unknown medical provider who had some
23 roll in the operation on Mr. Bickham for a thoracic surgical procedure completed at the wrong level.

24 7. More specifically but without limitations, Defendant ROE CORPORATION I, is an
25 unknown employer or principal of Dr. Schneier at the times alleged herein.

26 8. This Court has personal jurisdiction over the Defendants because they are residents
27 of the State of Nevada, business entities formed under the laws of the State of Nevada or have
28 minimum contacts with the state of Nevada under NRS § 14.065.

1 9. This Court has subject matter jurisdiction over this matter pursuant to Nev. Const.
2 Art. VI, § 6 and NRS § 4.370(1), as this Court has original jurisdiction in all cases not assigned to
3 the justices' courts and the amount in controversy exceeds \$15,000, exclusive of attorney's fees,
4 interest, and costs.

5 10. All the facts and circumstances that give rise to this dispute and lawsuit occurred in
6 Clark County, Nevada, making venue in the Eighth Judicial District the appropriate venue under
7 NRS § 13.040.

8 11. Without conceding that all or part of this action is an action for professional
9 negligence as defined by NRS § 41A.015, to the extent any allegations in this Complaint need
10 supported by a physician affidavit/declaration as to the standard of care, see the attached Declaration
11 of Michael Trainor, M.D., a physician in the same or substantially similar area of practice as the
12 Defendants. A copy of Dr. Trainor's supporting affidavit is attached as *Exhibit "1"* to this
13 Complaint.

14 **ALLEGATIONS COMMON TO ALL CAUSES OF ACTION**

15 12. Plaintiff hereby re-states and re-alleges each and every prior Paragraph of the
16 Complaint as if fully restated herein.

17 13. Frederick Bickham is a 50-year-old man, married with four children and residing in
18 Las Vegas, Nevada. Prior to the events in this case, he previously worked as a custodian and chef.

19 14. In late 2019, Mr. Bickham developed symptoms of extreme pain in the back with
20 difficulty walking. He presented to Sunrise Hospital on December 26, 2019.

21 15. Following completion of a dedicated thoracic MRI scan with scout images, a
22 diagnosis was made of thoracic myelomalacia myelopathy (injury to and softening of the spinal
23 cord) with severe stenosis at the T10-11 level. While 12-14 mm in diameter is typical for the
24 measurement of an adult's thoracic spinal canal, Mr. Bickham's stenosis was as little as 5 mm.

25 16. The stenosis and compression on the spinal cord was so severe and risk of worsening
26 of the condition was so high that surgery was urgently necessary.

27 17. On December 31, 2019, Defendant Dr. Schneier performed a thoracic laminectomy
28 for cord decompression with pedicle screw fixation and onlay lateral transverse fusion with allograft

1 autograft bone fusion, intended to be performed at T10-11.

2 18. In layman's terms, this means that part of Mr. Bickham's vertebral bone was to be
3 removed to relieve the pressure on his spinal cord, followed by placement of hardware and bone
4 grafts.

5 19. Apparently unknown intraoperatively, Dr. Schneier performed the surgery on the
6 incorrect level, T9-10. Also, during the December 31st surgery, Dr. Schneier misplaced a pedicle
7 screw which caused a medial breach of the spinal canal and likely additional pressure or contact
8 with the spinal cord, worsening the patient's condition.

9 20. On January 22, 2020, Mr. Bickham, still in pain following the prior surgery which
10 ignored the level of the severe stenosis, returned to Sunrise Hospital.

11 21. A thoracic CT scan was conducted and indicated left-sided pedicle screw
12 instrumentation at the T9-10 level with an apparent fifty percent (50%) medial breach of the left T9
13 pedicle screw.

14 22. On January 23, 2020, Dr. Schneier performed a second surgery and removed the
15 hardware at T9. However, Dr. Schneier made no effort to address the ongoing pathology at the T10-
16 11 level and still did not inform Mr. Bickham that the initial surgery was performed at the incorrect
17 level and he still needed an operation on T10-11, which he must have realized by that time.

18 23. Left to his own accord with the laminectomy at the incorrect thoracic level but with
19 severe stenosis on the spinal cord at T10-11 as little as 5 mm, Mr. Bickham's condition continued
20 to deteriorate. He went to the Emergency Room at Sunrise Hospital on multiple occasions in
21 February and March and his serious spinal condition was untreated.

22 24. On May 29, 2020 he was finally taken to Desert Springs Hospital and seen by
23 neurosurgeon Yevgeniy Khavkin, M.D., who quickly realized the problem and scheduled the correct
24 T10-11 laminectomy, which occurred on June 4th.

25 25. At present, Bickham is still unable to work and walk normally and the delay of
26 approximately five months in the performance of the correct surgery at T10-11 likely has caused
27 permanent damage.

28 ///

1 **FIRST CAUSE OF ACTION**

2 **(Professional Negligence/Medical Malpractice – Against All Defendants)**

3 26. Plaintiff hereby re-states and re-alleges each and every prior Paragraph of the
4 Complaint as if fully restated herein.

5 27. On December 31, 2019, Dr. Schneier performed a thoracic laminectomy for cord
6 decompression with pedicle screw fixation and onlay lateral transverse fusion with allograft
7 autograft bone fusion, intended to be performed at T10-11.

8 28. During the surgery, Dr. Schneier mistakenly performed the surgery at the T9-10 level
9 instead of the intended level of T10-T11.

10 29. During and after the surgery, Dr. Schneier breached the standard of care for a
11 physician by, without limitation:

- 12 a. Failed to use proper techniques and landmarks to identify the T10-11 levels;
13 b. Failed to visually distinguish the T10-11 levels from the T9-10 levels;
14 c. Failed to consult other physicians as to difficulties incurred;
15 d. Failed to inform Mr. Bickham that the incorrect procedure had been performed;
16 e. Misplaced a pedicle screw causing a medial breach of the spinal canal, then failed
17 to timely identify this, advise the patient and timely rectify it;
18 f. Failed to address the ongoing pathology at T10-11 during the second procedure.

19 30. As a result of the foregoing, Mr. Bickham's condition continued to deteriorate
20 resulting in additional procedures in order to repair the damage done by Dr. Schneier and the damage
21 caused by the delay in getting the correct surgery.

22 31. Dr. Schneier's negligent care resulted in additional pain, discomfort, additional
23 surgical procedures, hospitalizations, and medical expenses to Mr. Bickham that he otherwise would
24 not have incurred.

25 32. In support of Plaintiff's Complaint, Plaintiff submits the Declaration of Michael
26 Trainor, M.D., attached hereto as *Exhibit "1"* and incorporated in full herein by reference.

27 33. At the time of the negligence herein alleged, Dr. Schneier was the actual, apparent,
28 implied or ostensible agent of Defendants, MICHAEL SCHNEIER NEUROSURGICAL

1 CONSULTING, P.C. and/or IMS NEUROSURGICAL SPECIALISTS LLC. Therefore, those
2 Defendants are responsible for the injuries, pain and suffering of Plaintiff under the theory of
3 respondeat superior, NRS § 41.130 and to the extent applicable NRS § 42.007.

4 34. As a direct result of Defendant's negligence, Plaintiff has been damaged in an
5 amount in excess of Fifteen Thousand Dollars (\$15,000.00), which will be proven at trial.

6 35. Plaintiff has or will incur attorney's fees, costs and other expenses in prosecuting
7 these claims and seeks to recover said damages by way of this action along with all pre-judgment
8 or post-judgment interest allowed by law.

9 **SECOND CAUSE OF ACTION**

10 **(Breach of Contract – Against All Defendants)**

11 36. Plaintiff hereby re-states and re-alleges each and every prior Paragraph of the
12 Complaint as if fully restated herein.

13 37. On or about December 31, 2019, the Plaintiff entered into a contract for Dr. Schneier
14 to provide medical services.

15 38. The medical services provided by Dr. Schneier were beneath the standard of care and
16 caused new injury to the Plaintiff, including consequential and incidental damages of additional
17 medical expenses to repair the damage done by Dr. Schneier.

18 39. As a result of the foregoing, Mr. Bickham's condition continued to deteriorate
19 resulting in additional procedures in order to repair the damage done by Dr. Schneier.

20 40. Dr. Schneier's breach of contract resulted in additional pain, discomfort, additional
21 surgical procedures, hospitalizations, and medical expenses to Plaintiff that he otherwise would not
22 have incurred.

23 41. At the time of the negligence herein alleged, Dr. Schneier was the actual, apparent,
24 implied or ostensible agent of Defendants, MICHAEL SCHNEIER NEUROSURGICAL
25 CONSULTING, P.C. and/or IMS NEUROSURGICAL SPECIALISTS LLC. Therefore, those
26 Defendants are responsible for the injuries, pain and suffering of Plaintiff under the theory of
27 respondeat superior, NRS § 41.130 and to the extent applicable NRS § 42.007.

28 42. As a direct result of Defendant's breach of contract, Plaintiff has been damaged in

1 an amount in excess of Fifteen Thousand Dollars (\$15,000.00), which will be proven at trial.

2 43. Plaintiff has or will incur attorney's fees, costs and other expenses in prosecuting
3 these claims and seeks to recover said damages by way of this action along with all pre-judgment
4 or post-judgment interest allowed by law.

5 **THIRD CAUSE OF ACTION**

6 **(Battery – Against All Defendants)**

7 44. Plaintiff hereby re-states and re-alleges each and every prior Paragraph of the
8 Complaint as if fully restated herein.

9 45. On December 31, 2019, Dr. Schneier performed a thoracic laminectomy for cor
10 compression with pedicle screw fixation.

11 46. During this procedure, Dr. Schneier incorrectly operated on levels T9-10.

12 47. At no time prior to the surgery did Dr. Schneier have permission to operate on the
13 T9 level. In fact, it was wholly unnecessary to do anything to that level.

14 48. As a result of the foregoing, Mr. Bickham's condition continued to deteriorate
15 resulting in additional procedures in order to repair the damage done by Dr. Schneier.

16 49. Dr. Schneier's actions resulted in additional pain, discomfort, additional surgical
17 procedures, hospitalizations, and medical expenses to Plaintiff that he otherwise would not have
18 incurred.

19 50. At the time of the negligence herein alleged, Dr. Schneier was the actual, apparent,
20 implied or ostensible agent of Defendants, MICHAEL SCHNEIER NEUROSURGICAL
21 CONSULTING, P.C. and/or IMS NEUROSURGICAL SPECIALISTS LLC. Therefore, those
22 Defendants are responsible for the injuries, pain and suffering of Plaintiff under the theory of
23 respondeat superior, NRS § 41.130 and to the extent applicable NRS § 42.007.

24 51. As a direct result of Defendant's acts, Plaintiff has been damaged in an amount in
25 excess of Fifteen Thousand Dollars (\$15,000.00), which will be proven at trial.

26 52. Plaintiff has or will incur attorney's fees, costs and other expenses in prosecuting
27 these claims and seeks to recover said damages by way of this action along with all pre-judgment
28 or post-judgment interest allowed by law.

1 **FOURTH CAUSE OF ACTION**

2 **(Breach of Fiduciary Duty/Fraud – Against All Defendants)**

3 53. Plaintiff hereby re-states and re-alleges each and every prior Paragraph of the
4 Complaint as if fully restated herein.

5 54. As a health care provider, Defendants are fiduciaries in relation to the Plaintiff and
6 have a duty to place the Plaintiff's interests above their own. Violation of said duty is fraud, in
7 addition to common law fraud.

8 55. Where a healthcare provider commits a breach of fiduciary duty and/or fraud, said
9 torts are separate from medical malpractice actions and are not subject to NRS Chapter 41A, or its
10 damages caps. Goldenberg v. Woodard, 130 Nev. 1181 (2014).

11 56. On December 31, 2019, Dr. Schneier performed a thoracic laminectomy for
12 decompression with pedicle screw fixation, intended to be performed at the T10-11 levels.

13 57. Subsequent to the December 31, 2019 surgery, Dr. Schneier at least by January 23,
14 2020 realized that he had made a serious error, that he had operated on the wrong level of
15 Mr. Bickham's spine, that the T10-11 level had been unaddressed by the surgery and was still
16 causing compression and damage to Plaintiff's spinal cord, and that a pedicle screw had been
17 misplaced during the surgery causing a medial breach of the spinal canal.

18 58. Instead of disclosing his errors to his patient, Dr. Schneier sought to conceal his
19 mistakes. He never told Mr. Bickham the wrong level had been operated on or that he still urgently
20 needed a surgery at T10-11. Moreover, Dr. Schneier wrote false and misleading statements in his
21 medical chart to cover up his errors, including but not limited to a statement that there had, in fact,
22 not been a medial breach of the spinal canal by a pedicle screw when in fact radiology plainly shows
23 this to be true, and that the December 31st surgery was intended at least in part to be performed at
24 T9-10 when it was not.

25 59. Dr. Schneier made intentionally false or misleading statements upon which the
26 Plaintiff reasonably relied, to his detriment and causing additional damages.

27 60. As a result of the foregoing, Mr. Bickham's condition continued to deteriorate
28 resulting in additional procedures in order to repair the damage done by Dr. Schneier, although the

1 damage at this point is likely permanent.

2 61. Dr. Schneier's actions resulted in additional pain, discomfort, additional surgical
3 procedures, hospitalizations, and medical expenses to Plaintiff that he otherwise would not have
4 incurred.

5 62. At the time of the negligence herein alleged, Dr. Schneier was the actual, apparent,
6 implied or ostensible agent of Defendants, MICHAEL SCHNEIER NEUROSURGICAL
7 CONSULTING, P.C. and/or IMS NEUROSURGICAL SPECIALISTS LLC. Therefore, those
8 Defendants are responsible for the injuries, pain and suffering of Plaintiff under the theory of
9 respondeat superior, NRS § 41.130 and to the extent applicable NRS § 42.007.

10 63. As a direct result of Defendant's acts, Plaintiff has been damaged in an amount in
11 excess of Fifteen Thousand Dollars (\$15,000.00), which will be proven at trial.

12 64. In addition, Dr. Schneier's actions were done with oppression, fraud or malice and
13 intent and he is subject to punitive damages.

14 65. Plaintiff has or will incur attorney's fees, costs and other expenses in prosecuting
15 these claims and seeks to recover said damages by way of this action along with all pre-judgment
16 or post-judgment interest allowed by law.

17 **FIFTH CAUSE OF ACTION**

18 **(Neglect of a Vulnerable Person- All Defendants)**

19 66. Plaintiff hereby re-states and re-alleges each and every preceding paragraph of the
20 Complaint as if fully restated herein.

21 67. In 1997, Nevada enacted Senate Bill 80, later codified as NRS § 41.1395, which had
22 the express purpose to curb abuse, exploitation and neglect of older persons and vulnerable persons
23 with physical and mental impairments.

24 68. As a remedial statute, NRS § 41.1395 must be broadly and liberally construed to
25 provide the most protections possible for vulnerable persons.

26 69. The "neglect" provisions of NRS § 41.1395 were broadly defined in both the statute
27 and legislative history to include the neglect of health care professionals, including nursing staff and
28 physicians as well as facilities, that have undertaken the care of vulnerable persons.

1 70. Similar statutes to curb abuse, exploitation and neglect of older persons and
2 vulnerable persons with physical and mental impairments have been held to be a separate, statutory
3 cause of action independent and distinct of tort medical malpractice actions, e.g., *Estate of McGill*
4 *v. Albrecht*, 203 Ariz. 525, 530, 57 P.3d 384, 389 (2002), and thus actions under NRS § 41.1395 are
5 not subsumed into professional negligence actions and are not subject to Nevada's medical
6 malpractice damages caps.

7 71. Plaintiff Bickham, at the time of the events in this case, was known to have severe
8 spinal cord stenosis at T10-11 causing damage to the spinal cord and rendering him in severe pain
9 and unable to walk. He was unable to independently care for himself and was, therefore, a
10 vulnerable person as defined by NRS § 41.1395(e).

11 72. The Defendants had reason to know of Plaintiff's status as a vulnerable person as his
12 status was apparent by observing him and his medical history was known to the Defendants.

13 73. Dr. Schneier voluntarily assumed a duty to care for Mr. Bickham, a vulnerable
14 person.

15 74. Dr. Schneier breached said duty by failing to provide medical services and care
16 within the scope of their responsibility or obligation necessary to maintain the physical health of
17 Bickham, both by failing to properly perform the subject medical procedures and concealing the
18 fact that the wrong level of the spinal cord had been operated on. Despite knowing Mr. Bickham
19 did not receive surgery at the correct level, Dr. Schneier neglected him and left him without
20 appropriate treatment.

21 75. At the time of the negligence herein alleged, Dr. Schneier was the actual, apparent,
22 implied or ostensible agent of Defendants, MICHAEL SCHNEIER NEUROSURGICAL
23 CONSULTING, P.C. and/or IMS NEUROSURGICAL SPECIALISTS LLC. Therefore, those
24 Defendants are responsible for the injuries, pain and suffering of Plaintiff under the theory of
25 respondeat superior, NRS § 41.130 and to the extent applicable NRS § 42.007.

26 76. As a direct and proximate cause of the acts of the Defendants, Plaintiff has sustained
27 damages in an amount to be determined at trial but exceeding \$15,000.

28 77. Plaintiff is entitled to two times the actual damages incurred by him due to the acts

1 of the Defendants under NRS § 41.1395(1).

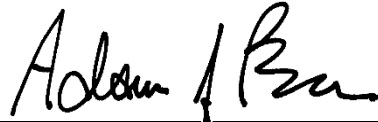
2 78. Plaintiff has or will incur attorney's fees, costs and other expenses in prosecuting
3 these claims and seeks to recover said damages by way of this action along with all pre-judgment
4 or post-judgment interest allowed by law.

5 **WHEREFORE**, Plaintiff prays for judgment against the Defendants and each of them
6 jointly and severally as follows:

- 7 1. For special and general damages in an amount to exceed \$15,000.00;
- 8 2. For punitive damages;
- 9 3. For attorney's fees, expenses, and costs of suit;
- 10 4. For all pre-judgment and post-judgment interest awardable by law;
- 11 5. For such further relief as the Court may deem just and proper.

12 DATED this 30th day of December, 2020.

13 **BREEDEN & ASSOCIATES, PLLC**

14 

15 **ADAM J. BREEDEN, ESQ.**

16 Nevada Bar No. 008768

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18 Las Vegas, Nevada 89119

19 Phone: (702) 819-7770

20 Fax: (702) 819-7771

21 Adam@Breedendassociates.com

22 *Attorneys for Plaintiff*

EXHIBIT “1”

DECLARATION OF MICHAEL A. TRAINOR, D.O.

STATE OF NEVADA)
) SS
COUNTY OF CLARK)

NOW COMES the Declarant, Michael Trainor, D.O., who first being sworn does testify to
the following under oath:

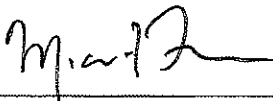
1. I am Michael Trainor. I am over 18 years old. I have personal knowledge of the facts set forth herein. I am a licensed physician and board certified by the American Osteopathic Academy of Orthopedics. I have undergone a residency in orthopedic surgery and fellowship training in orthopedic spine/neurosurgery. My medical opinions set forth herein are to a reasonable degree of medical probability. I am aware that this Declaration may be used for litigation purposes.
2. I have been asked to review the medical care of Frederick Bickham from December 2019 to present. I practice in an area of medicine, orthopedic spine surgery, which is the same or substantially similar to the subject of this Declaration, Ira Michael Schneier, M.D. I have performed hundreds of spinal surgeries and laminectomies or decompression surgeries of the spine of the kind performed by Dr. Schneier in this case.
3. By way of history, in December 2019 the patient Frederick Bickham was 49 years old. On December 26, 2019 he was admitted to Sunrise Hospital and evaluated for treatment of back pain and lower extremity pain and weakness. He was found to have severe spinal stenosis causing compression of the spinal cord at T10-11.
4. Following an earlier consultation and radiology, on December 31, 2019, Dr. Schneier performed a thoracic laminectomy intended to decompress the spinal cord at the T10-11 level.

5. During the surgery, Dr. Schneier failed to properly identify the surgical level and, in fact, operated at the wrong level of T9-10. This left the severe stenosis surgically unaddressed. To compound matters, a pedicle screw placed at left T9 (likely intended to be placed at T10) during the December 31st surgery had a medial breach of the pedicle wall.
6. After the patient continued with symptoms, a second surgery was performed by Dr. Schneier on January 23, 2020. At this time, Dr. Schneier removed the offending pedicle screw at left T9. Unfortunately, nothing was done to address the T10-11 level at the time of the January 23, 2020 surgery either. Indeed, there is no indication that Dr. Schneier ever told or admitted to the patient that the wrong level had been operated on and T10-11 was unaddressed surgically.
7. Unsurprisingly, Mr. Bickham continued to struggle after the January 23rd surgery. He sought Emergency Room evaluation on multiple occasions. His pathology at T10-11 continued to be unaddressed until a consultation with Dr. Yevgeniy Khavkin on May 30, 2020. A few days later, Dr. Khavkin performed a laminectomy at the correct T10-11, as Dr. Schneier should have done on December 31st, but by that time five months of additional compression on the spinal cord had occurred.
8. It is my opinion to a reasonable degree of medical probability that the care administered by Dr. Schneier fell below the standard of care in at least the following ways:
 - a. Failing to perform the December 31st surgery at the proper T10-11 level and instead performing surgery at the wrong level;
 - b. Failing to earlier recognize, alert the patient and appropriately address the misplacement and medial breach of a pedicle screw at T9 during the December 31st surgery. Although Dr. Schneier indicates that there was no evidence of breach by

ball tip palpation, radiology clearly shows a significant breach which more likely than not contributed to the patient's symptoms;

- c. Failing to address the T10-11 level during the January 23rd surgery;
 - d. Failing to address the T10-11 level despite numerous post-operation ER visits and continued complaints of pain and limitations by the patient;
 - e. Failing to disclose to the patient that the wrong level was operated on (T9-10 versus the intended T10-11 level).
9. I do believe that the repeated failure to surgically address the stenosis at T10-11 by Dr. Schneier led to additional damage to the spinal cord and has impaired or even prevented Mr. Bickham's recovery.

I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.



Michael A. Trainor, D.O.

12/28/20

Date



[MTD]

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Attorneys for Defendants,
Ira Michael Schneier, M.D. and
Michael Schneier Neurosurgical Consulting, P.C.

DISTRICT COURT
CLARK COUNTY, NEVADA

FREDERICK BICKHAM, individually,

Plaintiff,

vs.

IRA MICHAEL SCHNEIER, M.D., an
individual; MICHAEL SCHNEIER
NEUROSURGICAL CONSULTING, P.C., a
Nevada professional corporation; IMS
NEUROSURGICAL SPECIALISTS LLC, a
Nevada limited liability company; and DOES I
through X; and ROE CORPORATIONS I
through X, inclusive,

Defendants.

CASE NO. A20-827155-C
DEPT. NO. XXII

HEARING REQUESTED

**DEFENDANTS IRA MICHAEL
SCHNEIER, M.D. AND MICHAEL
SCHNEIER NEUROSURGICAL
CONSULTING, P.C.'S MOTION TO
DISMISS CERTAIN CAUSES OF
ACTION OF PLAINTIFF'S COMPLAINT**

COME NOW, Defendants, Ira Michael Schneier, M.D. and Michael Schneier Neurosurgical Consulting, P.C., a Nevada professional corporation, by and through their attorney of record, Anthony D. Lauria, Esq. of the law firm Lauria Tokunaga Gates & Linn, LLP, and hereby file this Motion to Dismiss Certain Causes of Action of Plaintiff's Complaint.

DEFENDANTS IRA MICHAEL SCHNEIER, M.D. AND MICHAEL SCHNEIER NEUROSURGICAL CONSULTING, P.C.'S
MOTION TO DISMISS CERTAIN CAUSES OF ACTION OF PLAINTIFF'S COMPLAINT

1 This Motion is made and based upon the pleadings and papers on file herein, the attached
2 Memorandum of Points and Authorities, and any argument the Court may entertain at the hearing of
3 this matter.

4 DATED: 2/9/2021

LAURIA TOKUNAGA GATES & LINN, LLP

5 /s/ Anthony D. Lauria

6 By: _____

7 Anthony D. Lauria, Esq.

8 Nevada Bar No.: 4114

601 South Seventh Street

Las Vegas, NV 89101

9 *Attorney for Defendants,*

10 *Ira Michael Schneier, M.D. and Michael*

11 *Schneier Neurosurgical Consulting, P.C.*

12 **MEMORANDUM OF POINTS AND AUTHORITIES**

13 **I**

14 **INTRODUCTION AND BACKGROUND**

15 On December 30, 2020, Plaintiff Frederick Bickham filed a Complaint in the Eighth Judicial
16 District Court which arises entirely from medical care and treatment provided by Dr. Ira Michael
17 Schneier, a Physician. This treatment of Mr. Bickham consisted of two surgical procedures on the
18 thoracic spine. Plaintiff essentially contends that on December 31, 2019 Dr. Schneier improperly
19 performed thoracic laminectomy, failed to recognize the surgery was performed at the wrong level, and
20 failed to address the correct level during a second procedure on January 23, 2020 to remove a pedicle
21 screw. (Complaint at ¶'s 27 to 29) The gravamen of the entire dissatisfaction of Plaintiff with Dr.
22 Schneier is the contention the medical care and treatment provided was not in accord with standard of
23 care.

24 Defendants do not seek to dismiss the entire action and do not contend that Plaintiff has not
25 stated a claim for "Professional Negligence" in the First Cause of Action which is sufficiently plead.
26 The First Cause of Action is also supported by a Declaration of Dr. Michael A. Trainor which Plaintiff
27 attached to the Complaint as required by NRS 41A.071. While Dr. Schneier strongly disputes the
28 contention that he was negligent in his treatment of Frederick Bickham and disagrees with the assertions

1 of Dr. Trainor, the First Cause of Action has been properly plead to sufficiently state a medical
2 malpractice claim.

3 Although the facts giving rise to this lawsuit all pertain to the medical care and treatment
4 provided, Plaintiff has not been satisfied with pleading the appropriate claim of “Professional
5 Negligence” and instead has also sought to add improper claims for “Breach of Contract”, “Battery”,
6 “Breach of Fiduciary Duty”, and “Neglect of Vulnerable Person” pursuant to NRS §41.1395.
7 Defendants respectfully submit that under Nevada Law, Plaintiff has failed to properly state claims for
8 “Breach of Contract”, “Battery”, “Breach of Fiduciary Duty”, and “Neglect of Vulnerable Person”
9 pursuant to NRS §41.1395. The Nevada Supreme Court has made clear that artful pleading is
10 disfavored and mislabeling or adding improper causes of action to a claim sounding in medical
11 malpractice will not be permitted. To permit such artful pleading to avoid the provisions enacted by
12 the voters and Legislature in NRS 41A and NRS 42 would vitiate the intent in enacting those provisions
13 in the first place. Where the “gravamen” of the action sounds in tort for medical negligence, that is the
14 claim which stands. For the reasons set forth below, the Second, Third, Fourth, and Fifth Causes of
15 Action must be dismissed.

16 II 17 ARGUMENT

18 Nevada Rule of Civil Procedure 12(b)(5) provides for dismissal of a cause of action for the
19 “failure to state a claim upon which relief can be granted.” A motion to dismiss tests the legal
20 sufficiency of the claim set out against the moving party. (See *Zalk-Josephs Co. v. Wells-Cargo, Inc.*,
21 81 Nev. 163, 400 P.2d 621 (1965).) Dismissal is appropriate where a Plaintiff’s allegations “are
22 insufficient to establish the elements of a claim for relief.” (*Hampe v. Foote*, 118 Nev. 405, 408, 47
23 P.3d 438, 439 (2002), overruled in part on other grounds by *Buzz Stew, LLC v. City of N. Las Vegas*,
24 124 Nev. 224, 228, 181 P. 3d 670, 672 (2008).)

25 Thus, to survive dismissal under NRCP 12(b)(5), each separate cause of action of a complaint
26 must contain “facts, which if true, would entitle the plaintiff to relief.” (*Id.*) Hence, in analyzing the
27 validity of a claim the court is to accept a plaintiff’s factual allegations “as true and draw all inference
28 in the Plaintiff’s favor.” (*Id.*) Nevertheless, the court is not bound to accept as true a plaintiff’s legal

conclusions, and “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” (*Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937 (2009) (analyzing the federal counterpart to NRCP 12(b)(5)).) Moreover, the court may not take into consideration matters outside of the pleading being attacked. (*Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 847, 858 P.2d 1258, 1261 (1993).)

In 2004, the voters of the State of Nevada enacted Ballot Measure No. 3 because of the “health care crisis” caused by “skyrocketing medical malpractice insurance costs.” As part of that enactment, NRS 41A.035 and NRS 42.021 were added which capped non-economic damages in a medical negligence action at \$350,000 and provided for the introduction into evidence of payments for medical treatment by third parties. These provisions were renewed by the Nevada Legislature. Following its enactment, plaintiffs routinely challenged NRS 41A.035 as being unconstitutional but this contention was finally put to rest by the Nevada Supreme Court in *Tam v. Eighth Judicial Dist. Court* (2015) 131 Nev. 792, 803 [358 P.3d 234, 242], where the Court stated unequivocally:

“Based on our analysis, we conclude that the district court erred in finding NRS 41A.035 unconstitutional. We further conclude that the district court erred when it found NRS 41A.035's cap for noneconomic damages applies per plaintiff and per defendant. Finally, we conclude that the district court erred when it found that NRS 41A.035 did not apply to claims for medical malpractice.”

Since the Nevada Supreme Court’s decision in *Tam*, plaintiffs have sought other ways to skirt the provisions of NRS 41A, including 41A.035 and to frustrate the clearly stated intent behind the enactment of those provisions. This is most often done by trying to insert a variety of different labels to causes of action which, at their core, are actually claims premised upon professional negligence. This is precisely what Plaintiff seeks to do in this case by taking a claim which is clearly and undoubtedly premised upon the provision of medical care and trying to frame it as three other causes of action. Such disingenuous pleading should not be permitted by this Court to circumvent the “gravamen” of the present case, the rulings of the Nevada Supreme Court, and the intent of both the voters and Nevada Legislature.

In fact, the Nevada Supreme Court has seen fit to address attempts to circumvent the provisions of NRS 41A in 4 separate recent decisions, all of which favor dismissal of the artfully plead causes of

1 action when the gravamen of the action is actually one for medical negligence. It has long been the
2 law in Nevada that the nature of the alleged wrong, not the label placed in the complaint, is the
3 controlling factor. As stated by the Nevada Supreme Court in *State Farm Mut. Auto. Ins. Co. v.*
4 *Wharton*, 88 Nev. 183, 186, 495 P.2d 359, 361 (1972):

5 “[I]t is the nature of the grievance rather than the form of the pleadings that determines
6 the character of the action. If the complaint states a cause of action in tort, and it appears
7 that this is the gravamen of the complaint, the nature of the action is not changed by
8 allegations in regard to the existence of or breach of a contract. In other words, it is the
9 object of the action, rather than the theory upon which recovery is sought[,] that is
10 controlling.”

11 In *Egan v Chambers*, 129 Nev. 239, 241 n.2, 299 P.3d 364, 366 (2013), the Nevada Supreme Court
12 recognized that both a battery claim and a negligence claim were subject to the requirements of NRS
13 41A.071 and noted that the affidavit requirement was equally applicable to the battery claim premised
14 upon a lack of informed consent. As stated by the Court:

15 “Egan's complaint asserted causes of action for both professional negligence and breach
16 of contract. However, because both causes of action were based on Chambers’ alleged
17 “failure to perform medical care which rose to the level of compliance with the
18 established care owed to [Egan],” her entire complaint in fact sounded in tort”

19 This established legal principle was recently applied in the context of actions for medical negligence
20 in *Turner v. Renown Reg'l Med. Ctr.*, 461 P.3d 163, 2020 Nev, Unpub. LEXIS 436 (April 23, 2020),
21 where the Court stated:

22 “Allegations of breach of duty involving medical judgment, diagnosis, or treatment
23 indicate that a claim is for medical malpractice.” *Szymborski v. Spring Mountain*
24 *Treatment Ctr.*, 133 Nev. 638, 642, 403 P.3d 1280, 1284 (2017) (explaining that “if the
25 jury can only evaluate the plaintiffs claims after presentation of the standards of care by
26 a medical expert, then it is a medical malpractice claim”). To determine whether a claim
27 is for medical malpractice or negligence, “we must look to the gravamen or substantial
28 point or essence of each claim rather than its form.”

29 In *Turner*, the Supreme Court went on to note that because the gravamen of the claims by the plaintiff
30 in that case involved “medical judgement and treatment and require expert testimony”, the district

1 court properly determined that the claims fell within the provisions of NRS 41A. (*Id.*)

2 In a very recent opinion from July 9, 2020, the Nevada Supreme Court clarified the distinctions
3 between a claim for “professional negligence” and claims for “elder abuse”. In *Estate of Curtis v. S.*
4 *Las Vegas Med. Inv’rs, LLC*, 466 P.3d 1263, 1270 n.5 (Nev. 2020), the Court found that the Plaintiff
5 had not stated an elder abuse claim where the gravamen of the action was alleged medical negligence
6 stating:

7
8 “First, the record does not support an elder abuse claim here, where Nurse Dawson's
9 actions were grounded in negligence, rather than in willful abuse or the failure to provide
a service. See NRS 41.1395(4)(a) (defining abuse) and (4)(c) (defining neglect).”

10 Similarly, *Lewis v. Renown Regional Med. Ctr.*, 2018 Nev. Unpub. LEXIS 1165 and the case
11 upon which it relied, *Szyborski v. Spring Mt. Treatment Ctr.*, 133 Nev. Op. 80 (2017), establish that
12 when the gravamen of the complaint is premised upon allegedly negligent medical care, the proper
13 cause of action is one for medical malpractice and not elder abuse. In *Lewis*, the Supreme Court
14 affirmed the dismissal of an Elder Abuse claim where the “gravamen” of the action related to allegedly
15 negligent medical care and treatment. As stated by the Nevada Supreme Court:

16
17 “In contrast to allegations of a healthcare provider's negligent performance of
18 nonmedical services, ‘[a]llegations of [a] breach of duty involving medical judgment,
19 diagnosis, or treatment indicate that a claim is for [professional negligence.
20 (citation.) The gravamen of Lewis' claim for abuse and neglect is that Renown failed to
adequately care for Sheila by failing to monitor her. Put differently, Renown breached
21 its duty to provide care to Sheila by failing to check on her every hour per the monitoring
22 order in place. We are not convinced by Lewis' arguments that a healthcare provider's
23 failure to provide care to a patient presents a claim distinct from a healthcare provider's
administration of substandard care; both claims amount to a claim for professional
24 negligence where it involves a “breach of duty involving medical judgment, diagnosis,
or treatment.” (citation) (*Lewis v. Renown Reg'l Med. Ctr.* (Nev. 2018) 432 P.3d 201.
25 [2018 Nev. Unpub. LEXIS 1165], quoting *Szyborski v. Spring Mt. Treatment Ctr.*,
133 Nev., Adv. Op. 80, 403 P.3d 1280, 1285 (2017).)

26 Trying to creatively plead, as Plaintiff does here, that a claim is not for malpractice because the
27 Complaint uses some different terminology has been routinely rejected. Perhaps the best discussion
28 of the distinction between a claim for medical negligence and elder abuse is set forth in an opinion by

1 the Hon. Larry Hicks, U.S. District Court Judge for Nevada in *Brown v. Mt. Grant Gen. Hosp.*, No.
2 3:12-CV-00461-LRH-WGC, 2013 U.S. Dist. LEXIS 120909 (D. Nev. Aug. 23, 2013). In dismissing
3 a plaintiff's "elder abuse" cause of action, the Court noted:

4
5 "Moreover, the Nevada Supreme Court has signaled a disapproval of artful pleading for
6 the purposes of evading the medical malpractice limitations. For example, the Court
7 concluded that medical malpractice claims extend to "both intentional and negligence-
8 based" actions. (*citation.*) This means that a plaintiff cannot escape the malpractice
9 statutes' damages or timeliness limitations by pleading an intentional tort—battery,
10 say—instead of negligence."

11 The Court went on to state:

12
13 "If the Nevada Supreme Court casts a jaundiced eye on the artful pleading of intentional
14 torts, it is likely to view the artful pleading of elder abuse similarly." *Brown, supra*. 2013
15 U.S. Dist., at *23)

16 A review of the Complaint in this action clearly establishes that every one of the 5 separate causes of
17 action plead is premised upon claims of medical negligence and that expert testimony would be required
18 to establish a prima facie case.

19 The Second Cause of Action for "Breach of Contract", in addition to failing to properly plead
20 all of the required elements of a contract claim, alleges the contract contained an agreement "for Dr.
21 Schneier to medical services" and that the "medical services provided by Dr. Schneier were beneath
22 the standard of care." (Complaint at p.6:15-17, ¶38.) Thus, the only contract is for medical care and
23 treatment and the purported obligation is to provided it within the standard of care. Obviously, to
24 determine if the services provided by Dr. Schneier complied with the "contract" requires expert
25 evidence of the standard of care and compliance or non-compliance with that standard. Thus, the
26 Second Cause of Action is clearly premised upon medical negligence and does not state a valid contract
27 claim. Further, the Second Cause of Action alleges the "breach of contract" caused "additional pain"
28 and "discomfort" in addition to additional medical expenses. (Complaint at p. 6:20-22, ¶40.) Pain and
suffering are clearly "tort" damages and not damages recoverable in a contract claim.

The Third Cause of Action is titled "Battery" but the gravamen of that claim is also professional
negligence. NRS 41A.015 provides:

1 “Professional negligence” means the failure of a provider of health care, in rendering
2 services, to use the reasonable care, skill or knowledge ordinarily used under similar
3 circumstances by similarly trained and experienced providers of health care.

4 By contrast:

5 "A battery is an intentional and offensive touching of a person who has not consented
6 to the touching . . ." (*Humboldt Gen. Hosp. v. Sixth Judicial Dist. Court of Nev.*, 132
7 Nev. 544, 549, 376 P.3d 167, 171 (2016).)

8 In *Humboldt*, the patient admitted that she had consented to the procedure performed but that it was not
9 performed precisely in the way she had consented it was to be performed. The Nevada Supreme Court
10 found that this was a claim for “professional negligence” and not a claim for the Intentional Tort of
11 Battery. In this case, there is no claim or contention that consent was not given for spine surgery to be
12 performed on Frederick Bickham to attempt to relieve pressure on his spinal cord. The claim is that
13 the surgery was not performed appropriately. This is not a proper claim for “Battery.”

14 The Fourth Cause of Action for “Breach of Fiduciary Duty” is virtually identical to the same
15 claims set forth in Plaintiff’s First Cause of Action for Professional Negligence and must also be
16 dismissed. Plaintiff does not make any new allegations separate from those that support his Professional
17 Negligence cause of action. As noted above, the Nevada Supreme Court has stated in *Lewis v. Renown*
18 *Regional Med. Ctr.*, 2018 Nev. Unpub. LEXIS 1165 and the case upon which it relied, *Szymborski v.*
19 *Spring Mt. Treatment Ctr.*, 133 Nev. Op. 80 (2017), that when the gravamen of the complaint is
20 premised upon allegedly negligent medical care, the proper cause of action is one for professional
21 negligence. As a physician, Dr. Schneier’s “duty” to Plaintiff is to provide reasonable medical care
22 and treatment within the applicable standard of care. (NRS 41A.015.) The “Breach of Fiduciary Duty”
23 claim is a direct liability claim in that the allegations are inextricably linked and depend upon the
24 underlying professional negligence claim.

25 Finally, the Fifth Cause of Action for “Neglect of a Vulnerable Person” must also be dismissed.
26 As with the cases of *Estate of Curtis*, *supra*, and *Lewis v. Renown Reg’l Med. Ctr.*, *supra*, the allegations
27 against Dr. Schneier are grounded in negligence, not abuse or neglect. Plaintiff alleges Dr. Schneier
28 “assumed a duty to care for Mr. Bickham” but this duty was to provide medical treatment within the

1 applicable standard. In fact, the allegations are that Dr. Schneier “breached said duty by failing to
2 provide medical services and care . . .” (Complaint at p. 10:13-20, at ¶’s 73 and 74.) These are precisely
3 the type of claims which sound in medical negligence, not “abuse” or “neglect.”

4 Dr. Schneier was not a “care custodian” and this was not a long-term care facility. Further,
5 expert testimony as to whether or not this medical care and treatment was appropriately provided is
6 required for Plaintiff to establish a prima facie case. The Nevada Supreme Court’s recent opinions and
7 the well-reasoned opinion of U.S. District Court Judge Hon. Larry Hicks in the *Brown v. Mt. Grant*
8 *Gen. Hosp.* matter clearly establish that Plaintiff’s claims against Dr. Schneier is sound in “professional
9 negligence” and that the Second, Third, Fourth, and Fifth Causes of Action should be dismissed.

10 III

11 CONCLUSION

12 For the foregoing reasons and based upon the authorities cited herein, Defendants respectfully
13 requests that the Court Dismiss the Second, Third, Fourth, and Fifth Causes of Action of Plaintiff’s
14 Complaint for failure to state a claim upon which relief can be granted.

15 DATED: 2/9/2021

LAURIA TOKUNAGA GATES & LINN, LLP

16 /s/ Anthony D. Lauria

17 By: _____

18 Anthony D. Lauria, Esq.
19 Nevada Bar No.: 4114
20 601 South Seventh Street
21 Las Vegas, NV 89101
22 *Attorney for Defendants,*
23 *Ira Michael Schneier, M.D. and Michael*
24 *Schneier Neurosurgical Consulting, P.C.*
25
26
27
28

CERTIFICATE OF SERVICE

Pursuant to N.R.C.P. 5(b), I certify that I am an employee of Lauria Tokunaga Gates & Linn, and that on this 9TH day of February, 2021, I served a true and correct copy of the foregoing **DEFENDANTS IRA MICHAEL SCHNEIER, M.D. AND MICHAEL SCHNEIER NUEROSURGICAL CONSULTING, P.C.'S MOTION TO DISMISS CERTAIN CAUSES OF ACTION OF PLAINTIFF'S COMPLAINT:**

☐ By placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepared in Las Vegas, Nevada; and/or

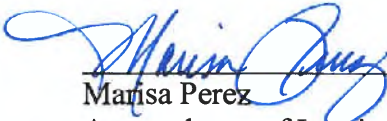
☒ By mandatory electronic service (e-service), proof of e-service attached to any copy filed with the Court; and/or

☐ By facsimile, pursuant to EDCR 7.26 (as amended); and/or

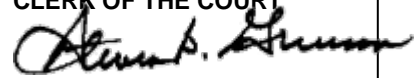
☐ By personal service

as follows:

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Marisa Perez
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10 *Attorneys for Plaintiff*

7 **EIGHTH JUDICIAL DISTRICT COURT**

8 **CLARK COUNTY, NEVADA**

9 FREDERICK BICKHAM, an individual,

10 Plaintiff,

11 v.

12 IRA MICHAEL SCHNEIER, M.D., an
13 individual; MICHAEL SCHNEIER
14 NEUROSURGICAL CONSULTING, P.C., a
15 Nevada professional corporation; IMS
16 NEUROSURGICAL SPECIALISTS LLC, a
17 Nevada limited liability company; and DOES I
18 through X; and ROE CORPORATIONS I
19 through X, inclusive,

20 Defendants.

CASE NO. A-20-827155-C

DEPT NO. XXII

**PLAINTIFF'S OPPOSITION TO
DEFENDANTS IRA MICHAEL
SCHNEIER, M.D. AND MICHAEL
SCHNEIER NEUROSURGICAL
CONSULTING, P.C.'S PARTIAL
MOTION TO DISMISS**

Date of Hearing: March 16, 2021

Time of Hearing: 8:30 a.m.

20 Plaintiff, FREDERICK BICKHAM, through his counsel, Adam J. Breeden, Esq. of
21 BREEDEN & ASSOCIATES, PLLC, hereby files the following Opposition to *Defendants Ira*
22 *Michael Schneir, M.D. and Michael Schneier Neurosurgical Consulting, P.C.'s Motion to Dismiss*
23 *Certain Causes of Action of Plaintiff's Complaint.*

24 **I. INTRODUCTION**

25 With his *Motion to Dismiss*, Defendant Dr. Schneier and his professional corporation asks
26 this Court to adopt brand new law and find that Nevada has abolished all causes of action against a
27 physician or provider of medical care with the exception of an action for professional

1 negligence/medical malpractice¹ under NRS Chapter 41A. The District Court should reject making
2 such unfounded new law.

3 Dr. Schneier has filed a pre-answer partial motion to dismiss all causes of action in the
4 Complaint apart from medical malpractice. In doing so, he cites to lines of cases from the Nevada
5 Supreme Court that if the gravamen of a cause of action is that for medical malpractice, the cause
6 of action is subject to Nevada's statute of limitations for medical malpractice actions (NRS §
7 41A.097) and Nevada's supporting physician affidavit requirement for medical malpractice actions
8 (NRS § 41A.100). However, Plaintiff has complied with *both* of these legal requirements. Thus,
9 the Defendant's *Motion to Dismiss* completely misses the mark and apparently mistakenly believes
10 that the Nevada Supreme Court has ruled that all statutory and common law actions against a
11 physician are barred except for medical malpractice, which is incorrect. Therefore, Defendant's
12 motion should be denied at this early pleading stage.

13 II. BACKGROUND

14 In this personal injury action, Plaintiff Frederick Bickham sues his physician following
15 spinal surgery performed on December 31, 2019 and January 23, 2020. During the surgery,
16 Defendant Dr. Schneier **operated on the wrong level of Mr. Bickham's spine** and failed to correct
17 the serious stenosis at the actual level, causing Mr. Bickham's condition to worsen with additional
18 spinal cord damage.

19 As alleged in the Complaint, Frederick Bickham is a 50-year-old man, married with four
20 children and residing in Las Vegas, Nevada. Prior to the events in this case, he previously worked
21 as a custodian and chef.² In late 2019, Mr. Bickham developed symptoms of extreme pain in the
22 back with difficulty walking. He presented to Sunrise Hospital on December 26, 2019.³ Following
23 completion of a dedicated thoracic MRI scan with scout images, a diagnosis was made of thoracic
24 _____

25 ¹ Although the term "professional negligence" might be more proper than "medical malpractice"
26 under NRS Chapter 41A and there may still exist slight differences in those terms, this brief will
use the term medical malpractice.

27 ² See Plaintiff's Complaint at ¶ 13.

28 ³ See Plaintiff's Complaint at ¶ 14.

1 myelomalacia myelopathy (injury to and softening of the spinal cord) with severe stenosis at the
2 T10-11 level. While 12-14 mm in diameter is typical for the measurement of an adult's thoracic
3 spinal canal, Mr. Bickham's stenosis was as little as 5 mm.⁴ The stenosis and compression on the
4 spinal cord was so severe and risk of worsening of the condition was so high that surgery was
5 urgently necessary.⁵

6 December 31, 2019, Defendant Dr. Schneier performed a thoracic laminectomy for cord
7 decompression with pedicle screw fixation and onlay lateral transverse fusion with allograft
8 autograft bone fusion, intended to be performed at T10-11.⁶ In layman's terms, this means that part
9 of Mr. Bickham's vertebral bone was to be removed to relieve the pressure on his spinal cord,
10 followed by placement of hardware and bone grafts.⁷

11 Apparently unknown intraoperatively, **Dr. Schneier performed the surgery on the**
12 **incorrect level, T9-10.** Also, during the December 31st surgery, Dr. Schneier misplaced a pedicle
13 screw which caused a medial breach of the spinal canal and likely additional pressure or contact
14 with the spinal cord, worsening the patient's condition.⁸

15 On January 22, 2020, Mr. Bickham, still in pain following the prior surgery which ignored
16 the level of the severe stenosis, returned to Sunrise Hospital.⁹ A thoracic CT scan was conducted
17 and indicated left-sided pedicle screw instrumentation at the T9-10 level with an apparent fifty
18 percent (50%) medial breach of the left T9 pedicle screw.¹⁰ On January 23, 2020, Dr. Schneier
19 performed a second surgery and removed the hardware at T9. However, Dr. Schneier made no effort
20 to address the ongoing pathology at the T10-11 level and still did not inform Mr. Bickham that the
21

22 _____
23 ⁴ See Plaintiff's Complaint at ¶ 15.

24 ⁵ See Plaintiff's Complaint at ¶ 16.

25 ⁶ See Plaintiff's Complaint at ¶ 17.

26 ⁷ See Plaintiff's Complaint at ¶ 18.

27 ⁸ See Plaintiff's Complaint at ¶ 19.

28 ⁹ See Plaintiff's Complaint at ¶ 20.

¹⁰ See Plaintiff's Complaint at ¶ 21.

1 initial surgery was performed at the incorrect level and he still needed an operation on T10-11,
2 which he must have realized by that time.¹¹

3 Left to his own accord with the laminectomy at the incorrect thoracic level but with severe
4 stenosis on the spinal cord at T10-11 as little as 5 mm, Mr. Bickham's condition continued to
5 deteriorate. He went to the Emergency Room at Sunrise Hospital on multiple occasions in February
6 and March and his serious spinal condition was untreated.¹² On May 29, 2020, he was finally taken
7 to Desert Springs Hospital and seen by neurosurgeon Yevgeniy Khavkin, M.D., who quickly
8 realized the problem and scheduled the correct T10-11 laminectomy, which occurred on June 4th.¹³
9 At present, Bickham is still unable to work and walk normally and the delay of approximately five
10 months in the performance of the correct surgery at T10-11 likely has caused permanent damage.¹⁴

11 The Complaint alleges five causes of action: (1) Professional Negligence/Medical
12 Malpractice, (2) Breach of Contract, (3) Battery, (4) Breach of Fiduciary Duty and (5) Neglect of a
13 Vulnerable Person/Breach of NRS § 41.1395. Defendants seek to dismiss all causes of action except
14 that of medical malpractice and claim, completely without any legal authority, that the Second
15 through Fifth cause of action are somehow subsumed or abolished by Plaintiff's claim for
16 Professional Negligence.

17 Despite the Defense's assertion, it is plainly *not* the law of Nevada that all causes of action
18 against a doctor or health care provider cease to exist except for medical malpractice. This has never
19 been the law. Instead, other causes of action survive but must comply with the statute of limitations
20 and supporting affidavit requirements of NRS § 41A.097. Since Plaintiff's Complaint plainly
21 satisfies both of those requirements, the *Motion to Dismiss* should be denied.

22 ///

23 ///

25 ¹¹ See Plaintiff's Complaint at ¶ 22.

26 ¹² See Plaintiff's Complaint at ¶ 23.

27 ¹³ See Plaintiff's Complaint at ¶ 24.

28 ¹⁴ See Plaintiff's Complaint at ¶ 25.

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IV. LAW AND ARGUMENT

A. **No Causes of Action can be Dismissed under the *Turner* and *Szymborski* Line of Cases for the “Gravamen” of the Action being Professional Negligence because the Medical Expert Affidavit Requirement and NRS Chapter 41 Statute of Limitations have been Satisfied.**

The Nevada Supreme Court determined in *Turner v. Renown Reg'l Med. Center* 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.097.¹⁹ The “gravamen” of the action is for medical malpractice when a cause of action “involve[s] medical diagnosis, judgment, or treatment”²⁰ 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 v. Spring Mt. Treatment Ctr.*²¹ pursuant to NRS § 41A.071.

Together, the *Turner* and *Szymborski* decisions act as a gatekeeper to keep untimely medical malpractice cases or medical malpractice cases that could not be supported by an expert masquerading as other causes or action out of court. The policy behind this rule is likely well-founded, i.e. that the medical malpractice statute of limitations scheme in Chapter 41A would be rendered useless if a plaintiff could simply plead substitute causes of action to evade it. Thus, if the “gravamen” of the action is medical malpractice, the medical malpractice statute of limitations and supporting expert affidavit requirements in Chapter 41A apply to that cause of action. **However, the effect of an alternative cause of action having the “gravamen” of medical malpractice is not immediate dismissal for failure to states a claim, only that the cause of action must satisfy the expert affidavit and statute of limitations in Chapter 41A.**

The Plaintiff and his counsel are 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

¹⁹ *E.g., Turner v. Renown Reg'l Med. Ctr.*, 461 P.3d 163 (Nev. 2020) (upholding dismissal of various causes of action sounding in medical malpractice by applying the one-year statute of limitations in NRS § 41A.097(2)).

²⁰ *Szymborski v. Spring Mt. Treatment Ctr.*, 403 P.3d 1280 (Nev. 2017).

²¹ *Szymborski v. Spring Mt. Treatment Ctr.*, 403 P.3d 1280 (Nev. 2017).

1 NRS § 41A.097 *and* attached a supporting medical expert declaration to the Complaint under NRS
2 § 41A.071. The Complaint attaches an affidavit from expert physician and spinal surgeon Michael
3 Trainor, M.D. attesting to violations of the standard of care by the Defendants.²² The Complaint
4 itself also plainly alleges that “[w]ithout conceding that all or part of this action is an action for
5 professional negligence as defined by NRS § 41A.015, to the extent any allegations in this
6 Complaint need supported by a physician affidavit/declaration as to the standard of care, the
7 Declaration of Michael Trainor, M.D., a physician in the same or substantially similar area of
8 practice as the Defendants, is attached as Exhibit “1” to this Complaint.”²³ Therefore, it is fruitless
9 for the Defense to seek dismissal of any action under those statutes or cases because the Plaintiff
10 has complied with them.

11 With his Motion, Dr. Schneier seems to urge a much stronger reading of *Turner* and
12 *Szymborski*²⁴ that requires all causes of action relating to “medical diagnosis, judgment, or
13 treatment” *other than* medical malpractice to be dismissed for failure to state a claim, even if the
14 Complaint is filed within the one-year statute of limitation and attaches a supporting expert affidavit.
15 This is an improper reading of *Turner* and *Szymborski*. The Nevada Supreme Court has never held
16 that all causes of action against a doctor are abolished accept medical malpractice and nowhere in
17 NRS Chapter 41A did the legislature state its intent to do so. Similarly, NRS Chapter 41A contains
18 no exclusive remedy provisions.²⁵ Therefore, even if alternate causes of action depend on the
19 “medical diagnosis, judgment, or treatment” of the Defendants, Plaintiff’s causes of action for
20 Breach of Contract, Battery, Breach of Fiduciary Duty and Neglect of a Vulnerable Person/NRS
21 § 41.1395 are valid causes of action and should not be dismissed.

22 Indeed, the Nevada Supreme Court already found that a claimant may plead a cause of action
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24 ²² See Plaintiff’s Complaint (attached hereto as **Exhibit “1”** as well to the present Opposition).

25 ²³ See Plaintiff’s Complaint at ¶ 11.

26 ²⁴ *Szymborski v. Spring Mt. Treatment Ctr.*, 403 P.3d 1280 (Nev. 2017) (actions sounding in medical
malpractice must attach a supporting physician affidavit.

27 ²⁵ Compare to NRS § 616A.020 (worker’s compensation actions are the exclusive remedy for
28 injured workers against their employer).

1 against a doctor for both professional negligence and another cause of action. In *Egan v. Chambers*²⁶
2 the court discussed a breach of contract claim filed against a physician along with a medical
3 malpractice action. In *Goldenberg v. Woodard*²⁷ a fraud claim in addition to a medical malpractice
4 action was permitted. In *Johnson v. Egtedar*²⁸ a battery and medical malpractice action were
5 permitted. And lastly in *Estate of Curtis v. S. Las Vegas Med. Inv'rs, LLC*²⁹ the court discussed an
6 elder abuse cause of action for violation of NRS § 41.1395 accompanying a medical malpractice
7 case, the very statute Plaintiff's Complaint raises. In fact, the Nevada Supreme Court has recognized
8 that not only are alternate causes of action not subsumed into professional negligence, if they can
9 be established those causes of action, such as intentional fraud during treatment, are not subject to
10 the malpractice caps of NRS Chapter 41A.

11 There is simply no legal authority that all causes of action that might be brought against a
12 physician are "subsumed" into NRS Chapter 41A. Indeed, both common sense and numerous
13 Nevada Supreme Court cases state otherwise. Plaintiff's causes of action should not be dismissed.

14 **B. The Second (Breach of Contract), Third (Battery), and Fourth (Violation of Statute/
15 NRS § 41.1395) Causes of Action are Adequately Plead and should not be Dismissed
at the Pleading Stage.**

16 In Nevada, NRCP 8 governs the general rules of pleading. NRCP 8(a) requires that a
17 complaint "contain a short and plain statement of the claim showing that the pleader is entitled to
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20 ²⁶ *Egan v. Chambers*, 129 Nev. 239, 241 n.2 (2013) (discussing a malpractice and breach of contract
21 action against a physician).

22 ²⁷ *Goldenberg v. Woodard*, 130 Nev. 1181 (2014) (permitting a fraud and malpractice action against
23 a physician); *see also Parminder Kang v. Eighth Judicial Dist. Court of Nev.*, 460 P.3d 18 (Nev.
2020) (refusing writ relief where breach of contract and fraud claims against doctor were presented
along with medical malpractice).

24 ²⁸ *Johnson v. Egtedar*, 112 Nev. 428, 430 (1996) (discussing a battery and malpractice action against
25 a physician).

26 ²⁹ *Estate of Curtis v. S. Las Vegas Med. Inv'rs, LLC*, 466 P.3d 1263, 1270 n.5 (Nev. 2020)
27 (discussing both an abuse/neglect cause of action under NRS § 41.1395 and ordinary negligence
28 claims as separate from a malpractice claim). Ultimately this cause of action was dismissed in the
Estate of Curtis case, but only because a medical expert affidavit had not been attached to the
Complaint. Plaintiff's case remedies that issue and attached such a declaration.

1 relief.”³⁰ A complaint need only “set forth sufficient facts to establish all necessary elements of a
2 claim for relief so that the adverse party has adequate notice of the nature of the claim and relief
3 sought.”³¹ The pleading of a conclusion, either of law or fact, is sufficient so long as the pleading
4 gives fair notice of the nature and basis of the claim.³² “Because Nevada is a notice-pleading
5 jurisdiction, [its] courts liberally construe pleadings to place into issue matters which are fairly
6 noticed to the adverse party.”³³ Additionally, a Plaintiff is free to plead alternative causes of action.
7 NRCp 8(a)&(e) states that “[r]elief in the alternative or of several different types may be
8 demanded,” “[a] party may set forth two or more statements of a claim or defense alternately or
9 hypothetically” and “[a] party may also state as many separate claims or defenses as the party has
10 regardless of consistency and whether based on legal or on equitable grounds or on both.” With this
11 explanation, Plaintiff now turns to the second through fifth causes of action in his complaint.

12 ***1. Plaintiff has Pleaded a Valid Cause of Action for Breach of Contract***

13 The Second Cause of Action alleges a breach of a contract to provide medical services. Like
14 any other professional, a physician may be sued for breach of contract.³⁴ “Under Nevada law, ‘the
15 plaintiff in a breach of contract action [must] show (1) the existence of a valid contract, (2) a breach
16 by the defendant, and (3) damage as a result of the breach.’”³⁵ There is an implied covenant in
17 service contracts that the work performed will be done in a proper and professional manner. In this
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20 ³⁰ NRCp 8(a); see also *Crucil v. Carson City*, 95 Nev. 583, 585, 600 P.2d 216, 217 (1979) (quoting
NRCp 8(a)).

21 ³¹ *Hay v. Hay*, 100 Nev. 196, 198, 678 P.2d 672, 674 (1984) (internal citations omitted).

22 ³² *Crucil v. Carson City*, 95 Nev. 583, 585 600 P.2d 216 (1979) (citing *Taylor v. State and Univ.*,
73 Nev. 151, 152, 311 P.2d 733, 734 (1957)).

23 ³³ *Hay*, 100 Nev. at 198, 678 P.2d at 674 (citing *Chavez v. Robberson Steel Co.*, 94 Nev. 597, 599,
24 584 P.2d 159, 160 (1978)).

25 ³⁴ *Szekeres v. Robinson*, 102 Nev. 93 (1986) (patient of botched procedure is allowed to recover
26 damages under breach of contract theory against doctor). 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.

27 ³⁵ *Rivera v. Peri & Sons Farms, Inc.*, 735 F.3d 892, 899 (9th Cir. 2013) quoting *Saini v. Int'l Game*
28 *Tech.*, 434 F. Supp. 2d 913, 919-20 (D. Nev. 2006).

1 case, Plaintiff presents a straightforward claim that they hired the Defendants to perform medical
2 services and those services were not properly performed. As a result, Mr. Bickham sustained new
3 injuries and may recover contractual incidental and consequential damages, including what was paid
4 for the original surgery.³⁶

5 The Nevada Supreme Court most directly discussed the ability of a patient to sue a medical
6 provider for breach of contract in the case of *Szekeres v. Robinson*.³⁷ In that case, the plaintiff hired
7 the defendant doctor to perform a sterilization medical procedure so she could no longer have
8 children. The procedure was incorrectly performed, and the plaintiff became pregnant and gave
9 birth to a healthy, albeit unplanned child. Although the Nevada Supreme Court found that delivery
10 of a healthy baby is not actionable damages for a medical malpractice case (rejecting a so-called
11 “wrongful birth” cause of action), it supported a theory of contract recovery from a physician, stating
12 that “failure to carry out the [surgical] process in the manner promised would result in an award, at
13 least, of the costs of medical, surgical and hospital care associated with the failed surgery. In such a
14 case damages could be awarded in accordance with what was contemplated by the parties at the
15 time the contract was made.”³⁸

16 Although *Szekeres* is an unusual case factually, its core holding that a breach of contract
17 action may be filed against a physician was not limited to the facts of that case. More recently, the
18 Nevada Supreme Court discussed in passing actions simultaneously tried for professional
19 negligence and breach of contract against a physician in *Egan v. Chambers*³⁹ and *Busick v.*
20 *Trainor*.⁴⁰ As recently as 2020 the Nevada Supreme Court allowed a breach of contract and fraud
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23 ³⁶ *Newmar Corp. v. McCrary*, 129 Nev. 638, 646 (2013) (explaining availability of incidental and
consequential damages for breach of contract).

24 ³⁷ *Szekeres v. Robinson*, 102 Nev. 93 (1986) (patient of botched procedure is allowed to recover
25 damages under breach of contract theory against doctor).

26 ³⁸ *Id.* at 98.

27 ³⁹ *Egan v. Chambers*, 129 Nev. 239, 241 n.2 (2013) (discussing a malpractice and breach of contract
action against a physician).

28 ⁴⁰ *Busick v. Trainor*, 437 P.3d 1050 (Nev. 2019).

1 cause of action to independently and simultaneously proceed to trial with a medical malpractice
2 claim against a Defendant doctor who used a different knee implant during surgery than the implant
3 the patient agreed on in *Parminder Kang v. Eighth Judicial Dist. Court of Nev.*⁴¹ Far from being
4 barred, the Nevada Supreme Court has repeatedly recognized and permitted breach of contract
5 recovery from a physician. The District Court must ask itself: If the Defendants' position is correct
6 and breach of contract cases against physicians must be immediately dismissed for failure to state a
7 claim, how are so darn many physician's breach of contract cases getting to trial and appeal?

8 There is simply no legal authority that all breach of contract causes of action that might be
9 brought against a physician are "subsumed" into NRS Chapter 41A. Indeed, both common sense
10 and numerous Nevada Supreme Court cases state otherwise. Plaintiff's Second Cause of Action for
11 Breach of Contract should not be dismissed and is adequately pleaded, the damages recoverable
12 under that theory are well set forth in the *Szekeres* case.

13 **2. Plaintiff has Pleaded a Cause of Action for Battery**

14 Next, the Defendants argue that Plaintiff has failed to adequately plead the Third Cause of
15 Action for battery. The Complaint alleges that, without consent, Dr. Schneier operated on the wrong
16 level of Mr. Bickham's spine.

17 The leading case on this battery issue in Nevada is *Humboldt Gen. Hosp. v. Sixth Judicial*
18 *Dist. Court.*⁴² In *Humboldt Gen. Hosp.* the plaintiff's doctor implanted her with an intrauterine
19 device (IUD) but the plaintiff later learned that the particular IUD implanted was not FDA-approved
20 because it came from a foreign pharmacy. The plaintiff was apparently otherwise uninjured.
21 Nevertheless, the plaintiff sued her physician for battery because she gave no consent to implant a
22 non-FDA approved device yet did not attach a medical expert affidavit to support the Complaint.
23 The Nevada Supreme Court made clear that "[a] battery is an intentional and offensive touching of
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26 ⁴¹ *Parminder Kang v. Eighth Judicial Dist. Court of Nev.*, 460 P.3d 18 (Nev. 2020) ("We reject
27 petitioner's argument that the gravamen of the claims is professional negligence simply because
the alleged facts "involve medical diagnosis, treatment, or judgment."").

28 ⁴² *Humboldt Gen. Hosp. v. Sixth Judicial Dist. Court of Nev.*, 132 Nev. 544 (2016).

1 a person who has not consented to the touching,” and “[i]t is well settled that a physician who
2 performs a medical procedure without the patient's consent commits a battery irrespective of the
3 skill or care used.”⁴³ The court went on to distinguish circumstances between a total lack of consent
4 and partial consent. In *Humboldt Gen. Hosp.* the plaintiff was found to have been required to have
5 attached a medical expert affidavit (which she had not done) to the complaint because her lack of
6 informed consent case sounded in medical malpractice “unless a plaintiff has established that there
7 was a complete lack of consent for the treatment or procedure performed.”⁴⁴ **Thus, in the *Humboldt***
8 ***Gen. Hosp.* case the Nevada Supreme Court expressly recognized the so-called “partial**
9 **consent” battery case against a physician wherein the physician has *some* consent of the**
10 **patient, but not consent for the full nature of the procedure actually performed.**
11 **Mr. Bickham’s case is *exactly* such a case.** In Mr. Bickham’s case however, he has covered his
12 bases and attached a supporting medical expert affidavit, thus surviving the dismissal that occurred
13 in *Humboldt Gen. Hosp.* Thus, even if this case were viewed as a partial lack of informed consent
14 case as opposed to a total lack of consent case, Plaintiff has complied with NRS § 41A.071 so his
15 battery/informed consent claims should not be dismissed.

16 The Nevada Supreme Court has addressed several battery claims in the context of medical
17 treatment and has never held that a patient cannot plead a cause of action against a physician for
18 battery.⁴⁵ The Plaintiff has adequately pleaded this cause of action as an alternate cause of action
19 in the Complaint and it should not be dismissed at the pleading stage.⁴⁶ The Defendant simply did
20 not have consent to operate on the level of the spine he operated on and, therefore, he committed a

22 ⁴³ *Id.* at 549, citing *Conte v. Girard Orthopaedic Surgeons Med. Grp. Inc.*, 107 Cal. App. 4th
23 1260, 132 Cal. Rptr. 2d 855, 859 (Ct. App. 2003).

24 ⁴⁴ *Bangalore v. Eighth Judicial Dist. Court of Nev.*, 132 Nev. 943 (2016) (explaining *Humboldt*
Gen. Hosp.).

25 ⁴⁵ *Humboldt Gen. Hosp. v. Sixth Judicial Dist. Court of Nev.*, 132 Nev. 544, 376 P.3d 167 (2016)
26 (battery cause of action permitted but sounded in malpractice so it must be supported by a
27 physician affidavit); *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)

28 ⁴⁶ See Plaintiff’s Complaint at Paragraphs 44-52.

1 battery. Whether the District Court views this as a *total* lack of consent or *partial* lack of consent
2 battery case (the former not needing a supporting expert affidavit, the latter needing one), the
3 supporting medical expert affidavit was attached to the Complaint, so the cause of action survives.

4 **3. Plaintiff has Properly Pleaded a Cause of Action for Breach of Fiduciary Duty**

5 Plaintiff's Fourth Cause of Action is one for Breach of Fiduciary Duty. This case presents
6 two troubling facts in the doctor/patient relationship between Dr. Schneier and Mr. Bickham. The
7 first is that Dr. Schneier plainly operated on the wrong level of Mr. Bickham's spine yet when he
8 realized that he did not disclose it to Mr. Bickham, leaving Mr. Bickham to sustain further spinal
9 cord damage from the severe stenosis he had. The second is that during the original surgery,
10 Dr. Schneier misplaced a pedicle screw causing a medial breach of the spinal canal. Although
11 Dr. Schneier operated to remove the screw and radiology clearly shows the screw breached the
12 spinal canal, it is alleged that Dr. Schneier falsified his medical report to indicate that upon operating
13 on the patient no medical breach of the screw was found. This statement in the records is plainly
14 false as the breach is visible on radiology and was even identified by the radiologist. Again, it seems
15 that Dr. Schneier did not want to reveal to his patient the errors he had made during surgery.

16 The Nevada Supreme Court first recognized that the relationship between patient and doctor
17 is a fiduciary relationship in a psychiatry case, *Massey v. Litton*.⁴⁷ Several years later in *Hoopes v.*
18 *Hammargren*⁴⁸ the Supreme Court clarified that the "fiduciary relationship and the position of trust
19 occupied by *all* physicians demands that the standard apply to all physicians,"⁴⁹ in that case a
20 neurosurgeon, exactly like Dr. Schneier. The Nevada Supreme Court explained in *Hoopes* that:

21 [a] fiduciary relationship is deemed to exist when one party is bound to act
22 for the benefit of the other party. Such a relationship imposes a duty of
23 utmost good faith. The essence of a fiduciary or confidential relationship is
24 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... A

25 ⁴⁷ *Massey v. Litton*, 99 Nev. 723, 728, 669 P.2d 248, 252 (1983).

26 ⁴⁸ *Hoopes v. Hammargren*, 102 Nev. 425, 431, 725 P.2d 238, 242 (1986) (explaining fiduciary
27 duty of a doctor to a patient).

28 ⁴⁹ *Id.* at 431 (emphasis in original).

1 patient generally seeks the assistance of a physician in order to resolve a
2 medical problem. The patient expects that the physician can achieve such
3 resolution. Occasionally (due to illness), the patient is emotionally unstable
4 and often vulnerable. There is the hope that the physician possesses
5 unlimited powers. It is at this point in the professional relationship that there
6 is the potential and opportunity for the physician to take advantage of the
7 patient's vulnerabilities. To do so, however, would violate a trust and
8 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...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.
[citations omitted]

9 It is therefore crystal clear that the Defendants had a fiduciary duty to their patient,
10 Mr. Bickham. The question then becomes whether it states a cause of action for breach of fiduciary
11 duty to allege that the physician did not inform the patient that an error was made in operating on
12 the wrong level of the spine and placement of a surgery screw in order to conceal his negligence.
13 Plaintiff believes that it does. Dr. Schneier had a duty to advise his patient that serious medical
14 errors were made by him. His fiduciary duty requires him to place the interest of his patient above
15 any personal interest of his own. Dr. Schneier plainly did not do this. Instead, he placed his own
16 interest in concealing the errors above the health of his patient. Respectfully, this is the exact type
17 of behavior that should trigger a breach of fiduciary action against a physician and the Fourth Cause
18 of Action should not be dismissed for failure to state a claim.

19 ***4. Plaintiff has Properly Pleaded a Cause of Action for Neglect of a Vulnerable Person***

20 Dr. Schneier lastly seeks to dismiss Plaintiff's Fifth Cause of Action for breach of statute
21 under NRS § 41.1395. This is commonly referred to as an "elder abuse" statute, however the history
22 and definitions in this law indicate that (1) the statute applies in far greater circumstances than
23 intentional abuse and covers negligence and neglect as well, and (2) the statute also applies to
24 "vulnerable" persons as defined by the statute, not solely the elderly. The Complaint labels this as
25 a cause of action for "neglect of a vulnerable person" under NRS § 41.1395.

26 In 1997, Nevada enacted Senate Bill 80, later codified as NRS § 41.1395, which had the
27 express purpose to curb abuse, exploitation and neglect of older persons and vulnerable persons with
28 physical and mental impairments. As a remedial statute, NRS § 41.1395 must be broadly and

1 liberally construed to provide the most protections possible for vulnerable persons.⁵⁰ NRS
2 § 41.1395 is a powerful ally to older and vulnerable people as it allows an award of double damages
3 and attorney's fees in addition to other recoverable compensable damages.

4 NRS § 41.1395 is plainly *not* limited to intentional or malicious abuse and efforts of the
5 Defendant to limit or pigeon-hole the statute to such a purpose should be rejected by this court.
6 Separate from the "abuse" definition contained in the statute, the "neglect" definition provisions of
7 NRS § 41.1395⁵¹ were broadly defined in both the statute and legislative history to include the
8 neglect of health care professionals, including physicians as well as facilities that have undertaken
9 the care of the vulnerable. Indeed, the legislative history of NRS § 41.1395 plainly shows that the
10 intent of the statute was meant to, for example, deal with "mistreatment in nursing homes and
11 managed care facilities" and "certain obligations for [health] care"⁵² but can apply to any provider
12 of health care, not solely nursing or long-term care facilities.⁵³

13 Similar statutes in other states to curb abuse, exploitation and neglect of older persons and
14 vulnerable persons with physical and mental impairments have been held to be a separate, statutory
15 cause of action **independent and distinct** of a tort medical malpractice action.⁵⁴ Indeed, only
16 recently the Nevada Supreme Court expressly recognized that a nurse provider of health care can be
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19 ⁵⁰ *Colello v. Adm'r of Real Estate Div.*, 100 Nev. 344, 347 (1984) ("Statutes with a protective
20 purpose should be liberally construed in order to effectuate the benefits intended to be obtained.").

21 ⁵¹ NRS § 41.1395(4)(c): "Neglect" means the failure of a person who has assumed legal
22 responsibility or a contractual obligation for caring for an older person or a vulnerable person, or
23 who has voluntarily assumed responsibility for such a person's care, to provide food, shelter,
24 clothing or services within the scope of the person's responsibility or obligation, which are necessary
25 to maintain the physical or mental health of the older person or vulnerable person. For the purposes
26 of this paragraph, a person voluntarily assumes responsibility to provide care for an older or
27 vulnerable person only to the extent that the person has expressly acknowledged the person's
28 responsibility to provide such care.

⁵² See 1997 SB 80 Leg. History attached hereto as **Exhibit "2"** (excerpt).

⁵³ *Estate of McGill v. Albrecht*, 203 Ariz. 525, 530, 57 P.3d 384, 389 (2002) (discussing the statute
as applied to a nurse in an ordinary hospital setting).

⁵⁴ 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).

1 sued under NRS § 41.1395 along with a medical malpractice action, albeit in some cases subject to
2 the medical expert affidavit requirement which has been satisfied in this case.⁵⁵

3 In this case, the Complaint plainly alleges that Plaintiff Frederick Bickham, a 50 year old
4 man with such severe spinal cord compression and damage that he was unable to walk normally, is
5 covered by the statute as defined by NRS § 41.1395(e).⁵⁶ The Complaint alleges that the Defendants
6 had reason to know of Plaintiff's status as an vulnerable person as his severe medical condition and
7 hospitalization was visually apparent.⁵⁷ The Defendants voluntarily assumed a duty to care for
8 Mr. Bickham.⁵⁸ Furthermore, the Complaint alleges the Defendants neglected to properly care for
9 Mr. Bickham in various ways, including operating on the wrong spinal cord level, not telling
10 Mr. Bickham of the error and not operating or addressing the correct level of his spine.⁵⁹ Surely it
11 is neglect of a vulnerable person as a physician to operate on the wrong level of their spine, discover
12 your error and not even tell the patient or address the correct level.

13 The proper allegations have been made in the Complaint. The Nevada Supreme Court has
14 recognized that a cause of action under NRS § 41.1395 may apply to a provider of health care. This
15 is not a summary judgment motion and no time for discovery has yet occurred. Given the law, the
16 Court cannot dismiss Plaintiff's neglect of a vulnerable person cause of action in the Complaint.

17 V. **ALTERNATIVELY, IF THE COURT IS INCLINED TO GRANT**
18 **DEFENDANTS' MOTION, PLAINTIFF SHOULD BE GIVEN**
19 **LEAVE TO AMEND THE COMPLAINT**

20 Dr. Schneier seeks dismissal of most of Plaintiff's causes of action at the pleading stage.
21 "[W]hen a complaint can be amended to state a claim for relief, leave to amend, rather than dismissal,
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24 ⁵⁵ *Estate of Curtis v. S. Las Vegas Med. Inv'rs, LLC*, 466 P.3d 1263, 1270 (Nev. July 9, 2020)
25 (referencing an elder abuse claim under NRS § 41.1395 filed against a nurse).

26 ⁵⁶ See Plaintiff's Complaint at Paragraph 50.

27 ⁵⁷ See Plaintiff's Complaint at Paragraph 51.

28 ⁵⁸ See Plaintiff's Complaint at Paragraph 52.

⁵⁹ See Plaintiff's Complaint at Paragraph 53.

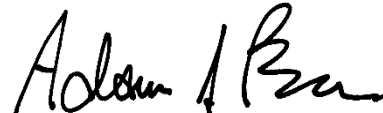
1 is the preferred remedy.”⁶⁰ “Leave to amend should be freely given when justice requires.”⁶¹ Here,
2 if this Court is inclined to grant Defendant’s *Motion to Dismiss* for certain technical pleading reasons
3 that might be cured by an amendment to the Complaint, Plaintiff requests leave to amend the
4 Complaint to plead additional facts to support his claims.

5 **VI. CONCLUSION**

6 This is a pre-answer and pre-discovery *Motion to Dismiss*, not a summary judgment motion.
7 The Plaintiff has properly pleaded causes of action for Breach of Contract, Battery, Breach of
8 Fiduciary Duty and Breach of Statute/NRS § 41.1395. These are all properly pleaded causes of
9 action that may co-exist with each other as alternative causes of action in the Complaint. Therefore,
10 the Motion to Dismiss should be denied at this stage.

11 DATED this 23rd day of February, 2021.

12 **BREEDEN & ASSOCIATES, PLLC**

13 

14 **ADAM J. BREEDEN, ESQ.**

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27 ⁶⁰ *Cohen v. Mirage Resorts, Inc.*, 119 Nev. 1, 22, 62 P.3d 720, 734 (2003) (citing *Zalk-Josephs Co.*
v. Wells Cargo, Inc., 81 Nev. 163, 169-70, 400 P.2d 624-25 (1965)).

28 ⁶¹ *Id.*

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of February, 2021, I served a copy of the foregoing legal document **PLAINTIFF'S OPPOSITION TO DEFENDANTS IRA MICHAEL SCHNEIER, M.D. AND MICHAEL SCHNEIER NEUROSURGICAL CONSULTING, P.C.'S PARTIAL MOTION TO DISMISS** via the method indicated below:

X	Pursuant to NRCP 5 and NEFCR 9, by electronically serving all counsel and e-mails registered to this matter on the Court's official service, Wiznet system.
	Pursuant to NRCP 5, by placing a copy in the US mail, postage pre-paid to the following counsel of record or parties in proper person: Anthony D. Lauria, Esq. LAURIA TOKUNAGA GATES & LINN, LLP 601 South 7 th Street Las Vegas, Nevada 891010 <i>Attorneys for Defendants</i>
	Via receipt of copy (proof of service to follow)

An Attorney or Employee of the following firm:

/s/ Kristy Johnson

BREEDEN & ASSOCIATES, PLLC

EXHIBIT “1”

DECLARATION OF MICHAEL A. TRAINOR, D.O.

STATE OF NEVADA)
) SS
COUNTY OF CLARK)

NOW COMES the Declarant, Michael Trainor, D.O., who first being sworn does testify to
the following under oath:

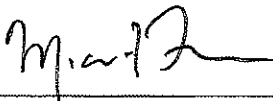
1. I am Michael Trainor. I am over 18 years old. I have personal knowledge of the facts set forth herein. I am a licensed physician and board certified by the American Osteopathic Academy of Orthopedics. I have undergone a residency in orthopedic surgery and fellowship training in orthopedic spine/neurosurgery. My medical opinions set forth herein are to a reasonable degree of medical probability. I am aware that this Declaration may be used for litigation purposes.
2. I have been asked to review the medical care of Frederick Bickham from December 2019 to present. I practice in an area of medicine, orthopedic spine surgery, which is the same or substantially similar to the subject of this Declaration, Ira Michael Schneier, M.D. I have performed hundreds of spinal surgeries and laminectomies or decompression surgeries of the spine of the kind performed by Dr. Schneier in this case.
3. By way of history, in December 2019 the patient Frederick Bickham was 49 years old. On December 26, 2019 he was admitted to Sunrise Hospital and evaluated for treatment of back pain and lower extremity pain and weakness. He was found to have severe spinal stenosis causing compression of the spinal cord at T10-11.
4. Following an earlier consultation and radiology, on December 31, 2019, Dr. Schneier performed a thoracic laminectomy intended to decompress the spinal cord at the T10-11 level.

5. During the surgery, Dr. Schneier failed to properly identify the surgical level and, in fact, operated at the wrong level of T9-10. This left the severe stenosis surgically unaddressed. To compound matters, a pedicle screw placed at left T9 (likely intended to be placed at T10) during the December 31st surgery had a medial breach of the pedicle wall.
6. After the patient continued with symptoms, a second surgery was performed by Dr. Schneier on January 23, 2020. At this time, Dr. Schneier removed the offending pedicle screw at left T9. Unfortunately, nothing was done to address the T10-11 level at the time of the January 23, 2020 surgery either. Indeed, there is no indication that Dr. Schneier ever told or admitted to the patient that the wrong level had been operated on and T10-11 was unaddressed surgically.
7. Unsurprisingly, Mr. Bickham continued to struggle after the January 23rd surgery. He sought Emergency Room evaluation on multiple occasions. His pathology at T10-11 continued to be unaddressed until a consultation with Dr. Yevgeniy Khavkin on May 30, 2020. A few days later, Dr. Khavkin performed a laminectomy at the correct T10-11, as Dr. Schneier should have done on December 31st, but by that time five months of additional compression on the spinal cord had occurred.
8. It is my opinion to a reasonable degree of medical probability that the care administered by Dr. Schneier fell below the standard of care in at least the following ways:
 - a. Failing to perform the December 31st surgery at the proper T10-11 level and instead performing surgery at the wrong level;
 - b. Failing to earlier recognize, alert the patient and appropriately address the misplacement and medial breach of a pedicle screw at T9 during the December 31st surgery. Although Dr. Schneier indicates that there was no evidence of breach by

ball tip palpation, radiology clearly shows a significant breach which more likely than not contributed to the patient's symptoms;

- c. Failing to address the T10-11 level during the January 23rd surgery;
 - d. Failing to address the T10-11 level despite numerous post-operation ER visits and continued complaints of pain and limitations by the patient;
 - e. Failing to disclose to the patient that the wrong level was operated on (T9-10 versus the intended T10-11 level).
9. I do believe that the repeated failure to surgically address the stenosis at T10-11 by Dr. Schneier led to additional damage to the spinal cord and has impaired or even prevented Mr. Bickham's recovery.

I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.



Michael A. Trainor, D.O.

12/28/20

Date

EXHIBIT “2”

**MINUTES OF THE
ASSEMBLY COMMITTEE ON JUDICIARY**

**Sixty-ninth Session
April 15, 1997**

The Committee on Judiciary was called to order at 8:15 a.m., on Tuesday, April 15, 1997. Chairman Bernie Anderson presided in Room 3142 of the Legislative Building, Carson City, Nevada. Exhibit A is the Agenda. Exhibit B is the Guest List.

COMMITTEE MEMBERS PRESENT:

Mr. Bernie Anderson, Chairman
Ms. Barbara Buckley, Vice Chairman
Mr. Clarence (Tom) Collins
Ms. Merle Berman
Mr. John Carpenter
Mr. Don Gustavson
Mr. Dario Herrera
Mrs. Ellen Koivisto
Mr. Mark Manendo
Mr. Dennis Nolan
Ms. Genie Ohrenschall
Mr. Richard Perkins
Mr. Brian Sandoval
Mrs. Gene Segerblom

STAFF MEMBERS PRESENT:

Risa L. Berger, Committee Counsel
Juliann K. Jenson, Senior Research Analyst
Matthew Baker, Committee Secretary

OTHERS PRESENT:

John Slansky, Assistant Director, Operations, Nevada Department of Prisons
Carlos Concha, Deputy Chief, Parole and Probation Division, Department of Motor Vehicles and Public Safety
Pamela Roberts, Deputy Attorney General, Medicaid Fraud Control Unit

The floor assignment for A.B. 315 was given to Assemblywoman Ohrenschall.

Testimony commenced on S.B. 80.

SENATE BILL 80 - **Makes person liable in treble damages for abuse, neglect or exploitation of certain older persons or vulnerable persons.**

Pamela Roberts, Deputy Attorney General, Medicaid Fraud Control Unit, addressed the committee. She stated the purpose of the bill was to encourage private attorneys to take up the fight on the behalf of elder victims. The law would allow private attorneys to recover fees and costs and would award treble damages to the victim upon conclusion of the suit.

Ms. Roberts explained how difficult it was to prove criminal abuse due to the victim's inability to testify and some other evidentiary problems. She pointed out the burden of proof in a civil action was not as high as a criminal trial, so it was hoped S.B. 80 would help victims to recover their losses, both in terms of damages from abuse and neglect, but especially when financial exploitation occurred.

Since the bill was drafted, Ms. Roberts explained there had been a significant development in case law regarding employer liability for employee's actions.

She pointed out section 7, subsection b of the bill, which made the employer responsible for its employee's conduct, and jointly and civilly liable for treble damages imposed. She explained when that section was drafted it was based upon the existing case law and the interpretation of "respondeat superior," or "let the master answer," a term of the law that held an employer vicariously liable for its employee's acts.

Ms. Roberts explained the case law at the time S.B. 80 was drafted would have held the employer responsible for the acts of the employee if that action was during the course of the employee's employment. A recent case involving the State of Nevada and the Department of Human Resources Division of Mental Hygiene and Retardation, versus Julie Jimenez as guardian for John Doe, had called into question what the status of the law was regarding employer liability for employee's acts.

She commented the case had created a lack of clarity and some concern about what the original intent was, in terms of the scope of liability for S.B. 80. It was her suggestion, with the Chairman's consent, that perhaps the bill should

be put into a work session to analyze and further assess the implications of the Jimenez case, in terms of whether to keep the bill as drafted, in terms of that particular provision. It was her understanding there was a pending bill draft request to address the definition of scope of employment. Depending on its passage, it would help clarify whether S.B. 80 needed to be amended.

Assemblyman Sandoval questioned how far the bill went in helping to determine civil liability, especially as dealt with mistreatment in nursing homes and managed care facilities.

Ms. Roberts stated the potential of liability would include the detrimental conduct rumored to occur in nursing homes and managed care facilities. Most such conduct would fall under section 5, subsection 3 of the bill, dealing with certain obligations for care, making it necessary to maintain an older person's physical or mental health.

Assemblyman Carpenter questioned if the bill dealt strictly with civil actions. Ms. Roberts stated the bill dealt strictly with private civil causes of action a victim could pursue. In the event of the victim's death, the family could pursue a civil action on behalf of the victim.

Assemblyman Carpenter asked if there were criminal liabilities connected with the detrimental conduct and situations mentioned in section 5, subsection 3 of the bill. Ms. Roberts noted criminal liability already existed in statute under NRS 200.5092, which were the elder abuse statutes. She stated the reason there was a need to clarify and be specific about civil liability was that there was a difficulty in proving certain types of criminal cases against the perpetrators of fraud, abuse and neglect. The bill allowed some recourse for the family of those victimized to recover damages and losses.

Assemblyman Carpenter commented on the "mental anguish" language of the bill in section 5, subsection 1. He questioned what the actual definition of mental anguish was. Risa Berger, Committee Counsel, stated she would research the matter.

Assemblyman Carpenter questioned the language referring to the voluntary obligation of a person, spoken of in section 5, subsection 3 of the bill. He wondered how the language would apply to the "real world." Ms. Roberts noted the background of putting such language into the bill originated from the elder abuse and neglect statutes. It sought to only impose liability upon people who voluntarily assumed the obligation of taking care of an elderly person. She stated a family member volunteering to take on the obligation of taking care of a family member, for whom they were responsible and handling all their personal

affairs and having that person come into their home, was an example. Those family members had an obligation to provide care in a reasonably fair fashion, not neglecting the elderly person.

Chairman Anderson questioned if a volunteer program, such as "Meals on Wheels," that visited an elderly person and fed them and checked up on them periodically but then discontinued their help for a period of time and exposed that elderly person to potential neglect, would be held civilly liable.

Ms. Roberts explained in such a situation the volunteer organization should not be held liable because the context of the bill discussed someone who had assumed a legal responsibility, such as a nursing professional, or a contractual responsibility such as a long-term care facility, group home, family member or caregiver who had assumed responsibility for taking care of the person. It would not extend to a helpful neighbor or volunteer.

Ms. Berger informed the committee NRS 200.5092 defined terms for purposes of the elder abuse statutes. The term "mental anguish" was used under the definition of abuse of an older person and also in the definition of neglect of an older person.

Ms. Roberts said the bill's intent was not for someone to incur liability for acting in good faith in trying to help neighbors, family members and others they cared about. She suggested the bill might need to be clarified through a change in language or legislative intent.

Assemblyman Sandoval questioned if the bill would allow resentful siblings to sue one another, especially if they were not happy with how one or the other was taking care of their parents. Ms. Roberts explained the cause of civil action belonged to the victim—the older person. As long as the older person was alive, they would be the one who would be able to obtain counsel and sue on behalf of themselves, in terms of being a victim: intentional pain or injury, neglect of services, negligent failure to provide food and services. In terms of siblings suing one another, they could only do so if the elderly person died and there was a cause of action. If the elderly person was still alive and one of the siblings was appointed guardian, they would be able to litigate certain things on behalf of the older person.

Assemblyman Carpenter questioned how an elderly person would initiate a civil action if they were mentally incompetent. Ms. Roberts noted she could not fully answer that question and the subject should be addressed or looked into.

Ms. Roberts noted much of the discussion on the bill had focused on the neglect and abuse, in terms of physical harm, which might result to an older person. One of the additional intents of the bill was to bring others into the scope of liability. This dealt mainly with the financial exploitation which occurred with elderly people.

Bill Bradley, Representative, Nevada Trial Lawyer's Association (NTLA), addressed the committee. With him was Thomas Brennan, of the law firm of Durney and Brennan, located in Reno, Nevada.

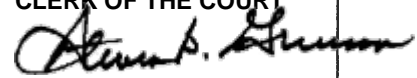
Mr. Bradley stated Mr. Brennan was one of the attorneys who represented Julie Jimenez and her son, John Doe. Mr. Bradley wished for the committee to be able to get the actual facts underlying the case because it would be greatly discussed in the future. He felt Mr. Brennan could provide information that was not contained in any of the information the committee had received so far.

Chairman Anderson noted the committee had requested for a bill draft to come forward that would, in part, deal with the Jimenez case. The impact of the case on legislation, if any, would be open to interpretation.

Mr. Bradley was in favor of the underlying policy of protecting elderly people from abuse. The questions on volunteers was very viable. A volunteer who provided medical assistance may fall under the absolute immunity of a "good samaritan." It was something to look at and the committee's concerns were valid. He had concerns with section 7 of the bill which stipulated the distribution of fees and how the award of treble damage should be distributed. It was of concern because it broached the area of regulating fees between victims and their attorneys. There was a long standing opposition by the NTLA against such policies.

The effective date of the legislation was troubling. When a new statute was implemented that affected civil litigation, it was important to know if the act applied to only acts of abuse that occurred on or after a certain date or did they apply only after a lawsuit was filed after an effective date. The effective date of the legislation needed to be clarified further.

Chairman Anderson asked Mr. Bradley if he had an opinion about mental anguish as it applied. Was it always open to judicial discretion? Mr. Bradley replied he classified "mental anguish" as humiliation, embarrassment, depression, fear, anxiety, and concern. Those were all feelings encompassed by the term "mental anguish." He was unfamiliar with any statute which actually defined "mental anguish." When someone described such emotions as previously stated, it is up to a jury to decide if they constituted "mental anguish."



[RPLY]

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Attorneys for Defendants,
Ira Michael Schneier, M.D. and
Michael Schneier Neurosurgical Consulting, P.C.

DISTRICT COURT
CLARK COUNTY, NEVADA

FREDERICK BICKHAM, individually,

Plaintiff,

vs.

IRA MICHAEL SCHNEIER, M.D., an
individual; MICHAEL SCHNEIER
NEUROSURGICAL CONSULTING, P.C., a
Nevada professional corporation; IMS
NEUROSURGICAL SPECIALISTS LLC, a
Nevada limited liability company; and DOES I
through X; and ROE CORPORATIONS I
through X, inclusive,

Defendants.

CASE NO. A20-827155-C
DEPT. NO. XXII

**DEFENDANTS IRA MICHAEL
SCHNEIER, M.D. AND MICHAEL
SCHNEIER NEUROSURGICAL
CONSULTING, P.C.'S REPLY TO
PLAINTIFF'S OPPOSITION TO
MOTION TO DISMISS CERTAIN
CAUSES OF ACTION OF PLAINTIFF'S
COMPLAINT**

Hearing: March 16, 2021
Time: 8:30 a.m.

COME NOW, Defendants, Ira Michael Schneier, M.D. and Michael Schneier Neurosurgical Consulting, P.C., a Nevada professional corporation, by and through their attorney of record, Anthony

DEFENDANTS IRA MICHAEL SCHNEIER, M.D. AND MICHAEL SCHNEIER NEUROSURGICAL CONSULTING, P.C.'S
REPLY TO PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS CERTAIN CAUSES OF ACTION OF PLAINTIFF'S
COMPLAINT

1 D. Lauria, Esq. of the law firm Lauria Tokunaga Gates & Linn, LLP, and hereby file this Reply to
2 Plaintiff's Opposition to Motion to Dismiss Certain Causes of Action of Plaintiff's Complaint.

3 This Motion is made and based upon the pleadings and papers on file herein, the attached
4 Memorandum of Points and Authorities, and any argument the Court may entertain at the hearing of
5 this matter.

6 DATED: 3/9/2021

LAURIA TOKUNAGA GATES & LINN, LLP

7 /s/ Anthony D. Lauria

8 By: _____

9 Anthony D. Lauria, Esq.
10 Nevada Bar No.: 4114
11 601 South Seventh Street
12 Las Vegas, NV 89101
13 Attorney for Defendants,
14 Ira Michael Schneier, M.D. and Michael
15 Schneier Neurosurgical Consulting, P.C.

16 **MEMORANDUM OF POINTS AND AUTHORITIES**

17 **I**

18 **A SIMILAR ATTEMPT AT ARTFUL PLEADING WAS STRUCK DOWN**

19 Defendants respectfully request that the Court take Judicial Notice of the Complaint, Motion to
20 Dismiss, Opposition and Reply, as well as the Order Granting Motion to Dismiss in the matters of
21 *Thomas Ziegler v. Daniel M. Kirgan, M.D.*, Clark County District Court Case No. A-20-821720-C, and
22 *Errys Dee Davis v. Stephanie A. Jones, D.O.*, Clark County District Court Case No. A-20-826513-C,
23 where virtually the same arguments and attempts at artful pleading were rejected by the Hon. Susan
24 Johnson and Hon. Veronica M. Barisich, who rightly recognized that the gravamen of all of the causes
25 of action was alleged medical negligence and dismissed all other causes of action. A true and correct
26 copy of the Orders granting dismissal of the Breach of Contract, Battery, and Elder Abuse claims are
27 attached as Exhibit "A" and "B" for the convenience of the Court.

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II

**NEVADA SUPREME COURT CASES ON “GRAVAMEN” OF ACTION ARE NOT
LIMITED TO STATUTE OF LIMITATIONS OR EXPERT AFFIDAVIT REQUIREMENTS**

Plaintiff's Opposition seeks to distinguish the numerous recent Nevada Supreme Court cases which have held that the provisions of NRS 41A and NRS 42 are applicable to actions for which the “Gravamen” of the claim is based on “Professional Negligence” (NRS 41A.015) by incorrectly suggesting that the reasoning and holding of these cases apply ONLY to the statute of limitations or expert affidavit requirements of NRS 41A. Of course, none of the numerous cases cited by Defendants say what Plaintiff's Opposition contends or “narrows the issues” in the manner Plaintiff seeks. Rather, the holdings are broad in nature and clearly applicable beyond solely statute of limitations or affidavit challenges. These cases set forth the interpretive framework which this Court is bound to follow in determining whether a Plaintiff can effectively split causes of action and use “artful pleading” to avoid the application of other statutes in NRS 41A and NRS 42 clearly applicable to cases in which the “gravamen” is the provision of allegedly negligent medical care.

As noted in the moving papers, the statute of limitations and affidavit provisions of NRS 41A, which Plaintiff admits are applicable to his claims, were enacted at the same time as the limitation on economic damages provisions of NRS 41A.035 and the creation of the exception to the collateral source rule in NRS 42.021. Thus, under Plaintiff's position, all of his claims are subject to the 1 year statute of limitations and could be dismissed if no expert affidavit were submitted since the “gravamen” of his complaint is clearly and undisputedly the medical care and treatment he received. Yet, the other provisions applicable to actions for professional negligence do not apply since he has artfully plead some other labels for his claims. This position is untenable. It defies logic to suggest that the Nevada Supreme Court's application of statutory interpretation to NRS 41A.071 and 41A.097 does not apply to NRS 41A.035 and NRS 42.021 and Plaintiff cites no legal authority to support this unique contention. Yet, it is precisely the provisions of NRS 41A.035 and NRS 42.021 which Plaintiff now tries to circumvent by artful pleading.

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III

DEFENDANT DOES NOT SEEK DISMISSAL OF “THE COMPLAINT”

Plaintiff cites to the well-established rules regarding evaluation of a 12(b)(5) Motion including the language that the Complaint “should be dismissed only if it appears beyond a doubt that it could prove no set of facts, which, if true, would entitle it to relief.” (*Buzz Stew, LLC v. City of N. Las Vegas* 124 Nev. 224, 228 (2008.)) This is undoubtedly established law in Nevada where dismissal of the ENTIRE Complaint is sought. In fact, in the *Buzz Stew* case cited by Plaintiff, the Court upheld the dismissal of all of the various causes of actions brought against the Defendant except the one cause of action it found to be appropriate. (*Id.* 124 Nev. at 231)

That is precisely what is sought in this Motion. Defendant does not seek dismissal of the entire Complaint and agree that for purposes of pleading, Plaintiff has stated a valid claim for professional negligence under NRS 41A.015. Thus, if the “set of facts” establishing negligence in the medical care and treatment provided are proven, Plaintiff would be entitled to relief. The problem with this Complaint is that although it is abundantly clear that all of Plaintiff’s claims arise out of the medical care and treatment provided, and that expert medical testimony is required to evaluate that appropriateness of that care, Plaintiff is trying to circumvent the clear intent of the legislature by artfully trying to plead other causes of action. This type of artful pleading has been repeatedly rejected. (*State Farm Mut. Auto. Ins. Co. v. Wharton*, 88 Nev. 183, 186, 495 P.2d 359, 361 (1972); *Egan v Chambers*, 129 Nev. 239, 241 n.2, 299 P.3d 364, 366 (2013); *Lewis v. Renown Reg'l Med. Ctr.* (Nev. 2018) 432 P.3d 201. [2018 Nev. Unpub. LEXIS 1165]; *Estate of Curtis v. S. Las Vegas Med. Inv'rs, LLC*, 466 P.3d 1263, 1270 n.5 (Nev. 2020); *Turner v. Renown Reg'l Med. Ctr.*, 461 P.3d 163, 2020 Nev, Unpub. LEXIS 436 (April 23. 2020).)

IV

“CONTRACT” IS SOLELY TO PROVIDE “MEDICAL CARE”

According to the allegations of the Complaint itself, the only “contract” described was a contract “to provide medical care” with an “implied agreement” the services would be “within the standard of care.” (Complaint at p. 6:13-17, ¶’s 37 and 38). On its face, the entire “gravamen” and basis of the action is the provision of medical care and services and expert testimony is required to determine if

1 said services were “within the standard of care.” If the treatment was not “negligent”, there was no
2 breach of contract. This is precisely the type of claim which “sounds in tort” as no determination of a
3 contractual breach can be made without reference to the tort law of medical negligence. (See e.g. *Egan*
4 *v Chambers*, 129 Nev. 239, 241 n.2, 299 P.3d 364, 366 (2013); *Szymborski v. Spring Mountain*
5 *Treatment Ctr.*, 133 Nev. 638, 642, 403 P.3d 1280, 1284 (2017); *Turner v. Renown Reg'l Med. Ctr.*,
6 461 P.3d 163 (Nev. 2020).) Clearly it was not the intent of the voters or the Nevada legislature to
7 permit Plaintiff to simply circumvent the provisions of NRS 41A.035 and NRS 42.021 by simply
8 labeling a claim as “breach of contract” which could be the only reason for pleading such a cause of
9 action.

10 V

11 THE “BATTERY” CLAIM IS ACTUALLY ONE FOR PROFESSIONAL NEGLIGENCE

12 As with the breach of contract claim, the “battery” claim is entirely premised on a theory that
13 an error was made during the surgical procedure. There is no contention that Dr. Schneier did not have
14 consent to perform the thoracic laminectomy. That consent is undisputed. Instead, the claim is that by
15 operating on T9-10 level, instead of the T10-11, this was a battery since the consent did not specifically
16 cover the T9-10 level. (See Complaint at p. 7:11-13, ¶’s 46 and 47.) Further, the cases cited by Plaintiff
17 support the dismissal of the “battery” claim since there is no question or contention that consent was
18 given for a thoracic laminectomy for cord decompression. The claim that an error was made which led
19 to injury does not vitiate that consent. In *Humboldt Gen. Hosp. v. Sixth Judicial Dist. Court of Nev.*,
20 132 Nev. 544, 551, 376 P.3d 167, 172 (2016), the Nevada Supreme Court upheld the dismissal of a
21 battery claim where the Plaintiff did “not allege that the IUD procedure completely lacked her consent.”
22 The Court went on to state: “Accordingly, we conclude that Barrett's battery claim is actually a medical
23 malpractice claim governed by Chapter 41A.” (*Id.*) Further, *Johnson v Egtegar*, 112 Nev. 428, 915
24 P.2d. 271 (1996) provides no support for Plaintiff’s battery cause of action in this case. While the
25 introductory paragraph of the opinion indicates the “filed suit” on theories of “battery and medical
26 malpractice”, there is no further discussion of a battery claim whatsoever. In fact, the Court’s opinion
27 focused on the failure to give a Res Ipsa Loquitor instruction regarding medical malpractice. Thus, the
28 *Johnson* case is of no benefit to Plaintiff. Similarly, the opinion in *Bangalore v. Eighth Judicial Dist.*

1 *Court of Nev.*, 2016 Nev. Unpub. LEXIS 590, 132 Nev. 943 (2016)(unpublished disposition) does not
2 support Plaintiff's battery claim. In *Bangalore*, the Court found that judgment in favor of the physician
3 was appropriate where the patient did not show she objected to "touching" by the doctor.

4 In fact, Plaintiff's Opposition admits that by pleading the breach of contract and battery claims,
5 he simply seeks to circumvent the malpractice reform statutes in NRS 41A.

6 VI

7 PLAINTIFF'S BREACH OF FIDUCIARY DUTY CLAIM IS ONE FOR MEDICAL 8 MALPRACTICE

9 Plaintiff's attempt to support his contention that a valid "breach of fiduciary duty" claim has
10 been stated is unsupported and flimsy at best. In fact, Plaintiff inappropriately compares this case to
11 *Hoopes v. Hammargren*, 102 Nev. 425 (1986) to support his claim that Dr. Schneier breached his
12 fiduciary duty to Plaintiff because he did not inform Plaintiff an error was made in operating on the
13 wrong level of the spine and placement of a surgery screw. (See Opposition at p. 13:10-14:8.) However,
14 Plaintiff fails to state that in *Hoopes*, a breach of fiduciary duty was raised only because the defendant
15 physician was having sexual relations with the plaintiff, his patient at the time. A brief glance at *Hoopes*
16 proves how grossly it differs from this case where Dr. Schneier's spinal surgery is compared to another
17 physician taking sexual advantage of his patient. Even in *Hoopes*, the court stated that taking sexual
18 advantage of the physician-patient relationship can constitute malpractice. *Hoopes v. Hammargren*,
19 102 Nev. 425, 432 (1986). Essentially, the court treated the claim for breach of fiduciary duty as one
20 for malpractice. Thus, the *Hoopes* case is of no benefit to Plaintiff. Plaintiff has failed to provide any
21 case law or statute to support his contention that a valid claim for breach of fiduciary duty has been
22 stated.

23 VII

24 PLAINTIFF HAS FAILED TO STATE AN ELDER ABUSE CLAIM

25 It must be noted that Plaintiff has not cited a single Nevada Supreme Court or Nevada Federal
26 District Court case to support his contention a valid "Elder Abuse" claim has been stated. Plaintiff
27 cites a case from Arizona applying an entirely different statute which is irrelevant to this action.
28 Plaintiff also briefly references the case of *Estate of Curtis v. S. Las Vegas Med. Investors, LLC*, 466

1 P.3d 1263 (Nevada July, 9, 2020) (See Opposition at p. 15:15-16:2) but entirely FAILS to mention that
2 the Nevada Supreme Court held that an Elder Abuse claim was not appropriate against the nurse in that
3 case where the allegations were that the nurse “administered the wrong medication” and thereafter
4 “failed to properly monitor or treat” the patient, stating:

5
6 “First, the record does not support an elder abuse claim here, where Nurse Dawson's
7 actions were grounded in negligence, rather than in willful abuse or the failure to provide
8 a service. See NRS 41.1395(4)(a) (defining abuse) and (4)(c) (defining neglect).”
(*Estate of Curtis v. S. Las Vegas Med. Inv'rs, LLC*, 466 P.3d 1263, 1270 n.5 (Nev. 2020))

9 Nor does Plaintiff's Opposition attempt to address the recent decision in *Lewis v. Renown*
10 *Regional Med. Ctr.*, 2018 Nev. Unpub. LEXIS 1165 which affirmed the dismissal of an Elder Abuse
11 claim where the “gravamen” of the action related to allegedly negligent medical care and treatment.
12 As stated by the Nevada Supreme Court:

13 “In contrast to allegations of a healthcare provider's negligent performance of
14 nonmedical services, ‘[a]llegations of [a] breach of duty involving medical judgment,
15 diagnosis, or treatment indicate that a claim is for [professional negligence.
16 (citation.) The gravamen of Lewis' claim for abuse and neglect is that Renown failed to
17 adequately care for Sheila by failing to monitor her. Put differently, Renown breached
18 its duty to provide care to Sheila by failing to check on her every hour per the monitoring
19 order in place. We are not convinced by Lewis' arguments that a healthcare provider's
20 failure to provide care to a patient presents a claim distinct from a healthcare provider's
21 administration of substandard care; both claims amount to a claim for professional
22 negligence where it involves a “breach of duty involving medical judgment, diagnosis,
23 or treatment.” (citation) (*Lewis v. Renown Reg'l Med. Ctr.* (Nev. 2018) 432 P.3d 201.
24 [2018 Nev. Unpub. LEXIS 1165], quoting *Szymborski v. Spring Mt. Treatment Ctr.*,
25 133 Nev., Adv. Op. 80, 403 P.3d 1280, 1285 (2017))

26 A thorough and well-reasoned discussion of the distinction between a medical negligence claim and an
27 Elder Abuse claim is set forth in *Brown v. Mt. Grant Gen. Hosp.*, No. 3:12-CV-00461-LRH-WGC,
28 2013 U.S. Dist. LEXIS 120909, at *17 (D. Nev. Aug. 23, 2013). In the *Brown* decision, the Court
examined the Legislative History, the differing requirements of the two claims and the distinctions
between the provision of allegedly negligent medical care and the type of “long-term relationships”
envisioned by the statutes creating the Elder Abuse remedies. The Court went on to state:

1 “Thus, both the plain language of § 41.1395 and its legislative history suggest that the
2 statute targets the relationship between long-term caretakers and their charges. This is
3 in contradistinction to the type of relationship that exists between hospitals and their
4 patients.” (*Brown v. Mt. Grant Gen. Hosp.*, No. 3:12-CV-00461-LRH-WGC, 2013 U.S.
Dist. LEXIS 120909, at *20)

5 The Court in *Brown* went on to hold that, under Nevada law, an Elder Abuse claim was inappropriate
6 and subject to dismissal where the factual basis of the allegations was of medical negligence. The
7 *Brown* decision also recognized that a plaintiff cannot evade the provisions of NRS sections 41A.035
8 and 42.021 pertaining to actions for medical malpractice by “artful pleading”. (*Brown* at *22).

9 In fact, the allegations of the Fifth Cause of Action for “Elder Abuse” show they are entirely
10 premised upon the allegations of a failure to provide competent medical care. (See Complaint at p.
11 10:13-20, ¶’s 73 & 74) These are the same types of allegations which the Nevada Supreme Court found
12 did not support Elder Abuse claims in *Estate of Curtis* and *Lewis v. Renown* cited above.

13 VIII

14 CONCLUSION

15 For the foregoing reasons and based upon the authorities cited herein, Defendants respectfully
16 requests that the Court Dismiss the Second, Third, Fourth, and Fifth Causes of Action of Plaintiff’s
17 Complaint for failure to state a claim upon which relief can be granted.

18 DATED: 3/9/2021

LAURIA TOKUNAGA GATES & LINN, LLP

19 /s/ Anthony D. Lauria

20 By: _____

21 Anthony D. Lauria, Esq.
22 Nevada Bar No.: 4114
23 601 South Seventh Street
24 Las Vegas, NV 89101
25 Attorney for Defendants,
26 Ira Michael Schneier, M.D. and Michael
27 Schneier Neurosurgical Consulting, P.C.
28

CERTIFICATE OF SERVICE

Pursuant to N.R.C.P. 5(b), I certify that I am an employee of Lauria Tokunaga Gates & Linn, and that on this 9TH day of March, 2021, I served a true and correct copy of the foregoing **DEFENDANTS IRA MICHAEL SCHNEIER, M.D. AND MICHAEL SCHNEIER NUEROSURGICAL CONSULTING, P.C.'S REPLY TO PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS CERTAIN CAUSES OF ACTION OF PLAINTIFF'S COMPLAINT:**

☐ By placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepared in Las Vegas, Nevada; and/or

☒ By mandatory electronic service (e-service), proof of e-service attached to any copy filed with the Court; and/or

☐ By facsimile, pursuant to EDCR 7.26 (as amended); and/or

☐ By personal service

as follows:

<i>Attorneys for Plaintiff</i> Adam J. Breeden, Esq. BREEDEN & ASSOCIATES, PLLC 376 E. Warm Springs Road, Suite 120 Las Vegas, NV 89119 Tel. (702) 819-7770 Fax. (702) 819-7771 Adam@BreedendAssociates.com	
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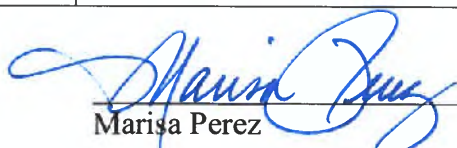
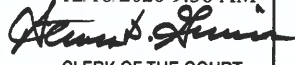

Marisa Perez
An employee of Lauria Tokunaga
Gates & Linn, LLP

EXHIBIT A

EXHIBIT A


CLERK OF THE COURT

OGM

~~ORDER~~

Anthony D. Lauria, Esq.
NV State Bar No. 4114
LAURIA TOKUNAGA GATES & LINN, LLP
1755 Creekside Oaks Drive, Suite 240
Sacramento, CA 95833
Tel. (916) 492-2000
Fax. (916) 492-2500
Email: alauria@ltglaw.net

Southern Nevada Office:
LAURIA TOKUNAGA GATES & LINN, LLP
601 South Seventh Street
Las Vegas, NV 89101
Tel. (702) 387-8633
Fax. (702) 387-8635

Attorney for Defendant,
Daniel M. Kirgan, M.D.

DISTRICT COURT
CLARK COUNTY, NEVADA

A-20-821720-C

THOMAS ZIEGLER, an individual,

Plaintiff,

vs.

DANIEL M. KIRGAN, M.D., an individual;
CLARK COUNTY, NEVADA d/b/a
UNIVERSITY MEDICAL CENTER, a
political subdivision the State of Nevada; and
DOES I through X; and ROE
CORPORATIONS I through X, inclusive,

Defendants.

CASE NO. ~~A-20-821720-C~~
DEPT. NO. 22

**ORDER GRANTING DEFENDANT
DANIEL M. KIRGAN, M.D.'S MOTION
TO DISMISS CERTAIN CAUSES OF
ACTION OF PLAINTIFF'S COMPLAINT**

Hearing date: 12/08/2020
Time: 8:30 A.M.

COMES NOW, Defendant, DANIEL M. KIRGAN, M.D.'s Motion to Dismiss Certain Causes of Action of Plaintiff's Complaint came on for hearing on December 8, 2020, in Department 22, the Honorable Susan Johnson presiding. Plaintiff Thomas Ziegler, an individual, appearing telephonically by and through his counsel Adam J. Breeden of the law firm Breeden & Associates, PLLC. Defendant Daniel M. Kirgan, M.D. appearing telephonically by and through his counsel Anthony D. Lauria of the

ORDER GRANTING DEFENDANT DANIEL M. KIRGAN, M.D.'S
MOTION TO DISMISS CERTAIN CAUSES OF ACTION OF PLAINTIFF'S COMPLAINT

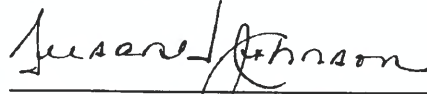
1 law firm Lauria Tokunaga Gates & Linn, LLP. The Court having reviewed the pleadings and papers
2 on file, and having heard oral argument of the parties regarding causes of action and whether or not
3 there was a failure to state a claim upon which relief could be granted, being fully advised and good
4 cause appearing therefore, finds as follows:

5 The Court finds that the gravamen of all of Plaintiff's claims is alleged Professional Negligence
6 and all of the causes of action sought to be plead would require proof by way of expert testimony to
7 establish medical malpractice. All of these claims are subject to the provisions of NRS 41A. relating
8 to actions for professional negligence and to NRS 41.035 relating to the limited waiver of sovereign
9 immunity by the State of Nevada.

10 **IT IS HEREBY ORDERED** that Defendant Daniel M. Kirgan, M.D.'s Motion to Dismiss
11 Plaintiff's Complaint as to the Second Cause of Action (Breach of Contract - All Defendants), Third
12 Cause of Action (Unjust Enrichment - All Defendants), Fourth Cause of Action (Negligent Infliction
13 of Emotional Distress - All Defendants) and Fifth Cause of Action (Neglect of a Vulnerable Person -
14 All Defendants) are GRANTED.

15 **IT IS SO ORDERED.**

16 Dated this 18th day of December, 2020

17 

18 DISTRICT COURT JUDGE

19
20 Respectfully Submitted by:

21 DATED: 12/9/2020

22 LAURIA TOKUNAGA GATES & LINN, LLP

23 /s/ Anthony D. Lauria

24 By: _____

25 Anthony D. Lauria, Esq.
26 Nevada Bar No.: 4114
27 601 South Seventh Street
28 Las Vegas, NV 89101
Tel. (916) 492-2000
Attorney for Defendant,
Daniel M. Kirgan, M.D.

97A C38 2B47 00AC
Susan Johnson
District Court Judge

1 APPROVED AS TO FORM AND CONTENT:

2 DATED: 12/9/2020

3 BREEDEN & ASSOCIATES, PLLC

4 /s/ Adam J. Breeden

5 By: _____

Adam J. Breeden, Esq.

Nevada Bar No. 8768

376 E. Warm Springs Road, Suite 120

Las Vegas, NV 89119

Tel. (702) 819-7770

Fax. (702) 819-7771

Attorney for Plaintiff,

Thomas Ziegler

Marisa E. Perez

From: Adam Breeden <adam@breedenandassociates.com>
Sent: Wednesday, December 9, 2020 7:11 AM
To: Marisa E. Perez
Cc: Anthony D. Lauria
Subject: Re: Ziegler v. Kirgan - Proposed Order

Marisa and Anthony,

The Order language is approved, you may submit with my e signature.

Adam

On Tue, Dec 8, 2020 at 4:29 PM Marisa E. Perez <mperez@ltglaw.net> wrote:

Mr. Breeden,

Attached please find the proposed Order Granting Defendant Daniel M. Kirgan, M.D.'s Motion to Dismiss Certain Causes of Action of Plaintiff's Complaint.

Please advise if the Order is acceptable as written, or if you would like us to consider any changes to the proposed Order. If you approve as to form and content, please advise if we have permission to use your electronic signature.

Thank you for your courtesy.



Marisa Perez

Legal Assistant to Anthony D. Lauria

LAURIA TOKUNAGA GATES & LINN, LLP

[1755 Creekside Oaks Drive, Suite 240](#)

[Sacramento, CA 95833](#)

Tel: (916) 492-2000

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Southern Nevada: 601 South Seventh Street, Las Vegas, NV 89101

Tel: (702) 387-8633 Fax: (702) 387-8635

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Please consider the environment before printing this email

--

Sincerely,

Adam J. Breeden, Esq.
BREEDEN & ASSOCIATES, PLLC
(702) 819-7770

*Sent from or dictated from a mobile device. Please pardon any transcription errors.

1 CSERV

2 DISTRICT COURT
3 CLARK COUNTY, NEVADA
4

5
6 Thomas Ziegler, Plaintiff(s)

CASE NO: A-20-821720-C

7 vs.

DEPT. NO. Department 22

8 Daniel Kirgan, M.D.,
9 Defendant(s)

10
11 **AUTOMATED CERTIFICATE OF SERVICE**

12 This automated certificate of service was generated by the Eighth Judicial District
13 Court. The foregoing Order Granting Motion was served via the court's electronic eFile
system to all recipients registered for e-Service on the above entitled case as listed below:

14 Service Date: 12/18/2020

15 Adam Breeden

adam@breedenandassociates.com

16 Anthony Lauria, Esq.

alauria@ltglaw.net

17 Marisa Perez

mperez@ltglaw.net

18 Kristy Johnson

kristy@breedenandassociates.com

EXHIBIT B

EXHIBIT B

[OGM]

Anthony D. Lauria, Esq.
NV State Bar No. 4114
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Southern Nevada Office:
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601 South Seventh Street
Las Vegas, NV 89101
Tel. (702) 387-8633
Fax. (702) 387-8635

Attorney for Defendant,
Stephanie A. Jones, D.O.

DISTRICT COURT
CLARK COUNTY, NEVADA

ERRYS DEE DAVIS, a minor, by her parents,
TRACI LYNN PARKS and ERRICK DAVIS;
TRACI LYNN PARKS, individually; ERRICK
DAVIS, individually,

Plaintiffs,

vs.

STEPHANIE A. JONES, D.O., an individual,
DOES I through X; and ROE
CORPORATIONS XI through XX, inclusive,

Defendants.

CASE NO. A-20-826513-C
DEPT. NO. 5

**ORDER GRANTING DEFENDANT
STEPHANIE A. JONES, D.O.'S MOTION
TO DISMISS CERTAIN CAUSES OF
ACTION OF PLAINTIFFS' COMPLAINT**

Hearing Date: 2/9/2021
Time: 9:00 A.M.

COMES NOW, Defendant, STEPHANIE A. JONES, M.D.'s Motion to Dismiss Certain Causes of Action of Plaintiffs' Complaint came on for hearing on February 9, 2021 in Department 25, the Honorable Veronica Barisich presiding. Plaintiffs appearing remotely by and through counsel Adam J. Breeden of the law firm Breeden & Associates, PLLC. Defendant STEPHANIE A. JONES M.D. appearing remotely by and through Anthony D. Lauria of the law firm Lauria Tokunaga Gates &

ORDER GRANTING DEFENDANT STEPHANIE A. JONES, M.D.'S
MOTION TO DISMISS CERTAIN CAUSES OF ACTION OF PLAINTIFFS' COMPLAINT

1 Linn, LLP. The Court having reviewed the pleadings and papers on file, and having heard oral
2 argument of the parties, being fully advised and good cause appearing therefore, finds as follows:

3 The Court finds that the gravamen of all of Plaintiffs' claims is alleged Professional Negligence
4 which arise out of medical diagnosis and treatment provided by Defendant. As such all of the causes
5 of action sought to be plead would require proof by way of expert testimony to establish medical
6 malpractice. The Breach of Contract cause of action is premised upon a purported contract to provided
7 reasonable medical care would require expert testimony to establish a breach of such contract. The
8 Court finds that the Battery claim is also subsumed within the cause of action alleging professional
9 negligence. Plaintiffs admit that consent was given for surgery as identified under NRS 41A.110 and
10 the claim that another adjacent organ was injured does not state a valid claim for battery. Similarly,
11 the cause of action for Injury to a Vulnerable Person pursuant to NRS 41.1395 is premised entirely on
12 the contention that the medical care and treatment provided by Defendant was not in accord with the
13 standard of care. This claim is also subsumed in the First Cause of Action for Professional Negligence.

14 The Court finds that all of these claims are subject to the provisions of NRS 41A relating to
15 actions for professional negligence and to NRS 41.035 relating to the limited waiver of sovereign
16 immunity by the State of Nevada. While leave to amend is to be freely granted, an exception exists
17 where it is evident that amendment would be futile and the claims would still properly addressed in the
18 context of Professional Negligence. For that reason, the dismissal of the Second, Third and Fourth
19 Causes of Action is made without leave to amend.

20 **IT IS HEREBY ORDERED** that Defendant Stephanie A. Jones, M.D.'s Motion to Dismiss
21 Plaintiffs' Complaint as to the Second Cause of Action (Breach of Contract), Third Cause of Action
22 (Battery), and Fourth Cause of Action (Neglect of a Vulnerable Person) is GRANTED without leave
23 to amend.

24 **IT IS SO ORDERED.**

Dated this 17th day of February, 2021

25 

26 DISTRICT COURT JUDGE

27 CD9 A20 BE25 80F5
28 Veronica M. Barisich
District Court Judge

1 Respectfully Submitted by:

2 DATED: 2/9/2021

3 LAURIA TOKUNAGA GATES & LINN, LLP

4 */s/ Anthony D. Lauria*

5 By: _____

6 Anthony D. Lauria, Esq.

7 Nevada Bar No.: 4114

8 601 South Seventh Street

9 Las Vegas, NV 89101

10 Tel. (916) 492-2000

11 *Attorney for Defendant,*

12 *Stephanie A. Jones, M.D.*

13 APPROVED AS TO FORM AND CONTENT:

14 DATED: 2/9/2021

15 BREEDEN & ASSOCIATES, PLLC

16 */s/ Adam J. Breeden*

17 By: _____

18 Adam J. Breeden, Esq.

19 Nevada Bar No. 8768

20 376 E. Warm Springs Road, Suite 120

21 Las Vegas, NV 89119

22 Tel. (702) 819-7770

23 Fax. (702) 819-7771

24 *Attorney for Plaintiffs*

Marisa E. Perez

From: Adam Breeden <adam@breedenandassociates.com>
Sent: Tuesday, February 9, 2021 4:06 PM
To: Marisa E. Perez
Cc: Anthony D. Lauria
Subject: Re: Davis v. Jones - Proposed Order

You have my authority to submit the proposed order with my e-signature. Approved as to form and content only.



Adam J. Breeden
Trial Attorney, Breeden & Associates, PLLC
(702) 819-7770 | adam@breedenandassociates.com
www.breedenandassociates.com
376 E. Warm Springs Rd., Suite 120 Las Vegas, NV 89119-4262
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On Tue, Feb 9, 2021 at 2:33 PM Marisa E. Perez <mperez@ltglaw.net> wrote:

Mr. Breeden,

Enclosed is the proposed Order Granting Defendant Stephanie A. Jones, D.O.'s Motion to Dismiss Certain Causes of Action of Plaintiffs' Complaint. Please advise if the Order is acceptable as written, or if you would like us to consider any changes to the proposed Order. If you approve as to form, please advise if we have permission to use your electronic signature.

Thank you for your courtesy.



Marisa Perez

Legal Assistant to Anthony D. Luria

LAURIA TOKUNAGA GATES & LINN, LLP

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1 **CSERV**

2
3 DISTRICT COURT
4 CLARK COUNTY, NEVADA

5
6 Traci Parks, Plaintiff(s)

CASE NO: A-20-826513-C

7 vs.

DEPT. NO. Department 5

8 Stephani Jones, DO,
9 Defendant(s)

10
11 **AUTOMATED CERTIFICATE OF SERVICE**

12 This automated certificate of service was generated by the Eighth Judicial District
13 Court. The foregoing Order Granting Motion was served via the court's electronic eFile
14 system to all recipients registered for e-Service on the above entitled case as listed below:

15 Service Date: 2/17/2021

16 Adam Breeden

adam@breedenandassociates.com

17 Anthony Lauria, Esq.

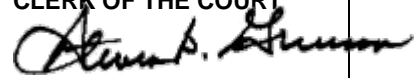
alauria@ltglaw.net

18 Marisa Perez

mperez@ltglaw.net

19 Kristy Johnson

kristy@breedenandassociates.com



TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA

FREDERICK BICKHAM,

Plaintiff,

vs.

IRA SCHNEIER, M.D.,

Defendant.

CASE NO. A-20-827155-C

DEPT. XXII

BEFORE THE HONORABLE SUSAN JOHNSON, DISTRICT COURT JUDGE
MARCH 16, 2021

RECORDER'S TRANSCRIPT OF HEARING RE

***DEFENDANTS IRA MICHAEL SCHNEIER, M.D. AND MICHAEL SCHNEIER
NEUROSURGICAL CONSULTING, P.C.'S MOTION TO DISMISS CERTAIN
CAUSES OF ACTION OF PLAINTIFF'S COMPLAINT***

APPEARANCES:

For the Plaintiff:

ADAM J. BREEDEN, ESQ.
Via Video Conference

For the Defendant:

ANTHONY D. LAURIA, ESQ.
Via Video Conference

RECORDED BY: NORMA RAMIREZ, COURT RECORDER

1 MARCH 16, 2021 AT 9:33 A.M.

2
3 THE COURT: Good morning. I'm calling the case of Bickham versus
4 Schneier, case number A20-827155-C. Would counsel please identify themselves
5 for the record? Let's start with Plaintiff's counsel.

6 MR. BREEDEN: Good morning, Your Honor. This is Adam Breeden, bar
7 number 8768 on behalf of the Plaintiffs.

8 THE COURT: Okay. And Mr. Lauria.

9 MR. LAURIA: Good morning, Your Honor. Anthony Lauria, bar number 4114
10 for Dr. Schneier.

11 THE COURT: Okay. And I apologize if I blistered his name.

12 This is Defendant's Motion to Dismiss Certain Causes of Action of
13 Plaintiff's Complaint. And I understand that this dismissal -- this motion seeks to
14 dismiss all but the professional negligence claim, right?

15 MR. LAURIA: That is correct, Your Honor.

16 THE COURT: Okay. I'll hear your motion.

17 MR. LAURIA: Thank you, Your Honor. And I am not going to belabor the
18 points that are already set forth in the briefing; I think it's all set out. I will credit
19 Plaintiff's counsel for his creativity in trying to get around the provisions relating to
20 medical malpractice claims which placed limits on damages and permitted the
21 introduction of collateral sources, and so he's using creative arguments to try and
22 get around those but I think the Supreme Court has repeatedly struck down those
23 attempts.

24 While counsel suggests that all those cases only relate to striking down
25 the attempts to get around the affidavit requirement and/or statute of limitations

1 issues, none of the cases actually say that. This motion or a similar motion has
2 been before this Court before as we have pointed out and basically we're dealing
3 with a cause of action for breach of contract which the only contract is to provide,
4 according to the complaint, competent medical treatment. It's a professional
5 negligence claim. The better claim here is that, well, I gave permission to do lumbar
6 spine surgery but only at a certain level. And so the question becomes, well, if the
7 doctor goes in and he said trying to do surgery at L4-5 and he goes in and he's like,
8 oh wait, I'm at L3 and then doesn't do anything but exposes it and then goes back to
9 L4-5, does that vitiate the informed consent that's given? Of course it doesn't. So,
10 counsel then makes an argument that, well, this is kind of really an informed consent
11 battery argument to some degree but the Supreme Court has made clear that
12 informed consent arguments need to be supported by an expert affidavit outlining
13 what the informed consent requirements are and how they weren't met which didn't
14 occur in this case.

15 Same thing is true with the breach of fiduciary duty claim. The only
16 duty here again is to provide competent medical care within the standard of care
17 and that requires expert testimony which is the Szymborski test that the Supreme
18 Court always talks about. For example, in the breach of contract case counsel for
19 this time bring up the Szerkes case, S-z-e-r-k-e-s, in which the Court said, well, you
20 can potentially enter a breach of contract to recover the costs of medical treatment
21 or costs of medical care, but those costs are all recoverable under the professional
22 negligence action in this case. So -- and unless there's negligence there's no
23 breach of contract. It also cites a new unpublished decision by the Nevada
24 Supreme Court in Parminder Kang in which a writ petition was denied. Now, that's a
25 case in which no expert affidavit was submitted with Plaintiff's complaint. They

1 alleged only breach of contract and fraud and the allegation was that the surgeon
2 agreed to use a certain prosthetic device and used one that the -- a different one
3 that the Plaintiff hadn't agreed on. And the basis for that opinion which said, well,
4 we're not gonna grant the writ petition, we're gonna let the case go forward was that
5 the Court found that there was no expert testimony needed because the agreement
6 was to provide one particular tool versus another. So, in this case obviously expert
7 testimony is needed to establish (1) was surgery done at an incorrect level or was it
8 not? (2) How did that occur and was that below the standard of care?

9 So, finally the elder abuse claim. Your Honor, we've addressed it I
10 think in the pleadings and we've outlined the Supreme Court has indicated on
11 several occasions that when the genesis of the claim is negligence and medical
12 treatment it does not rise to the level of elder abuse and I think that the Federal
13 Court decision in Brown that we cited has a thorough analysis of the differences
14 between professional negligence and elder abuse. So, this is not a situation where
15 we are again are seeking dismissal of the entire complaint so the whole line of
16 argument about, you know, any basis for stating a claim, you know, you must deny
17 in a motion doesn't apply here. We're agreeing that they've stated a valid,
18 professional negligence claim although we disagree wholeheartedly that there was
19 such a negligence, but the remaining other four causes of action we believe are
20 inappropriate and should be dismissed.

21 THE COURT: Mr. Breedon.

22 MR. BREEDEN: Your Honor, I'll also try to move quickly but there is quite a
23 bit that I wish to say. Again, this is a pre-answer Motion to Dismiss where the
24 allegations in the complaint have to be broadly interpreted in favor [indecipherable]
25 and are assumed to be true. The allegations here are essentially that the doctor

1 was faced with a patient who very urgently needed a thoracic spine surgery to avoid
2 additional damage to his thoracic spine. The physician, Defendant, unfortunately
3 operated on the wrong level. The patient for obvious reasons had a poor recovery.
4 The doctor does an additional surgery approximately 30 days later at which time he
5 discovers he has operated on the wrong level and he does not advise the patient of
6 that and unfortunately my client then went another five or six months before another
7 doctor figured all of this out. We do also allege that the doctor, Defendant, falsified
8 at least one portion of his records to try to disguise or cover up the extent of the
9 damages.

10 I think, Your Honor, I've actually been in front of you on two similar
11 matters. Turning now to the breach of contract allegations and you have denied t
12 hem both or dismissed those cause of actions in these other two matters. I
13 respectfully disagree with the Court's belief on what the law is here and my
14 understanding is that the Court's belief is that you simply cannot sue a physician for
15 breach of contract, that that action has simply been subsumed or abolished by NRS
16 Chapter 40(b)(1)(a). I respectfully disagree with that. I'm unlikely to change your
17 mind given that this was the third time I've argued this issue in front of you, Your
18 Honor, but I would just continue to note we have the Szekeres case where the
19 Nevada Supreme Court stated that, hey, you can sue a physician on a breach of
20 contract theory. We have several recent cases Egan versus Chambers, Busick
21 versus Trainor and Kang versus Eighth Judicial District Court where the Nevada
22 Supreme Court has allowed the breach of contract theory to proceed or it is going to
23 appeal after at the District Court level a breach of contract action against the
24 physician was allowed to proceed, and therefore I think that these tempered causes
25 of action are still out there and exist and my client might get some additional

1 instructions that would be favorable on these theories or for other treatment.
2 There's obviously no intent here to evade the statute of limitations or affidavit
3 requirement in pleading this cause of action because we abided by those, we
4 satisfied those requirements. I've also mentioned a subtle difference. In this
5 particular case the breach of contract is not solely limited to an allegation that the
6 services were --provided that were contracted for -- improperly performed, you have
7 an allegation here that one operation or procedure was contracted for and a
8 procedure was performed on an entirely level of the spine. So, I think that is one
9 distinguishing factor here from other matters that I've argued in front of the Court.

10 Turning to the battery cause of action. Again, we know from Humboldt
11 General Hospital versus Sixth Judicial Court that you can sue a doctor for battery;
12 such cases get divided into two categories. One is a complete lack of consent
13 battery and the other is a partial lack of consent battery case. The line between
14 those two is a little gray at times I think, but the point of our opposition on this
15 battery issue is to say that whether you consider this to be a total lack of consent
16 case or a partial lack of consent case it is supported with a affidavit from a physician
17 in a similar practice and so I believe we're allowed to proceed on the theory that,
18 you know, consent was given to operate on one level but certainly not another level.
19 That is a partial lack of consent case. And again, I think we have very clear case
20 law from the Humboldt General Hospital case that that is permitted. And that case,
21 by the way, the plaintiff's cause of action was considered to be a partial lack of
22 consent case so it was dismissed because there was no supporting affidavit. We
23 have the supporting affidavit in this case. So, we've cured the defect that the Court
24 found in the Humboldt General Hospital case.

25 Turning next to the breach of fiduciary duty cause of action in the

1 complaint. Again, we know from two Nevada Supreme Court cases Massey versus
2 Litton and Hoopes versus Hammargren that physicians are fiduciaries, vis-à-vis to
3 their patient. The fiduciary duty claim or breach of that duty is based on the fact that
4 when the doctor discovered that he made an error and operated on the wrong level
5 and when he discovered that he improperly placed a screw into the spinal canal he
6 placed his own interests above his patients and chose not to disclose his errors to
7 the patient and that is what the breach of fiduciary claim is based on, not the
8 negligent treatment itself but his decision not to disclose what he had done to the
9 patient which in this case we allege was extremely harmful to my client because he
10 had a spinal condition that very urgently needed surgery to repair and he did not get
11 that because the doctor erred and then did not disclose his error to my client.

12 Next, Your Honor, we have the -- it was called by the Defense elder
13 abuse. This is not elder abuse, it's abuse of a vulnerable person. At the time that
14 this procedure was performed my client could not even walk so I believe that he
15 would qualify as a vulnerable person under this statute. Again, I argued this to the
16 Court and I did in the past and not prevailed on this, but I think that in the recent
17 case of Estate of Curtis versus South Las Vegas Medical Investors you saw that the
18 Nevada Supreme Court does consider this to be a cause of action that is separate
19 from medical malpractice and can be viable on its own. We also have some out of
20 state authority from the state of Arizona that had a identical statute and they have
21 ruled that in these cases. Incidentally the Arizona statute was later changed or
22 modified but Nevada had not made that modification so this is still an independent
23 cause of action. In the Estate of Curtis case the cause of action was dismissed
24 because again there were issues of medical care and it was not supported by an
25 affidavit which of course is a defect that we've cured in this case. We provided a

1 supporting affidavit.

2 Again, none of the pleading issue in this case are designed to
3 circumvent the statute of limitations or supporting affidavit requirements in NRS
4 Chapter 41(a), none of them. We're just saying there are different causes of action
5 that you can sue a physician for and this in particular -- I think there's a case that
6 strongly shows why these causes of action continue to exist. You know, this is a
7 case where the doctor performed a surgery at the wrong level and then took steps to
8 cover it up and we believe that certainly if you're at the pleading stage these causes
9 of action can continue so we can get additional discovery and potentially different
10 levels of damages and potentially different jury instructions if this matter goes to trial.
11 Thank you.

12 THE COURT: Okay. Mr. Lauria.

13 MR. LAURIA: Thank you, Your Honor. And so, the Estate of Curtis case
14 counsel is correct, the Supreme Court said it's a medical negligence case, there's
15 no claim for elder abuse here based on the allegations that you've made which is
16 similar to this case. The -- again, I appreciate counsel's straightforwardness. Well,
17 he is right, he's not arguing statute of limitations or affidavit requirements, what he is
18 trying to do is circumvent the protections that were put in place first by the voters in
19 -- as you remember 4 and then by the legislature limiting general damages in
20 medical malpractice cases and permitting collateral source payments to be
21 admissible. That's all this is about, Judge, is trying to circumvent those provisions
22 by trying to creatively lead a cause of action and the Supreme Court has said, look,
23 the test is, is expert testimony required to establish the cause of action you're trying
24 to claim here? And if so it's really a medical malpractice claim. To the extent that
25 he's now saying -- or the claim is, well, the doctor is somehow later discovered at

1 another surgery that is erred but hidden that's a claim for fraud. If he wants to plead
2 -- he hasn't pled a claim for fraud, that's not a range of fiduciary duty. If there's
3 fraud or misrepresentation you need to plead specific facts under the Nevada Rules
4 of Civil Procedures, Rule 8, and you need to outline each of the five elements of a
5 fraud claim. So, he hasn't done that. He really hasn't pled that cause of action.

6 Your Honor, I think this is the same motion that we've been before you
7 before trying to distinguish it from the others that is really an unsuccessful attempt
8 that I think dismissal of the additional four causes of action needs to be granted.

9 MR. BREEDEN: Your Honor, may I comment on one point of law in
10 response?

11 THE COURT: Okay. But I'm gonna let Mr. Lauria finish.

12 MR. BREEDEN: Yes. So, I believe a breach of a fiduciary duty is a fraud per
13 se and that's why the complaint is pleaded in that manner.

14 THE COURT: Okay. This is what I'm going to do. I'm going to grant the
15 motion in part. I am gonna grant it with respect to the breach to contract, the
16 battery, and the elder abuse counts. I am concerned about the fraud. I don't see
17 that as medical malpractice or professional malpractice. If the doctor wrote
18 something in medical records that are not true I see this as falling outside that. And,
19 I mean, I'm looking at it right now, I think he said enough under -- I think he satisfies
20 at least Rule 9(b) with respect to setting forth with -- I mean, it doesn't say exactly
21 what he wrote. I mean, I might let you go ahead and ask for a more definite
22 statement with respect to what he wrote but I'm not gonna dismiss that one out. I
23 just see that as different. And in keeping with the Curtis case, you know, Curtis
24 basically said that in order to determine whether a claim sounds in professional
25 negligence the Courts must evaluate whether the claim involves medical diagnosis,

1 judgment or treatment or is based on the -- or is based upon the performance of
2 non-medical services. Writing in a medical record, I mean, yeah, I guess you could
3 say it is part of that but I see it is different. He -- if it -- if I take the allegations of the
4 complaint as true that he wrote false statements to cover up his negligence then
5 that's a problem. I don't think that a jury needs -- I think that they're capable of
6 evaluating the provider's action with using their common knowledge and experience.
7 So -- but if you transform that, Mr. Lauria, into a motion for a more definite statement
8 I'll grant that.

9 MR. LAURIA: I would, Your Honor. And if I can just make one point, is that in
10 order to determine whether or not the statement he wrote in his record is accurate or
11 false you have to have a medical expert saying, oh, I see this versus the doctor said
12 he saw that. So, it does require a medical expert to say what he wrote in this record
13 is inaccurate because I see x, y and z while the doctor said he saw a, b and c. So, I
14 don't think that falls outside of that category.

15 THE COURT: I -- that will be an issue for a different day.

16 MR. LAURIA: Okay.

17 THE COURT: But I will allow Mr. Breeden to provide a more definite
18 statement with respect to his fourth cause of action so that we know exactly what --
19 what it is. It may be a situation where you're right that it is not false, it may be
20 interpreted differently. I don't know, we may need a medical expert to talk about
21 whether or not that's fraud or not, but that's gonna be an issue for a different day.
22 We need to see exactly what it was that he is alleged to have falsified, okay?

23 MR. LAURIA: Thank you, Your Honor.

24 THE COURT: Okay.

25 MR. BREEDEN: Your Honor, are you then ordering me to file a first amended

1 complaint?

2 THE COURT: Well, I -- I'm granting an oral motion for a more definite
3 statement. So, you have the opportunity to go ahead and state your fourth cause of
4 action with more specificity, okay?

5 MR. BREEDEN: Okay. And I think that would be through an amended
6 complaint --

7 THE COURT: It is.

8 MR. BREEDEN: -- am I --

9 THE COURT: It would be.

10 MR. BREEDEN: Yes. Yes.

11 THE COURT: Yes, it would be.

12 MR. BREEDEN: We'll do that within I would day ten days.

13 THE COURT: Okay. That sounds great.

14 MR. LAURIA: Thank you. Just to clarify, Your Honor. As to -- the amended
15 complaint is not gonna re-raise the ones that we've just dismissed here, it's just
16 gonna deal with the fourth cause of action?

17 THE COURT: Right. So, it shouldn't -- Mr. Breeden, it should not encompass
18 the breach of contract, the battery or the elder abuse claims, just the -- in fact, I
19 guess you could say the fourth cause of action would be transferred to a second
20 cause of action so to speak because obviously the professional negligence remains.

21 MR. BREEDEN: Your Honor, for appellate reasons I would like to keep those
22 allegations in the complaint but I'll stipulate that the Court has dismissed them.

23 THE COURT: Well, you're not gonna have the same --

24 MR. BREEDEN: And I'll --

25 THE COURT: -- you're not gonna have the same causes of action in them

1 because I've already dismissed them. You've got your record.

2 MR. BREEDEN: Okay. So, if that's what you're ordering I think that's enough
3 for appellate purposes.

4 THE COURT: Sure. Yeah. Let's clean up the complaint.

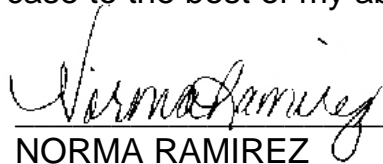
5 MR. LAURIA: Thank you, Your Honor.

6 THE COURT: All right. Thank you.

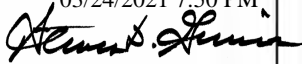
7 [Proceedings concluded at 9:55 a.m.]

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12
13 ATTEST: I do hereby certify that I have truly and correctly transcribed the
14 audio/video recording in the above-entitled case to the best of my ability.

15 

16 NORMA RAMIREZ
17 Court Recorder
18 District Court Dept. XXII
19 702 671-0572
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CLERK OF THE COURT

[ORDR]

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Attorneys for Defendants, *Ira Michael Schneier, M.D. and
Michael Schneier Neurosurgical Consulting, P.C.*

DISTRICT COURT
CLARK COUNTY, NEVADA

FREDERICK BICKHAM, individually,

Plaintiff,

vs.

IRA MICHAEL SCHNEIER, M.D., an
individual; MICHAEL SCHNEIER
NEUROSURGICAL CONSULTING, P.C., a
Nevada professional corporation; IMS
NEUROSURGICAL SPECIALISTS LLC, a
Nevada limited liability company; and DOES I
through X; and ROE CORPORATIONS I
through X, inclusive,

Defendants.

CASE NO. A-20-827155-C
DEPT. NO. XXII

**ORDER GRANTING DEFENDANTS IRA
MICHAEL SCHNEIER, M.D. AND
MICHAEL SCHNEIER
NEUROSURGICAL CONSULTING,
P.C.'S MOTION TO DISMISS CERTAIN
CAUSES OF ACTION OF PLAINTIFF'S
COMPLAINT IN PART AND GRANTING
MOTION FOR MORE DEFINITE
STATEMENT**

Hearing: March 16, 2021
Time: 8:30 a.m.

COMES NOW, Defendant, Ira Michael Schneier, M.D. and Michael Schneier Neurosurgical Consulting, P.C., a Nevada professional corporation's Motion to Dismiss Certain Causes of Action of Plaintiff's Complaint came on for hearing on March 16, 2021, in Department 22, the Honorable Susan Johnson presiding. Plaintiff Frederick Bickham, an individual, appearing telephonically by and

ORDER GRANTING DEFENDANT DEFENDANTS IRA MICHAEL SCHNEIER, M.D. AND
MICHAEL SCHNEIER NEUROSURGICAL CONSULTING, P.C.'S MOTION TO DISMISS
CERTAIN CAUSES OF ACTION OF PLAINTIFF'S COMPLAINT

1 through his counsel Adam J. Breeden of the law firm Breeden & Associates, PLLC. Defendants Ira
2 Michael Schneier, M.D. and Michael Schneier Neurosurgical Consulting, P.C., a Nevada professional
3 corporation, appearing telephonically by and through his counsel Anthony D. Lauria of the law firm
4 Lauria Tokunaga Gates & Linn, LLP. The Court having reviewed the pleadings and papers on file, and
5 having heard oral argument of the parties regarding causes of action and whether or not there was a
6 failure to state a claim upon which relief could be granted, being fully advised and good cause appearing
7 therefore, finds as follows:

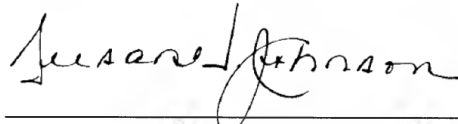
8 The Court finds that the gravamen of Plaintiff's Causes of Action for Breach of Contract,
9 Battery, and Neglect of a Vulnerable Person is alleged Professional Negligence and all of the causes of
10 action sought to be plead would require proof by way of expert testimony to establish medical
11 malpractice. All of these claims are subject to the provisions of NRS 41A. relating to actions for
12 professional negligence and to NRS 42.021.

13 An Oral Motion for More Definite Statement by Defendant as to Plaintiff's Fourth Cause of
14 Action entitled Breach of Fiduciary Duty/Fraud is also Granted and Plaintiff is granted leave to file a
15 more definite statement as to the facts and basis for the Breach of Fiduciary Duty/Fraud claim.

16 **IT IS HEREBY ORDERED** that Defendants Ira Michael Schneier, M.D. and Michael
17 Schneier Neurosurgical Consulting, P.C., a Nevada professional corporation's Motion to Dismiss
18 Plaintiff's Complaint as to the Second Cause of Action (Breach of Contract), Third Cause of Action
19 (Battery), and Fifth Cause of Action (Neglect of a Vulnerable Person) is GRANTED without leave to
20 amend.

21 **IT IS FURTHER ORDERED** that Plaintiff is granted leave to file a more definite statement
22 as to the facts and basis for the Fourth Cause of Action (Breach of Fiduciary Duty/Fraud).

23 Dated this 24th day of March, 2021

24 

25 DISTRICT COURT JUDGE

26 ///

27 **B49 0FE 1ECA 0140**
28 **Susan Johnson**
District Court Judge

ORDER GRANTING DEFENDANT DEFENDANTS IRA MICHAEL SCHNEIER, M.D. AND
MICHAEL SCHNEIER NEUROSURGICAL CONSULTING, P.C.'S MOTION TO DISMISS
CERTAIN CAUSES OF ACTION OF PLAINTIFF'S COMPLAINT

1 Respectfully Submitted by:

2 DATED: 3/16/2021

3 LAURIA TOKUNAGA GATES & LINN, LLP

4 /s/ Anthony D. Lauria

5 By: _____

6 Anthony D. Lauria, Esq.

7 Nevada Bar No.: 4114

8 601 South Seventh Street

9 Las Vegas, NV 89101

10 Tel. (916) 492-2000

11 *Attorney for Defendants Ira Michael Schneier, M.D. and Michael Schneier Neurosurgical*
12 *Consulting, P.C., a Nevada professional corporation.*

13 APPROVED AS TO FORM AND CONTENT:

14 DATED: 3/17/2021

15 BREEDEN & ASSOCIATES, PLLC

16 /s/ Adam J. Breeden

17 By: _____

18 Adam J. Breeden, Esq.

19 Nevada Bar No. 8768

20 376 E. Warm Springs Road, Suite 120

21 Las Vegas, NV 89119

22 Tel. (702) 819-7770

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24 *Attorney for Plaintiff,*

25 *Frederick Bickham*

Marisa E. Perez

From: Adam Breeden <adam@breedenandassociates.com>
Sent: Wednesday, March 17, 2021 10:45 AM
To: Marisa E. Perez
Cc: Anthony D. Lauria
Subject: Re: Bickham v. Schneier - Proposed Order

You may submit to the Court with my e-signature.



Adam J. Breeden
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On Tue, Mar 16, 2021 at 2:26 PM Marisa E. Perez <mperez@ltglaw.net> wrote:

Mr. Breeden,

Attached please find the proposed Order Granting Defendants Ira Michael Schneier, M.D. and Michael Schneier Neurosurgical Consulting, P.C.'s Motion to Dismiss Certain Causes of Action of Plaintiff's Complaint in Part and Granting Motion for More Definite Statement.

Please advise if the Order is acceptable as written, or if you would like us to consider any changes to the proposed Order. If you approve as to form and content, please advise if we have permission to use your electronic signature.

Thank you for your courtesy.



LAURIA
TOKUNAGA
GATES &
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ATTORNEYS AT LAW

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1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

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5
6 Frederick Bickham, Plaintiff(s) | CASE NO: A-20-827155-C
7 vs. | DEPT. NO. Department 22
8 Ira Schneier, M.D., Defendant(s)
9

10 **AUTOMATED CERTIFICATE OF SERVICE**

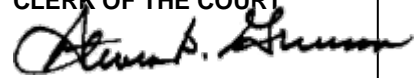
11 This automated certificate of service was generated by the Eighth Judicial District
12 Court. The foregoing Order was served via the court's electronic eFile system to all
13 recipients registered for e-Service on the above entitled case as listed below:

14 Service Date: 3/24/2021

15 Adam Breeden	adam@breedenandassociates.com
16 Anthony Lauria, Esq.	alauria@ltglaw.net
17 Marisa Perez	mperez@ltglaw.net
18 Kristy Johnson	kristy@breedenandassociates.com

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000402



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3 Nevada Bar No. 008768
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8 Fax: (702) 819-7771
9 Adam@Breedendandassociates.com
10 *Attorneys for Plaintiff*

7 **EIGHTH JUDICIAL DISTRICT COURT**

8 **CLARK COUNTY, NEVADA**

9 FREDERICK BICKHAM, an individual,

10 Plaintiff,

11 v.

12 IRA MICHAEL SCHNEIER, M.D., an
13 individual; MICHAEL SCHNEIER
14 NEUROSURGICAL CONSULTING, P.C., a
15 Nevada professional corporation; and DOES I
16 through X; and ROE CORPORATIONS I
17 through X, inclusive,

18 Defendants.

CASE NO. A-20-827155-C

DEPT NO. XXII

FIRST AMENDED COMPLAINT

**Arbitration Exempt- Professional
Negligence/Medical Malpractice Case
Chapter 41A**

19 Plaintiff, FREDERICK BICKHAM, by and through his counsel, Adam J. Breedend, Esq. of
20 BREEDEN & ASSOCIATES, PLLC, for his causes of actions against Defendants, IRA MICHAEL
21 SCHNEIER, M.D., and MICHAEL SCHNEIER NEUROSURGICAL CONSULTING, P.C., and
22 each of them, alleges as follows:

23 **PARTIES AND VENUE**

24 1. Plaintiff, FREDERICK BICKHAM (hereinafter referred to as "Plaintiff" and/or
25 "Mr. Bickham") is a resident and citizen of the State of Nevada, County of Clark, and was at all
26 times relevant to this Complaint.

27 2. Defendant, IRA MICHAEL SCHNEIER, M.D. (hereinafter collectively referred to
28 as "Defendant" and/or "Dr. Schneier"), is and was a physician, with specialties in spinal and

1 craniofacial surgery, and provider of health care licensed to practice medicine within the State of
2 Nevada as defined by NRS § 630.014, NRS § 630.020 and NRS § 41A.017, and was a medical care
3 provider to Plaintiff at all times relevant to this Complaint. His state of residency and citizenship is
4 unknown.

5 3. Defendant MICHAEL SCHNEIER NEUROSURGICAL CONSULTING, P.C.
6 (hereinafter collectively referred to as “Defendant” and/or “MSNC”), is a Nevada professional
7 corporation with its principal place of business in Clark County, Nevada.

8 4. The true names and capacities, whether individual, corporate, associate, or otherwise,
9 of Defendants DOES I through X and ROE CORPORATIONS I through X, inclusive, are unknown
10 to the Plaintiff, who therefore sues these defendants by such fictitious names. Specifically, but
11 without limitation, Plaintiff does not know the exact name of the legal entity, if any, who employed
12 Dr. Schneier on the date of the incident. Plaintiff is informed and believes and thereon alleges that
13 each of the Defendants designated herein as a Does I through X, inclusive, and/or Roe Corporations
14 I through X, inclusive, is responsible in some manner for the events and happenings referred to
15 herein, and caused injury and damages proximately thereby to Plaintiff as herein alleged, and
16 Plaintiff will ask leave of this Court to amend this Complaint to insert the true names and capacities
17 of Defendants, DOES and/or ROE CORPORATIONS, when the same have been ascertained by
18 Plaintiff, together with appropriate charging allegations, and adjoin such Defendants in this action.

19 5. More specifically, Defendant DOE I, is an unknown medical provider who had some
20 roll in the operation on Mr. Bickham for a thoracic surgical procedure completed at the wrong level.

21 6. More specifically but without limitations, Defendant ROE CORPORATION I, is an
22 unknown employer or principal of Dr. Schneier at the times alleged herein.

23 7. This Court has personal jurisdiction over the Defendants because they are residents
24 of the State of Nevada, business entities formed under the laws of the State of Nevada or have
25 minimum contacts with the state of Nevada under NRS § 14.065.

26 8. This Court has subject matter jurisdiction over this matter pursuant to Nev. Const.
27 Art. VI, § 6 and NRS § 4.370(1), as this Court has original jurisdiction in all cases not assigned to
28 the justices’ courts and the amount in controversy exceeds \$15,000, exclusive of attorney’s fees,

1 interest, and costs.

2 9. All the facts and circumstances that give rise to this dispute and lawsuit occurred in
3 Clark County, Nevada, making venue in the Eighth Judicial District the appropriate venue under
4 NRS § 13.040.

5 10. Without conceding that all or part of this action is an action for professional
6 negligence as defined by NRS § 41A.015, to the extent any allegations in this Complaint need
7 supported by a physician affidavit/declaration as to the standard of care, see the attached Declaration
8 of Michael Trainor, M.D., a physician in the same or substantially similar area of practice as the
9 Defendants. A copy of Dr. Trainor's supporting affidavit is attached as *Exhibit "1"* to this
10 Complaint.

11 **ALLEGATIONS COMMON TO ALL CAUSES OF ACTION**

12 11. Plaintiff hereby re-states and re-alleges each and every prior Paragraph of the
13 Complaint as if fully restated herein.

14 12. Frederick Bickham is a 50-year-old man, married with four children and residing in
15 Las Vegas, Nevada. Prior to the events in this case, he previously worked as a custodian and chef.

16 13. In late 2019, Mr. Bickham developed symptoms of extreme pain in the back with
17 difficulty walking. He presented to Sunrise Hospital on December 26, 2019.

18 14. Following completion of a dedicated thoracic MRI scan with scout images, a
19 diagnosis was made of thoracic myelomalacia myelopathy (injury to and softening of the spinal
20 cord) with severe stenosis at the T10-11 level. While 12-14 mm in diameter is typical for the
21 measurement of an adult's thoracic spinal canal, Mr. Bickham's stenosis was as little as 5 mm.

22 15. The stenosis and compression on the spinal cord was so severe and risk of worsening
23 of the condition was so high that surgery was urgently necessary.

24 16. On December 31, 2019, Defendant Dr. Schneier performed a thoracic laminectomy
25 for cord decompression with pedicle screw fixation and onlay lateral transverse fusion with allograft
26 autograft bone fusion, intended to be performed at T10-11.

27 17. In layman's terms, this means that part of Mr. Bickham's vertebral bone was to be
28 removed to relieve the pressure on his spinal cord, followed by placement of hardware and bone

1 grafts.

2 18. Apparently unknown intraoperatively, Dr. Schneier performed the surgery on the
3 incorrect level, T9-10. Also, during the December 31st surgery, Dr. Schneier misplaced a pedicle
4 screw which caused a medial breach of the spinal canal and likely additional pressure or contact
5 with the spinal cord, worsening the patient's condition.

6 19. On January 22, 2020, Mr. Bickham, still in pain following the prior surgery which
7 ignored the level of the severe stenosis, returned to Sunrise Hospital.

8 20. A thoracic CT scan was conducted and indicated left-sided pedicle screw
9 instrumentation at the T9-10 level with an apparent fifty percent (50%) medial breach of the left T9
10 pedicle screw.

11 21. On January 23, 2020, Dr. Schneier performed a second surgery and removed the
12 hardware at T9. However, Dr. Schneier made no effort to address the ongoing pathology at the T10-
13 11 level and still did not inform Mr. Bickham that the initial surgery was performed at the incorrect
14 level and he still needed an operation on T10-11, which he must have realized by that time.

15 22. Left to his own accord with the laminectomy at the incorrect thoracic level but with
16 severe stenosis on the spinal cord at T10-11 as little as 5 mm, Mr. Bickham's condition continued
17 to deteriorate. He went to the Emergency Room at Sunrise Hospital on multiple occasions in
18 February and March and his serious spinal condition was untreated.

19 23. On May 29, 2020 he was finally taken to Desert Springs Hospital and seen by
20 neurosurgeon Yevgeniy Khavkin, M.D., who quickly realized the problem and scheduled the correct
21 T10-11 laminectomy, which occurred on June 4th.

22 24. At present, Bickham is still unable to work and walk normally and the delay of
23 approximately five months in the performance of the correct surgery at T10-11 likely has caused
24 permanent damage.

25 **FIRST CAUSE OF ACTION**

26 **(Professional Negligence/Medical Malpractice – Against All Defendants)**

27 25. Plaintiff hereby re-states and re-alleges each and every prior Paragraph of the
28 Complaint as if fully restated herein.

1 26. On December 31, 2019, Dr. Schneier performed a thoracic laminectomy for cord
2 decompression with pedicle screw fixation and onlay lateral transverse fusion with allograft
3 autograft bone fusion, intended to be performed at T10-11.

4 27. During the surgery, Dr. Schneier mistakenly performed the surgery at the T9-10 level
5 instead of the intended level of T10-T11.

6 28. During and after the surgery, Dr. Schneier breached the standard of care for a
7 physician by, without limitation:

- 8 a. Failed to use proper techniques and landmarks to identify the T10-11 levels;
- 9 b. Failed to visually distinguish the T10-11 levels from the T9-10 levels;
- 10 c. Failed to consult other physicians as to difficulties incurred;
- 11 d. Failed to inform Mr. Bickham that the incorrect procedure had been performed;
- 12 e. Misplaced a pedicle screw causing a medial breach of the spinal canal, then failed
13 to timely identify this, advise the patient and timely rectify it;
- 14 f. Failed to address the ongoing pathology at T10-11 during the second procedure.

15 29. As a result of the foregoing, Mr. Bickham's condition continued to deteriorate
16 resulting in additional procedures in order to repair the damage done by Dr. Schneier and the damage
17 caused by the delay in getting the correct surgery.

18 30. Dr. Schneier's negligent care resulted in additional pain, discomfort, additional
19 surgical procedures, hospitalizations, and medical expenses to Mr. Bickham that he otherwise would
20 not have incurred.

21 31. In support of Plaintiff's Complaint, Plaintiff submits the Declaration of Michael
22 Trainor, M.D., attached hereto as *Exhibit "1"* and incorporated in full herein by reference.

23 32. At the time of the negligence herein alleged, Dr. Schneier was the actual, apparent,
24 implied or ostensible agent of Defendant, MICHAEL SCHNEIER NEUROSURGICAL
25 CONSULTING, P.C. Therefore, that Defendant is responsible for the injuries, pain and suffering
26 of Plaintiff under the theory of respondeat superior, NRS § 41.130 and to the extent applicable NRS
27 § 42.007.

28 33. As a direct result of Defendant's negligence, Plaintiff has been damaged in an

1 amount in excess of Fifteen Thousand Dollars (\$15,000.00), which will be proven at trial.

2 34. Plaintiff has or will incur attorney's fees, costs and other expenses in prosecuting
3 these claims and seeks to recover said damages by way of this action along with all pre-judgment
4 or post-judgment interest allowed by law.

5 **SECOND CAUSE OF ACTION**

6 **(Breach of Fiduciary Duty/Fraud – Against All Defendants)**

7 35. Plaintiff hereby re-states and re-alleges each and every prior Paragraph of the
8 Complaint as if fully restated herein.

9 36. As a health care provider, Defendants are fiduciaries in relation to the Plaintiff and
10 have a duty to place the Plaintiff's interests above their own. Violation of said duty is fraud, in
11 addition to common law fraud.

12 37. Where a healthcare provider commits a breach of fiduciary duty and/or fraud, said
13 torts are separate from medical malpractice actions and are not subject to NRS Chapter 41A, or its
14 damages caps. Goldenberg v. Woodard, 130 Nev. 1181 (2014).

15 38. Among the fiduciary duties owed by a health care provider to a patient are a duty to
16 place the patient's health above the financial interests of the health care provider and to disclose
17 medical errors committed on the patient so the patient can make informed decisions and avoid
18 further injury.

19 39. The Defendants breached this fiduciary duty in at least two ways. First, on December
20 31, 2019, Dr. Schneier performed a thoracic laminectomy for decompression with pedicle screw
21 fixation, intended to be performed at the T10-11 levels. During said surgery, Dr. Schneier
22 erroneously placed a pedicle screw such that it breached the spinal canal, causing additional injury
23 and symptomology to the plaintiff. A medial breach of the spinal canal by the screw is (1) visible
24 on CT scan, (2) was confirmed by the interpreting radiologist, and (3) was recognized by plaintiff's
25 expert, Dr. Trainor. However, while Dr. Schneier performed surgery to remove the pedicle screw
26 he did not inform the plaintiff that the screw had caused him additional problems and, in fact, he
27 wrote in a report that upon exploration of the patient the medial breach did not exist. It is alleged
28 that this statement by Dr. Schneier is false and the medical record was falsified in this regard by

1 Dr. Schneier to conceal that he had injured the patient, which he never disclosed to Mr. Bickham.

2 40. Second, on December 31, 2019, Dr. Schneier performed a thoracic laminectomy for
3 decompression with pedicle screw fixation, intended to be performed at the T10-11 levels. Instead,
4 he operated at the wrong level. At least by January 23, 2020 realized that he had made a serious
5 error, that he had operated on the wrong level of Mr. Bickham's spine, and that the T10-11 level
6 had been unaddressed by the surgery and was still causing compression and damage to Plaintiff's
7 spinal cord. However, instead of disclosing his errors to his patient, Dr. Schneier sought to conceal
8 his mistake. He never told Mr. Bickham the wrong level had been operated on or that he still
9 urgently needed a surgery at T10-11, leaving Mr. Bickham to needlessly suffer and sustain
10 additional spinal cord damage.

11 41. Dr. Schneier made intentionally false or misleading statements or omissions of
12 material fact upon which the Plaintiff reasonably relied, to his detriment and causing additional
13 damages.

14 42. As a result of the foregoing, Mr. Bickham's condition continued to deteriorate
15 resulting in additional procedures in order to repair the damage done by Dr. Schneier, although the
16 damage at this point is likely permanent.

17 43. Dr. Schneier's actions resulted in additional pain, discomfort, additional surgical
18 procedures, hospitalizations, and medical expenses to Plaintiff that he otherwise would not have
19 incurred.

20 44. At the time of the acts herein alleged, Dr. Schneier was the actual, apparent, implied
21 or ostensible agent of Defendant, MICHAEL SCHNEIER NEUROSURGICAL CONSULTING,
22 P.C. Therefore, that Defendant is responsible for the injuries, pain and suffering of Plaintiff under
23 the theory of respondeat superior, NRS § 41.130 and to the extent applicable NRS § 42.007.

24 45. As a direct result of Defendant's acts, Plaintiff has been damaged in an amount in
25 excess of Fifteen Thousand Dollars (\$15,000.00), which will be proven at trial.

26 46. In addition, Dr. Schneier's actions were done with oppression, fraud or malice and
27 intent and he is subject to punitive damages. Most specifically, the Nevada Supreme Court has
28 stated that wrongful conduct which is done in reckless disregarding of its possible results or

conscious disregard for the safety and wellbeing of others warrants punitive damages.

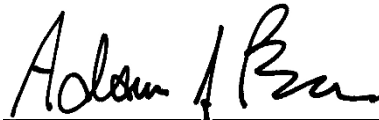
47. Plaintiff has or will incur attorney's fees, costs and other expenses in prosecuting these claims and seeks to recover said damages by way of this action along with all pre-judgment or post-judgment interest allowed by law.

WHEREFORE, Plaintiff prays for judgment against the Defendants and each of them jointly and severally as follows:

1. For special and general damages in an amount to exceed \$15,000.00;
2. For punitive damages for their acts which constitute oppression, fraud, malice, reckless disregard and/or conscious disregard for the safety and wellbeing of others;
3. For attorney's fees, expenses, and costs of suit;
4. For all pre-judgment and post-judgment interest awardable by law;
5. For such further relief as the Court may deem just and proper.

DATED this 24th day of March, 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@Breedendassociates.com
Attorneys for Plaintiff

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on the 24th day of March, 2021, I served a copy of the foregoing legal
3 document **PLAINTIFF'S FIRST AMENDED COMPLAINT** via the method indicated below:

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X	Pursuant to NRCP 5 and NEFCR 9, by electronically serving all counsel and e-mails registered to this matter on the Court's official service, Wiznet system.
	Pursuant to NRCP 5, by placing a copy in the US mail, postage pre-paid to the following counsel of record or parties in proper person: Anthony D. Lauria, Esq. LAURIA TOKUNAGA GATES & LINN, LLP 601 South 7 th Street Las Vegas, Nevada 891010 <i>Attorneys for Defendants</i>
	Via receipt of copy (proof of service to follow)

15 An Attorney or Employee of the following firm:

16 /s/ Kristy Johnson

17 **BREEDEN & ASSOCIATES, PLLC**

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EXHIBIT “1”

DECLARATION OF MICHAEL A. TRAINOR, D.O.

[illegible]

NOW COMES the Declarant, Michael Trainor, D.O., who first being sworn does testify to
the following under oath:

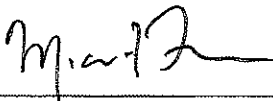
1. I am Michael Trainor. I am over 18 years old. I have personal knowledge of the facts set forth herein. I am a licensed physician and board certified by the American Osteopathic Academy of Orthopedics. I have undergone a residency in orthopedic surgery and fellowship training in orthopedic spine/neurosurgery. My medical opinions set forth herein are to a reasonable degree of medical probability. I am aware that this Declaration may be used for litigation purposes.
2. I have been asked to review the medical care of Frederick Bickham from December 2019 to present. I practice in an area of medicine, orthopedic spine surgery, which is the same or substantially similar to the subject of this Declaration, Ira Michael Schneider, M.D. I have performed hundreds of spinal surgeries and laminectomies or decompression surgeries of the spine of the kind performed by Dr. Schneider in this case.
3. By way of history, in December 2019 the patient Frederick Bickham was 49 years old. On December 26, 2019 he was admitted to Sunrise Hospital and evaluated for treatment of back pain and lower extremity pain and weakness. He was found to have severe spinal stenosis causing compression of the spinal cord at T10-11.
4. Following an earlier consultation and radiology, on December 31, 2019, Dr. Schneider performed a thoracic laminectomy intended to decompress the spinal cord at the T10-11 level.

5. During the surgery, Dr. Schneier failed to properly identify the surgical level and, in fact, operated at the wrong level of T9-10. This left the severe stenosis surgically unaddressed. To compound matters, a pedicle screw placed at left T9 (likely intended to be placed at T10) during the December 31st surgery had a medial breach of the pedicle wall.
6. After the patient continued with symptoms, a second surgery was performed by Dr. Schneier on January 23, 2020. At this time, Dr. Schneier removed the offending pedicle screw at left T9. Unfortunately, nothing was done to address the T10-11 level at the time of the January 23, 2020 surgery either. Indeed, there is no indication that Dr. Schneier ever told or admitted to the patient that the wrong level had been operated on and T10-11 was unaddressed surgically.
7. Unsurprisingly, Mr. Bickham continued to struggle after the January 23rd surgery. He sought Emergency Room evaluation on multiple occasions. His pathology at T10-11 continued to be unaddressed until a consultation with Dr. Yevgeniy Khavkin on May 30, 2020. A few days later, Dr. Khavkin performed a laminectomy at the correct T10-11, as Dr. Schneier should have done on December 31st, but by that time five months of additional compression on the spinal cord had occurred.
8. It is my opinion to a reasonable degree of medical probability that the care administered by Dr. Schneier fell below the standard of care in at least the following ways:
 - a. Failing to perform the December 31st surgery at the proper T10-11 level and instead performing surgery at the wrong level;
 - b. Failing to earlier recognize, alert the patient and appropriately address the misplacement and medial breach of a pedicle screw at T9 during the December 31st surgery. Although Dr. Schneier indicates that there was no evidence of breach by

ball tip palpation, radiology clearly shows a significant breach which more likely than not contributed to the patient's symptoms;

- c. Failing to address the T10-11 level during the January 23rd surgery;
 - d. Failing to address the T10-11 level despite numerous post-operation ER visits and continued complaints of pain and limitations by the patient;
 - e. Failing to disclose to the patient that the wrong level was operated on (T9-10 versus the intended T10-11 level).
9. I do believe that the repeated failure to surgically address the stenosis at T10-11 by Dr. Schneier led to additional damage to the spinal cord and has impaired or even prevented Mr. Bickham's recovery.

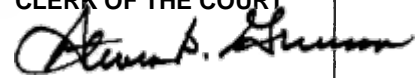
I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.



Michael A. Trainor, D.O.

12/28/20

Date



[MTD]

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Attorneys for Defendants,
Ira Michael Schneier, M.D. and
Michael Schneier Neurosurgical Consulting, P.C.

DISTRICT COURT
CLARK COUNTY, NEVADA

FREDERICK BICKHAM, individually,

Plaintiff,

vs.

IRA MICHAEL SCHNEIER, M.D., an
individual; MICHAEL SCHNEIER
NEUROSURGICAL CONSULTING, P.C., a
Nevada professional corporation; IMS
NEUROSURGICAL SPECIALISTS LLC, a
Nevada limited liability company; and DOES I
through X; and ROE CORPORATIONS I
through X, inclusive,

Defendants.

CASE NO. A20-827155-C
DEPT. NO. XXII

HEARING REQUESTED

**DEFENDANTS IRA MICHAEL
SCHNEIER, M.D. AND MICHAEL
SCHNEIER NEUROSURGICAL
CONSULTING, P.C.'S MOTION TO
DISMISS CERTAIN CAUSES OF
ACTION OF PLAINTIFF'S FIRST
AMENDED COMPLAINT**

COME NOW, Defendants, Ira Michael Schneier, M.D. and Michael Schneier Neurosurgical Consulting, P.C., a Nevada professional corporation, by and through their attorney of record, Anthony

DEFENDANTS IRA MICHAEL SCHNEIER, M.D. AND MICHAEL SCHNEIER NEUROSURGICAL CONSULTING, P.C.'S
MOTION TO DISMISS CERTAIN CAUSES OF ACTION OF PLAINTIFF'S FIRST AMENDED COMPLAINT

1 D. Lauria, Esq. of the law firm Lauria Tokunaga Gates & Linn, LLP, and hereby file this Motion to
2 Dismiss Certain Causes of Action of Plaintiff's First Amended Complaint.

3 This Motion is made and based upon the pleadings and papers on file herein, the attached
4 Memorandum of Points and Authorities, and any argument the Court may entertain at the hearing of
5 this matter.

6 DATED: 4/6/2021

LAURIA TOKUNAGA GATES & LINN, LLP

7 /s/ Anthony D. Lauria

8 By: _____

9 Anthony D. Lauria, Esq.
10 Nevada Bar No.: 4114
11 601 South Seventh Street
12 Las Vegas, NV 89101
13 Attorney for Defendants,
14 Ira Michael Schneier, M.D. and Michael
15 Schneier Neurosurgical Consulting, P.C.

16 **MEMORANDUM OF POINTS AND AUTHORITIES**

17 **I**

18 **INTRODUCTION AND BACKGROUND**

19 On December 30, 2020, Plaintiff Frederick Bickham filed a Complaint in the Eighth Judicial
20 District Court which arises entirely from medical care and treatment provided by Dr. Ira Michael
21 Schneier, a Physician. This treatment of Mr. Bickham consisted of two surgical procedures on the
22 thoracic spine. Plaintiff essentially contends that on December 31, 2019 Dr. Schneier improperly
23 performed thoracic laminectomy, failed to recognize the surgery was performed at the wrong level, and
24 failed to address the correct level during a second procedure on January 23, 2020 to remove a pedicle
25 screw. (Now set forth in First Amended Complaint at ¶'s 16 to 21)

26 Defendants moved to dismiss improper claims for "Breach of Contract", "Battery", "Breach of
27 Fiduciary Duty/Fraud", and "Neglect of Vulnerable Person" pursuant to NRS §41.1395 raised in the
28 initial Complaint. The Motion was granted as to the Contract, Battery and Neglect causes of action.
The Court further granted a Motion for More Definite Statement as to the "Breach of Fiduciary
Duty/Fraud" cause of action. Plaintiff has now filed his First Amended Complaint. Unfortunately,

1 Plaintiff has still failed to meet the requirements of Nevada Law regarding the specificity required in
2 pleading a valid cause of action for fraud against Defendants and, therefore, dismissal is warranted.
3 Defendants respectfully submit that the Court should dismiss the Second Cause of Action for Fraud at
4 this time with the proviso that Plaintiff may seek Leave to Amend to add such a claim in the future if
5 the evidence during discovery supports such a claim.

6 II 7 ARGUMENT

8 Nevada Rule of Civil Procedure 12(b)(5) provides for dismissal of a cause of action for the
9 “failure to state a claim upon which relief can be granted.” A motion to dismiss tests the legal
10 sufficiency of the claim set out against the moving party. (See *Zalk-Josephs Co. v. Wells-Cargo, Inc.*,
11 81 Nev. 163, 400 P.2d 621 (1965).) Dismissal is appropriate where a Plaintiff’s allegations “are
12 insufficient to establish the elements of a claim for relief.” (*Hampe v. Foote*, 118 Nev. 405, 408, 47
13 P.3d 438, 439 (2002), overruled in part on other grounds by *Buzz Stew, LLC v. City of N. Las Vegas*,
14 124 Nev. 224, 228, 181 P. 3d 670, 672 (2008).)

15 Thus, to survive dismissal under NRCP 12(b)(5), each separate cause of action of a complaint
16 must contain “facts, which if true, would entitle the plaintiff to relief.” (*Id.*) Hence, in analyzing the
17 validity of a claim the court is to accept a plaintiff’s factual allegations “as true and draw all inference
18 in the Plaintiff’s favor.” (*Id.*) Nevertheless, the court is not bound to accept as true a plaintiff’s legal
19 conclusions, and “[t]hreadbare recitals of the elements of a cause of action, supported by mere
20 conclusory statements, do not suffice.” (*Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937 (2009)
21 (analyzing the federal counterpart to NRCP 12(b)(5)).) Moreover, the court may not take into
22 consideration matters outside of the pleading being attacked. (*Breliant v. Preferred Equities Corp.*,
23 109 Nev. 842, 847, 858 P.2d 1258, 1261 (1993).)

24 Rule 9(b) of the Nevada Rules of Civil Procedure provides:

25
26 **“Fraud or Mistake; Conditions of Mind.** In alleging fraud or mistake, a party must state
27 with particularity the circumstances constituting fraud or mistake. Malice, intent,
28 knowledge, and other conditions of a person’s mind may be alleged generally.”

1 The necessary elements to establish a claim for fraud are as follows:

2 “Under Nevada law, [Plaintiff] has the burden of proving each and every element of his
3 fraudulent misrepresentation claim by clear and convincing evidence: (1) A false
4 representation made by the defendant; (2) defendant's knowledge or belief that its
5 representation was false or that defendant has an insufficient basis of information for
6 making the representation; (3) defendant intended to induce plaintiff to act or refrain
7 from acting upon the misrepresentation; and (4) damage to the plaintiff as a result of
8 relying on the misrepresentation.” (*Barmettler v. Reno Air, Inc.*, 114 Nev. 441, 446-47,
956 P.2d 1382, 1386 (1998))

8 Plaintiff's First Amended Complaint fails to meet the specificity of pleading a claim for Fraud
9 as required by Rule 9(b). The First Amended Complaint alleges that Dr. Schneier removed a pedicle
10 screw which Plaintiff contends had breached the canal but Dr. Schneier did not write this in his
11 Operative Report. (FAC at p. 6:19-7:1 at ¶39.) What the Plaintiff does not allege are the essential
12 elements that he read the Operative Report, that he relied upon the Operative Report, or that his
13 reliance caused him damage. The First Amended Complaint alleges absolutely no reliance or damage
14 from the Operative Report or not being told that an alleged pedicle screw breach had been found.
15 Thus, essential elements are patently missing from this claim. (See *Epperson v. Roloff*, 102 Nev. 206,
16 210-11, 719 P.2d 799, 802 (1986).)

17 The only other contention on which the Fraud claim is premised is in ¶40 in which Plaintiff
18 alleges that Dr. Schneier never told Plaintiff that he operated at the wrong level but the First Amended
19 Complaint does not allege what, if anything, Plaintiff was told about his surgery, what was false or
20 misleading, or how Plaintiff purportedly relied to his detriment. No times or dates of communications
21 between Plaintiff and Dr. Schneier are alleged. Rule 9(f) provides that allegations of “time and place”
22 are material when testing the sufficiency of a pleading. ¶41 alleges that: “Dr. Schneier made
23 “intentionally false or misleading statements or omissions of material fact upon which Plaintiff
24 reasonably relied. . .” but fails to identify the false or misleading statement, when they were supposedly
25 made, precisely what was said, and how Plaintiff relied on what was said. In fact, there is no factual
26 specificity. It has been held that:

27 “In actions involving fraud, the circumstances of the fraud are required by NRCP 9(b)
28 to be stated with particularity. The circumstances must be detailed including averments

1 to the time, the place, the identity of the parties involved, and the nature of the fraud or
2 mistake.” (*Brown v. Kellar* (1981) 97 Nev. 582, 636 P.2d 874)

3 Further,

4 “A pleading that offers “labels and conclusions” or “a formulaic recitation of the
5 elements of a cause of action will not do.” (citation). Nor does a complaint suffice if it
6 tenders “naked assertion[s]” devoid of “further factual enhancement.” (*Ashcroft v.*
7 *Iqbal*, 556 U.S. 662 at 678, citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556, 127 S.
8 Ct. 1955, 1965, 167 L. Ed. 2d 929 (2007).)

9 Here, there are insufficient factual allegations of the essential elements of the claim for Fraud.

10 “A plaintiff must make sufficient factual allegations to establish a plausible entitlement
11 to relief. (citation). Such allegations must amount to “more than labels and conclusions,
12 [or] a formulaic recitation of the elements of a cause of action.” (citation omitted)
13 (*Hafter v. Clark*, 992 F. Supp. 2d 1063, 1068 (D. Nev. 2014).)

14 Defendants respectfully submit that the Motion to Dismiss as to this Fraud cause of action should be
15 granted. In the event that discovery produces any actual evidence to support a potential cause of action
16 for Fraud, Plaintiff can move the Court for Leave to Amend to add such a claim. Based upon the
17 allegations of the First Amended Complaint, however, no valid claim has been stated and Plaintiff has
18 not met the statutory requirements of Rule 9(b).

19 **III**
20 **CONCLUSION**

21 For the foregoing reasons and based upon the authorities cited herein, Defendants respectfully
22 requests that the Court Dismiss the Second Cause of Action of Plaintiff’s First Amended Complaint for
23 failure to state a claim upon which relief can be granted.

24 DATED: 4/6/2021

25 LAURIA TOKUNAGA GATES & LINN, LLP

26 /s/ Anthony D. Lauria

27 By: _____

28 Anthony D. Lauria, Esq.
Nevada Bar No.: 4114
601 South Seventh Street
Las Vegas, NV 89101
Attorney for Defendants,
Ira Michael Schneier, M.D. and Michael
Schneier Neurosurgical Consulting, P.C.

CERTIFICATE OF SERVICE

Pursuant to N.R.C.P. 5(b), I certify that I am an employee of Lauria Tokunaga Gates & Linn, and that on this 6TH day of April, 2021, I served a true and correct copy of the foregoing **DEFENDANTS IRA MICHAEL SCHNEIER, M.D. AND MICHAEL SCHNEIER NUEROSURGICAL CONSULTING, P.C.'S MOTION TO DISMISS CERTAIN CAUSES OF ACTION OF PLAINTIFF'S FIRST AMENDED COMPLAINT:**

☐ By placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepared in Las Vegas, Nevada; and/or

☒ By mandatory electronic service (e-service), proof of e-service attached to any copy filed with the Court; and/or

☐ By facsimile, pursuant to EDCR 7.26 (as amended); and/or

☐ By personal service

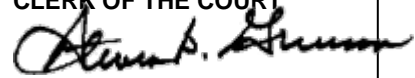
as follows:

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Marija Perez

An employee of Lauria Tokunaga
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8 Fax: (702) 819-7771
9 Adam@Breedendandassociates.com
10 *Attorneys for Plaintiff*

7 **EIGHTH JUDICIAL DISTRICT COURT**

8 **CLARK COUNTY, NEVADA**

9 FREDERICK BICKHAM, an individual,

10 Plaintiff,

11 v.

12 IRA MICHAEL SCHNEIER, M.D., an
13 individual; MICHAEL SCHNEIER
14 NEUROSURGICAL CONSULTING, P.C., a
15 Nevada professional corporation; IMS
16 NEUROSURGICAL SPECIALISTS LLC, a
17 Nevada limited liability company; and DOES I
18 through X; and ROE CORPORATIONS I
19 through X, inclusive,

20 Defendants.

CASE NO. A-20-827155-C

DEPT NO. XXII

**PLAINTIFF'S OPPOSITION TO
DEFENDANTS IRA MICHAEL
SCHNEIER, M.D. AND MICHAEL
SCHNEIER NEUROSURGICAL
CONSULTING, P.C.'S SECOND
PARTIAL MOTION TO DISMISS**

Date of Hearing: May 18, 2021

Time of Hearing: 8:30 a.m.

20 Plaintiff, FREDERICK BICKHAM, through his counsel, Adam J. Breeden, Esq. of
21 BREEDEN & ASSOCIATES, PLLC, hereby files the following Opposition to *Defendants Ira*
22 *Michael Schneir, M.D. and Michael Schneier Neurosurgical Consulting, P.C.'s [Second] Motion to*
23 *Dismiss Certain Causes of Action of Plaintiff's Complaint.*

24 **I. INTRODUCTION**

25 The Court previously heard this matter and granted Defendant Dr. Schneier's motion to
26 dismiss certain causes of action alleged in the complaint, which included breach of contract, battery
27 and neglect of a vulnerable person. This left causes of action in the *First Amended Complaint* for
28 medical malpractice and breach of fiduciary duty. At the prior hearing, the Court did not explain

000422

1 any pleading deficiencies in the breach of fiduciary duty cause of action but nevertheless indicated
2 the Defense's motion to dismiss that cause of action would be denied without prejudice with leave
3 for Plaintiff to re-plead the cause of action. Plaintiff did so, and the Defendant again moved to
4 dismiss on identical arguments.

5 **II. BACKGROUND**

6 In this personal injury action, Plaintiff Frederick Bickham sues his physician following
7 spinal surgery performed on December 31, 2019 and January 23, 2020. During the surgery,
8 Defendant Dr. Schneier **operated on the wrong level of Mr. Bickham's spine** and failed to correct
9 the serious stenosis at the actual level, causing Mr. Bickham's condition to worsen with additional
10 spinal cord damage. Worse yet, Dr. Schneier failed to tell Mr. Bickham this after he discovered his
11 errors.

12 As alleged in the First Amended Complaint, Frederick Bickham is a 50-year-old man,
13 married with four children and residing in Las Vegas, Nevada. Prior to the events in this case, he
14 previously worked as a custodian and chef.¹ In late 2019, Mr. Bickham developed symptoms of
15 extreme pain in the back with difficulty walking. He presented to Sunrise Hospital on December
16 26, 2019.² Following completion of a dedicated thoracic MRI scan with scout images, a diagnosis
17 was made of thoracic myelomalacia myelopathy (injury to and softening of the spinal cord) with
18 severe stenosis at the T10-11 level. While 12-14 mm in diameter is typical for the measurement of
19 an adult's thoracic spinal canal, Mr. Bickham's stenosis was as little as 5 mm.³ The stenosis and
20 compression on the spinal cord was so severe and risk of worsening of the condition was so high
21 that surgery was urgently necessary.⁴

22 December 31, 2019, Defendant Dr. Schneier performed a thoracic laminectomy for cord
23 decompression with pedicle screw fixation and onlay lateral transverse fusion with allograft
24

25 ¹ See Plaintiff's First Amended Complaint at ¶ 12.

26 ² See Plaintiff's First Amended Complaint at ¶ 13.

27 ³ See Plaintiff's First Amended Complaint at ¶ 14.

28 ⁴ See Plaintiff's First Amended Complaint at ¶ 15.

1 autograft bone fusion, intended to be performed at T10-11.⁵ In layman's terms, this means that part
2 of Mr. Bickham's vertebral bone was to be removed to relieve the pressure on his spinal cord,
3 followed by placement of hardware and bone grafts.⁶

4 Apparently unknown intraoperatively, **Dr. Schneier performed the surgery on the**
5 **incorrect level, T9-10.** Also, during the December 31st surgery, Dr. Schneier misplaced a pedicle
6 screw which caused a medial breach of the spinal canal and likely additional pressure or contact
7 with the spinal cord, worsening the patient's condition.⁷

8 On January 22, 2020, Mr. Bickham, still in pain following the prior surgery which ignored
9 the level of the severe stenosis, returned to Sunrise Hospital.⁸ A thoracic CT scan was conducted
10 and indicated left-sided pedicle screw instrumentation at the T9-10 level with an apparent fifty
11 percent (50%) medial breach of the left T9 pedicle screw.⁹ On January 23, 2020, Dr. Schneier
12 performed a second surgery and removed the hardware at T9. However, Dr. Schneier made no effort
13 to address the ongoing pathology at the T10-11 level and still did not inform Mr. Bickham that the
14 initial surgery was performed at the incorrect level and he still needed an operation on T10-11,
15 which he must have realized by that time.¹⁰

16 Left to his own accord with the laminectomy at the incorrect thoracic level but with severe
17 stenosis on the spinal cord at T10-11 as little as 5 mm, Mr. Bickham's condition continued to
18 deteriorate. He went to the Emergency Room at Sunrise Hospital on multiple occasions in February
19 and March and his serious spinal condition was untreated.¹¹ On May 29, 2020, he was finally taken
20 to Desert Springs Hospital and seen by neurosurgeon Yevgeniy Khavkin, M.D., who quickly
21

22 _____
23 ⁵ See Plaintiff's First Amended Complaint at ¶ 16.

24 ⁶ See Plaintiff's First Amended Complaint at ¶ 17.

25 ⁷ See Plaintiff's First Amended Complaint at ¶ 18.

26 ⁸ See Plaintiff's First Amended Complaint at ¶ 19.

27 ⁹ See Plaintiff's First Amended Complaint at ¶ 20.

28 ¹⁰ See Plaintiff's First Amended Complaint at ¶ 21.

¹¹ See Plaintiff's First Amended Complaint at ¶ 22.

1 realized the problem and scheduled the correct T10-11 laminectomy, which occurred on June 4th.¹²
2 At present, Bickham is still unable to work and walk normally and the delay of approximately five
3 months in the performance of the correct surgery at T10-11 likely has caused permanent damage.¹³

4 The Complaint alleges five causes of action: (1) Professional Negligence/Medical
5 Malpractice, (2) Breach of Contract, (3) Battery, (4) Breach of Fiduciary Duty and (5) Neglect of a
6 Vulnerable Person/Breach of NRS § 41.1395. Defendants seek to dismiss all causes of action except
7 that of medical malpractice. The Court previously dismissed the causes of action for (2) Breach of
8 Contract, (3) Battery and (5) Neglect of a Vulnerable Person/Breach of NRS § 41.1395. A First
9 Amended Complaint was filed on March 24, 2021 and the Defense filed a second or renewed Motion
10 to Dismiss as to the re-pleaded cause of action for Breach of Fiduciary Duty.

11 Despite the Defense's assertion, it is plainly *not* the law of Nevada that all causes of action
12 against a doctor or health care provider cease to exist except for medical malpractice. This has never
13 been the law. Instead, other causes of action survive but must comply with the statute of limitations
14 and supporting affidavit requirements of NRS § 41A.097. Since Plaintiff's Complaint plainly
15 satisfies both of those requirements, the *Motion to Dismiss* should be denied. A breach of fiduciary
16 duty cause of action has been validly pleaded.

17 **III. LEGAL STANDARD FOR MOTIONS TO DISMISS**
18 **FOR FAILURE TO STATE A CLAIM**

19 As this Court is well aware, getting a court to grant a Motion to Dismiss for failure to state
20 a claim is a high burden in Nevada. "The standard of review for a dismissal under NRCP 12 (b)(5)
21 is rigorous" and the court "must construe the pleading liberally and draw every fair inference in
22 favor of the nonmoving party."¹⁴ In ruling on a Motion to Dismiss, the District Court must
23 "recognize all factual allegations in [plaintiff's] complaint as true and draw all inferences in its
24

25 ¹² See Plaintiff's First Amended Complaint at ¶ 23.

26 ¹³ See Plaintiff's First Amended Complaint at ¶ 24.

27 ¹⁴ *Simpson v. Mars Inc.*, 113 Nev. 188, 190 (Nev. 1997) (describing the legal standard for a NRCP
28 12(b)(5) motion to dismiss).

1 favor.”¹⁵ After assuming all the factual allegations are true, the Complaint “should be dismissed
2 only if it appears beyond a doubt that it could prove no set of facts, which, if true, would entitle it
3 to relief.”¹⁶

4 Notably, Nevada has not even adopted the more relaxed federal “plausibility” standard for
5 assessing failure to state a claim motions but rather has continued to abide by the foregoing, plaintiff-
6 friendly and relaxed pleading standard for decades.¹⁷ While often filed, motions to dismiss for
7 failure to state a claim rarely survive this high burden and more often serve to stall a case by a
8 defendant than assert a genuine defense at the pleading stage.

9 IV. LAW AND ARGUMENT

10 A. **No Causes of Action can be Dismissed under the *Turner* and *Szymborski* Line of Cases 11 for the “Gravamen” of the Action being Professional Negligence because the Medical 12 Expert Affidavit Requirement and NRS Chapter 41 Statute of Limitations have been 13 Satisfied.**

14 The Nevada Supreme Court determined in *Turner v. Renown Reg’l Med. Center* that where
15 the “gravamen” of a cause of action is medical malpractice, it is subject to the medical malpractice
16 statute of limitations set forth in NRS § 41A.097.¹⁸ The “gravamen” of the action is for medical
17 malpractice when a cause of action “involve[s] medical diagnosis, judgment, or treatment”¹⁹ In
18 addition to such an action having to be filed within the medical malpractice statute of limitations
19 under *Turner*, the complaint must also be supported by a medical expert affidavit under *Szymborski*

20 ¹⁵ *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228 (2008); *Vacation Village v. Hitachi*
21 *Am.*, 110 Nev. 481, 484 (Nev. 1994) (same, “[a] complaint will not be dismissed for failure to state
22 a claim unless it appears beyond a doubt that the plaintiff could prove no set of facts which, if
accepted by the trier of fact, would entitle him [or her] to relief.”).

23 ¹⁶ *Id.*

24 ¹⁷ *Dezzani v. Kern & Assocs.*, 412 P.3d 56, 64 (Nev. 2018) (“Nevada has not adopted the federal
25 ‘plausibility’ standard for assessing a complaint’s sufficiency.”) *citing* *Ashcroft v. Iqbal*, 556 U.S.
662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570,
127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007).

26 ¹⁸ *E.g., Turner v. Renown Reg’l Med. Ctr.*, 461 P.3d 163 (Nev. 2020) (upholding dismissal of various
27 causes of action sounding in medical malpractice by applying the one-year statute of limitations in
NRS § 41A.097(2)).

28 ¹⁹ *Szymborski v. Spring Mt. Treatment Ctr.*, 403 P.3d 1280 (Nev. 2017).

1 v. *Spring Mt. Treatment Ctr.*²⁰ pursuant to NRS § 41A.071.

2 Together, the *Turner* and *Szymborski* decisions act as a gatekeeper to keep untimely medical
3 malpractice cases or medical malpractice cases that could not be supported by an expert
4 masquerading as other causes or action out of court. The policy behind this rule is likely well-
5 founded, i.e. that the medical malpractice statute of limitations scheme in Chapter 41A would be
6 rendered useless if a plaintiff could simply plead substitute causes of action to evade it. Thus, if the
7 “gravamen” of the action is medical malpractice, the medical malpractice statute of limitations and
8 supporting expert affidavit requirements in Chapter 41A apply to that cause of action. **However,**
9 **the effect of an alternative cause of action having the “gravamen” of medical malpractice is**
10 **not immediate dismissal for failure to state a claim, only that the cause of action must satisfy**
11 **the expert affidavit and statute of limitations in Chapter 41A.**

12 The Plaintiff and his counsel are well-aware of *Turner*, *Szymborski* and similar Nevada
13 Supreme Court rulings and, therefore, filed all causes of action within one year of the injury under
14 NRS § 41A.097 and attached a supporting medical expert declaration to the Complaint under NRS
15 § 41A.071. The Complaint attaches an affidavit from expert physician and spinal surgeon Michael
16 Trainor, M.D. attesting to violations of the standard of care by the Defendants.²¹ The First Amended
17 Complaint itself also plainly alleges that “[w]ithout conceding that all or part of this action is an
18 action for professional negligence as defined by NRS § 41A.015, to the extent any allegations in
19 this Complaint need supported by a physician affidavit/declaration as to the standard of care, the
20 Declaration of Michael Trainor, M.D., a physician in the same or substantially similar area of
21 practice as the Defendants, is attached as Exhibit “1” to this Complaint.”²² Therefore, it is fruitless
22 for the Defense to seek dismissal of any action under those statutes or cases because the Plaintiff
23 has complied with them.

24
25
26 ²⁰ *Szymborski v. Spring Mt. Treatment Ctr.*, 403 P.3d 1280 (Nev. 2017).

27 ²¹ See Plaintiff’s First Amended Complaint (attached hereto as **Exhibit “1”** as well to the present
Opposition).

28 ²² See Plaintiff’s First Amended Complaint at ¶ 10.

1 With his Motion, Dr. Schneier seems to urge a much stronger reading of *Turner* and
2 *Szymborski*²³ that requires all causes of action relating to “medical diagnosis, judgment, or
3 treatment” *other than* medical malpractice to be dismissed for failure to state a claim, even if the
4 Complaint is filed within the one-year statute of limitation and attaches a supporting expert affidavit.
5 This is an improper reading of *Turner* and *Szymborski*. The Nevada Supreme Court has never held
6 that all causes of action against a doctor are abolished except medical malpractice and nowhere in
7 NRS Chapter 41A did the legislature state its intent to do so. Similarly, NRS Chapter 41A contains
8 no exclusive remedy provisions.²⁴ Therefore, even if alternate causes of action depend on the
9 “medical diagnosis, judgment, or treatment” of the Defendants, Plaintiff’s cause of action for Breach
10 of Fiduciary Duty is a valid cause of action and should not be dismissed.

11 Indeed, the Nevada Supreme Court already found that a claimant may plead a cause of action
12 against a doctor for both professional negligence and another cause of action. In *Egan v. Chambers*²⁵
13 the court discussed a breach of contract claim filed against a physician along with a medical
14 malpractice action. In *Goldenberg v. Woodard*²⁶ a fraud claim in addition to a medical malpractice
15 action was permitted. In *Johnson v. Egtedar*²⁷ a battery and medical malpractice action were
16 permitted. And lastly in *Estate of Curtis v. S. Las Vegas Med. Inv’rs, LLC*²⁸ the court discussed an
17

18 ²³ *Szymborski v. Spring Mt. Treatment Ctr.*, 403 P.3d 1280 (Nev. 2017) (actions sounding in medical
19 malpractice must attach a supporting physician affidavit).

20 ²⁴ Compare to NRS § 616A.020 (worker’s compensation actions are the exclusive remedy for
injured workers against their employer).

21 ²⁵ *Egan v. Chambers*, 129 Nev. 239, 241 n.2 (2013) (discussing a malpractice and breach of contract
22 action against a physician).

23 ²⁶ *Goldenberg v. Woodard*, 130 Nev. 1181 (2014) (permitting a fraud and malpractice action against
a physician); see also *Parminder Kang v. Eighth Judicial Dist. Court of Nev.*, 460 P.3d 18 (Nev.
24 2020) (refusing writ relief where breach of contract and fraud claims against doctor were presented
along with medical malpractice).

25 ²⁷ *Johnson v. Egtedar*, 112 Nev. 428, 430 (1996) (discussing a battery and malpractice action against
a physician).

26 ²⁸ *Estate of Curtis v. S. Las Vegas Med. Inv’rs, LLC*, 466 P.3d 1263, 1270 n.5 (Nev. 2020)
27 (discussing both an abuse/neglect cause of action under NRS § 41.1395 and ordinary negligence
claims as separate from a malpractice claim). Ultimately this cause of action was dismissed in the
28

1 elder abuse cause of action for violation of NRS § 41.1395 accompanying a medical malpractice
2 case. In fact, the Nevada Supreme Court has recognized that not only are alternate causes of action
3 not subsumed into professional negligence, if they can be established those causes of action, such
4 as intentional fraud during treatment, are not subject to the malpractice caps of NRS Chapter 41A.

5 There is simply no legal authority that all causes of action that might be brought against a
6 physician are “subsumed” into NRS Chapter 41A. Indeed, both common sense and numerous
7 Nevada Supreme Court cases state otherwise. Plaintiff’s causes of action should not be dismissed.

8 **B. The Second (Breach of Fiduciary Duty) Cause of Action is Adequately Plead and**
9 **should not be Dismissed at the Pleading Stage.**

10 In Nevada, NRCP 8 governs the general rules of pleading. NRCP 8(a) requires that a
11 complaint “contain a short and plain statement of the claim showing that the pleader is entitled to
12 relief.”²⁹ A complaint need only “set forth sufficient facts to establish all necessary elements of a
13 claim for relief so that the adverse party has adequate notice of the nature of the claim and relief
14 sought.”³⁰ The pleading of a conclusion, either of law or fact, is sufficient so long as the pleading
15 gives fair notice of the nature and basis of the claim.³¹ “Because Nevada is a notice-pleading
16 jurisdiction, [its] courts liberally construe pleadings to place into issue matters which are fairly
17 noticed to the adverse party.”³² Additionally, a Plaintiff is free to plead alternative causes of action.
18 NRCP 8(a)&(e) states that “[r]elief in the alternative or of several different types may be
19 demanded,” “[a] party may set forth two or more statements of a claim or defense alternately or
20 hypothetically” and “[a] party may also state as many separate claims or defenses as the party has

21 _____
22 *Estate of Curtis* case, but only because a medical expert affidavit had not been attached to the
23 Complaint. Plaintiff’s case remedies that issue and attached such a declaration.

24 ²⁹ NRCP 8(a); see also *Crucil v. Carson City*, 95 Nev. 583, 585, 600 P.2d 216, 217 (1979) (quoting
NRCP 8(a)).

25 ³⁰ *Hay v. Hay*, 100 Nev. 196, 198, 678 P.2d 672, 674 (1984) (internal citations omitted).

26 ³¹ *Crucil v. Carson City*, 95 Nev. 583, 585 600 P.2d 216 (1979) (citing *Taylor v. State and Univ.*,
73 Nev. 151, 152, 311 P.2d 733, 734 (1957)).

27 ³² *Hay*, 100 Nev. at 198, 678 P.2d at 674 (citing *Chavez v. Robberson Steel Co.*, 94 Nev. 597, 599,
28 584 P.2d 159, 160 (1978)).

1 regardless of consistency and whether based on legal or on equitable grounds or on both.” With this
2 explanation, Plaintiff now turns to the cause of action for breach of fiduciary duty in the First
3 Amended Complaint.

4 The First Amended Complaint alleges the following regarding breach of fiduciary duty:

5 36. As a health care provider, Defendants are fiduciaries in relation to
6 the Plaintiff and have a duty to place the Plaintiff’s interests above their own.
Violation of said duty is fraud, in addition to common law fraud.

7 37. Where a healthcare provider commits a breach of fiduciary duty
8 and/or fraud, said torts are separate from medical malpractice actions and are not
9 subject to NRS Chapter 41A, or its damages caps. Goldenberg v. Woodard, 130
Nev. 1181 (2014).

10 38. Among the fiduciary duties owed by a health care provider to a
11 patient are a duty to place the patient’s health above the financial interests of the
health care provider and to disclose medical errors committed on the patient so the
patient can make informed decisions and avoid further injury.

12 39. The Defendants breached this fiduciary duty in at least two ways.
13 First, on December 31, 2019, Dr. Schneier performed a thoracic laminectomy for
14 decompression with pedicle screw fixation, intended to be performed at the T10-11
15 levels. During said surgery, Dr. Schneier erroneously placed a pedicle screw such
16 that it breached the spinal canal, causing additional injury and symptomology to the
17 plaintiff. A medial breach of the spinal canal by the screw is (1) visible on CT scan,
18 (2) was confirmed by the interpreting radiologist, and (3) was recognized by
19 plaintiff’s expert, Dr. Trainor. However, while Dr. Schneier performed surgery to
remove the pedicle screw he did not inform the plaintiff that the screw had caused
him additional problems and, in fact, he wrote in a report that upon exploration of
the patient the medial breach did not exist. It is alleged that this statement by Dr.
Schneier is false and the medical record was falsified in this regard by Dr. Schneier
to conceal that he had injured the patient, which he never disclosed to Mr. Bickham.

20 40. Second, on December 31, 2019, Dr. Schneier performed a thoracic
21 laminectomy for decompression with pedicle screw fixation, intended to be
22 performed at the T10-11 levels. Instead, he operated at the wrong level. At least
23 by January 23, 2020 realized that he had made a serious error, that he had operated
24 on the wrong level of Mr. Bickham’s spine, and that the T10-11 level had been
unaddressed by the surgery and was still causing compression and damage to
Plaintiff’s spinal cord. However, instead of disclosing his errors to his patient, Dr.
Schneier sought to conceal his mistake. He never told Mr. Bickham the wrong
level had been operated on or that he still urgently needed a surgery at T10-11,
25 leaving Mr. Bickham to needlessly suffer and sustain additional spinal cord
26 damage.

27 41. Dr. Schneier made intentionally false or misleading statements or
28 omissions of material fact upon which the Plaintiff reasonably relied, to his
detriment and causing additional damages.

1 42. As a result of the foregoing, Mr. Bickham's condition continued to
2 deteriorate resulting in additional procedures in order to repair the damage done by
Dr. Schneier, although the damage at this point is likely permanent.

3 43. Dr. Schneier's actions resulted in additional pain, discomfort,
4 additional surgical procedures, hospitalizations, and medical expenses to Plaintiff
that he otherwise would not have incurred.

5 44. At the time of the acts herein alleged, Dr. Schneier was the actual,
6 apparent, implied or ostensible agent of Defendant, MICHAEL SCHNEIER
7 NEUROSURGICAL CONSULTING, P.C. Therefore, that Defendant is
responsible for the injuries, pain and suffering of Plaintiff under the theory of
respondeat superior, NRS § 41.130 and to the extent applicable NRS § 42.007.

8 45. As a direct result of Defendant's acts, Plaintiff has been damaged in
9 an amount in excess of Fifteen Thousand Dollars (\$15,000.00), which will be
proven at trial.

10 46. In addition, Dr. Schneier's actions were done with oppression, fraud
11 or malice and intent and he is subject to punitive damages. Most specifically, the
12 Nevada Supreme Court has stated that wrongful conduct which is done in reckless
disregarding of its possible results or conscious disregard for the safety and
wellbeing of others warrants punitive damages.

13 47. Plaintiff has or will incur attorney's fees, costs and other expenses
14 in prosecuting these claims and seeks to recover said damages by way of this action
15 along with all pre-judgment or post-judgment interest allowed by law.

16 Plaintiff's Second Cause of Action is one for Breach of Fiduciary Duty. This case presents
17 two troubling facts in the doctor/patient relationship between Dr. Schneier and Mr. Bickham. The
18 first is that Dr. Schneier plainly operated on the wrong level of Mr. Bickham's spine *yet when he*
19 *realized that error he did not disclose it to Mr. Bickham*, leaving Mr. Bickham to sustain further
20 spinal cord damage from the severe stenosis he had. The second is that during the original surgery,
21 Dr. Schneier misplaced a pedicle screw causing a medial breach of the spinal canal. Although
22 Dr. Schneier operated to remove the screw and radiology clearly shows the screw breached the
23 spinal canal, it is alleged that Dr. Schneier falsified his medical report to indicate that upon operating
24 on the patient no medical breach of the screw was found. This statement in the records is plainly
25 false as the breach is visible on radiology and was even identified by the radiologist. Again, it seems
26 that Dr. Schneier did not want to reveal to his patient the errors he had made during surgery out of
27 his own self-interest.

28 The Nevada Supreme Court first recognized that the relationship between patient and doctor

1 is a fiduciary relationship in a psychiatry case, *Massey v. Litton*.³³ Several years later in *Hoopes v.*
2 *Hammargren*³⁴ the Supreme Court clarified that the “fiduciary relationship and the position of trust
3 occupied by *all* physicians demands that the standard apply to all physicians,”³⁵ in that case a
4 neurosurgeon, exactly like Dr. Schneier. The Nevada Supreme Court explained in *Hoopes* that:

5 [a] fiduciary relationship is deemed to exist when one party is bound to act
6 for the benefit of the other party. Such a relationship imposes a duty of
7 utmost good faith. The essence of a fiduciary or confidential relationship is
8 that the parties do not deal on equal terms, since the person in whom trust
9 and confidence is reposed and who accepts that trust and confidence is in a
10 superior position to exert unique influence over the dependent party... A
11 patient generally seeks the assistance of a physician in order to resolve a
12 medical problem. The patient expects that the physician can achieve such
13 resolution. Occasionally (due to illness), the patient is emotionally unstable
14 and often vulnerable. There is the hope that the physician possesses
15 unlimited powers. It is at this point in the professional relationship that there
16 is the potential and opportunity for the physician to take advantage of the
17 patient's vulnerabilities. To do so, however, would violate a trust and
18 constitute an abuse of power. This court would condemn any such type of
19 exploitation. Such conduct would fall below the acceptable standard for a
20 fiduciary...The physician-patient relationship is based on trust and
21 confidence. Society has placed physicians in an elevated position of trust,
22 and, therefore, the physician is obligated to exercise utmost good faith.
23 [citations omitted]

24 It is therefore *crystal clear* that the Defendants had a fiduciary duty to their patient,
25 Mr. Bickham. The question then becomes whether it states a cause of action for breach of fiduciary
26 duty to allege that the physician did not inform the patient that errors were made in operating on the
27 wrong level of the spine and placement of a surgery screw in order to conceal his negligence.
28 Plaintiff believes that it does. Dr. Schneier had a duty to advise his patient that serious medical
errors were made by him. His fiduciary duty requires him to place the interest of his patient above
any personal interest of his own. Dr. Schneier plainly did not do this. Instead, he placed his own
interest in concealing the errors above the health of his patient. Respectfully, this is the exact type

33 *Massey v. Litton*, 99 Nev. 723, 728, 669 P.2d 248, 252 (1983).

34 *Hoopes v. Hammargren*, 102 Nev. 425, 431, 725 P.2d 238, 242 (1986) (explaining fiduciary
duty of a doctor to a patient).

35 *Id.* at 431 (emphasis in original).

1 of behavior that should trigger a breach of fiduciary action against a physician and the Second Cause
2 of Action should not be dismissed for failure to state a claim.

3 At the prior hearing, the District Court invited and then granted an oral motion for a more
4 definite statement on this cause of action by the Defense. *Plaintiff's counsel has no understanding*
5 *of why the motion was made, nor why it was granted.* There was no written motion explaining what
6 was unclear to the defense about the prior pleading, so plaintiff had little to go by when the *First*
7 *Amended Complaint* was drafted. It is clear from case law that a fiduciary duty exists. It would
8 seem clear that not telling a patient about the physician's own medical error and actually concealing
9 it would be a breach of that duty. Yet now the litigants are here on the *second* motion arguing this
10 issue—at the pleading stage no less. It bears repeating that the breach of fiduciary duty and lack of
11 candor to Mr. Bickham had dire consequences for him and he anticipates producing evidence at trial
12 from two other physicians that had he received the correct surgery earlier, his spinal cord damage
13 would not have been as severe. However, he wasn't told of the medical errors by Dr. Schneier at
14 all.

15 What really seems to be going on here is that the District Court has aggressively adopted the
16 federal court system's *Iqbal* and *Twombly* "plausibility" standard for granting motions to dismiss,
17 which has been repeatedly rejected in Nevada.³⁶ Indeed, the Defense openly cites to *Iqbal* in their
18 motion, which has been plainly rejected in Nevada. The *Iqbal* standard requires the Court to
19 summarily review the complaint and dismiss a cause of action based on no submission of evidence,
20 no right to obtain discovery, no right to a jury trial and only what usually amounts to a subjective,
21 gut feeling by the judge immediately after a case is filed that the action is somehow "implausible,"
22 a standard that did not even exist in the law prior to the *Iqbal* decision in 2009. This standard has
23 been an absolute boon to defendants and an affront to plaintiffs seeking their day in Court.
24 Respectfully, the District Court should not apply this standard and should not dismiss the breach of

25
26 ³⁶ *Dezzani v. Kern & Assocs.*, 412 P.3d 56, 64 (Nev. 2018) ("Nevada has not adopted the federal
27 'plausibility' standard for assessing a complaint's sufficiency.") *citing* *Ashcroft v. Iqbal*, 556 U.S.
28 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570,
127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007).

1 fiduciary duty claim.

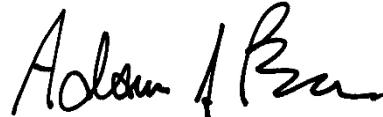
2 **V. CONCLUSION**

3 This is a pre-answer and pre-discovery *Motion to Dismiss*, not a summary judgment motion.
4 The Plaintiff has properly pleaded causes of action for Breach of Fiduciary Duty. These are all
5 properly pleaded causes of action that may co-exist with each other as alternative causes of action
6 in the Complaint. Therefore, the Motion to Dismiss should be denied at this stage.

7 A doctor may be sued for breach of fiduciary duty.

8 DATED this 20th day of April, 2021.

9 **BREEDEN & ASSOCIATES, PLLC**

10 

11 **ADAM J. BREIDEN, ESQ.**

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15 Phone: (702) 819-7770

16 Fax: (702) 819-7771

17 Adam@Breedendassociates.com

18 *Attorneys for Plaintiff*

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on the 20th day of April, 2021, I served a copy of the foregoing legal
3 document **PLAINTIFF'S OPPOSITION TO DEFENDANTS IRA MICHAEL SCHNEIER,**
4 **M.D. AND MICHAEL SCHNEIER NEUROSURGICAL CONSULTING, P.C.'S [SECOND]**
5 **PARTIAL MOTION TO DISMISS** via the method indicated below:

6

7 X	Pursuant to NRCP 5 and NEFCR 9, by electronically serving all counsel and 8 e-mails registered to this matter on the Court's official service, Wiznet 9 system.
10	Pursuant to NRCP 5, by placing a copy in the US mail, postage pre-paid to 11 the following counsel of record or parties in proper person: 12 Anthony D. Lauria, Esq. 13 LAURIA TOKUNAGA GATES & LINN, LLP 14 601 South 7 th Street Las Vegas, Nevada 891010 <i>Attorneys for Defendants</i>
15	Via receipt of copy (proof of service to follow)

16

17 An Attorney or Employee of the following firm:

18 /s/ Kristy Johnson

19 **BREEDEN & ASSOCIATES, PLLC**

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EXHIBIT “1”

DECLARATION OF MICHAEL A. TRAINOR, D.O.

STATE OF NEVADA)
) SS
COUNTY OF CLARK)

NOW COMES the Declarant, Michael Trainor, D.O., who first being sworn does testify to
the following under oath:

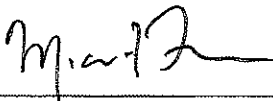
1. I am Michael Trainor. I am over 18 years old. I have personal knowledge of the facts set forth herein. I am a licensed physician and board certified by the American Osteopathic Academy of Orthopedics. I have undergone a residency in orthopedic surgery and fellowship training in orthopedic spine/neurosurgery. My medical opinions set forth herein are to a reasonable degree of medical probability. I am aware that this Declaration may be used for litigation purposes.
2. I have been asked to review the medical care of Frederick Bickham from December 2019 to present. I practice in an area of medicine, orthopedic spine surgery, which is the same or substantially similar to the subject of this Declaration, Ira Michael Schneier, M.D. I have performed hundreds of spinal surgeries and laminectomies or decompression surgeries of the spine of the kind performed by Dr. Schneier in this case.
3. By way of history, in December 2019 the patient Frederick Bickham was 49 years old. On December 26, 2019 he was admitted to Sunrise Hospital and evaluated for treatment of back pain and lower extremity pain and weakness. He was found to have severe spinal stenosis causing compression of the spinal cord at T10-11.
4. Following an earlier consultation and radiology, on December 31, 2019, Dr. Schneier performed a thoracic laminectomy intended to decompress the spinal cord at the T10-11 level.

5. During the surgery, Dr. Schneier failed to properly identify the surgical level and, in fact, operated at the wrong level of T9-10. This left the severe stenosis surgically unaddressed. To compound matters, a pedicle screw placed at left T9 (likely intended to be placed at T10) during the December 31st surgery had a medial breach of the pedicle wall.
6. After the patient continued with symptoms, a second surgery was performed by Dr. Schneier on January 23, 2020. At this time, Dr. Schneier removed the offending pedicle screw at left T9. Unfortunately, nothing was done to address the T10-11 level at the time of the January 23, 2020 surgery either. Indeed, there is no indication that Dr. Schneier ever told or admitted to the patient that the wrong level had been operated on and T10-11 was unaddressed surgically.
7. Unsurprisingly, Mr. Bickham continued to struggle after the January 23rd surgery. He sought Emergency Room evaluation on multiple occasions. His pathology at T10-11 continued to be unaddressed until a consultation with Dr. Yevgeniy Khavkin on May 30, 2020. A few days later, Dr. Khavkin performed a laminectomy at the correct T10-11, as Dr. Schneier should have done on December 31st, but by that time five months of additional compression on the spinal cord had occurred.
8. It is my opinion to a reasonable degree of medical probability that the care administered by Dr. Schneier fell below the standard of care in at least the following ways:
 - a. Failing to perform the December 31st surgery at the proper T10-11 level and instead performing surgery at the wrong level;
 - b. Failing to earlier recognize, alert the patient and appropriately address the misplacement and medial breach of a pedicle screw at T9 during the December 31st surgery. Although Dr. Schneier indicates that there was no evidence of breach by

ball tip palpation, radiology clearly shows a significant breach which more likely than not contributed to the patient's symptoms;

- c. Failing to address the T10-11 level during the January 23rd surgery;
 - d. Failing to address the T10-11 level despite numerous post-operation ER visits and continued complaints of pain and limitations by the patient;
 - e. Failing to disclose to the patient that the wrong level was operated on (T9-10 versus the intended T10-11 level).
9. I do believe that the repeated failure to surgically address the stenosis at T10-11 by Dr. Schneier led to additional damage to the spinal cord and has impaired or even prevented Mr. Bickham's recovery.

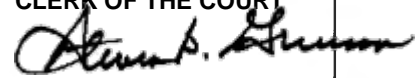
I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.



Michael A. Trainor, D.O.

12/28/20

Date



[RPLY]

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Attorneys for Defendants,
Ira Michael Schneier, M.D. and
Michael Schneier Neurosurgical Consulting, P.C.

DISTRICT COURT
CLARK COUNTY, NEVADA

FREDERICK BICKHAM, individually,

Plaintiff,

vs.

IRA MICHAEL SCHNEIER, M.D., an
individual; MICHAEL SCHNEIER
NEUROSURGICAL CONSULTING, P.C., a
Nevada professional corporation; IMS
NEUROSURGICAL SPECIALISTS LLC, a
Nevada limited liability company; and DOES I
through X; and ROE CORPORATIONS I
through X, inclusive,

Defendants.

CASE NO. A20-827155-C
DEPT. NO. XXII

**DEFENDANTS IRA MICHAEL
SCHNEIER, M.D. AND MICHAEL
SCHNEIER NEUROSURGICAL
CONSULTING, P.C.'S REPLY TO
OPPOSITION TO MOTION TO DISMISS
CERTAIN CAUSES OF ACTION OF
PLAINTIFF'S FIRST AMENDED
COMPLAINT**

Hearing Date: May 18, 2021
Time: 8:30 a.m.

COME NOW, Defendants, Ira Michael Schneier, M.D. and Michael Schneier Neurosurgical Consulting, P.C., a Nevada professional corporation, by and through their attorney of record, Anthony

DEFENDANTS IRA MICHAEL SCHNEIER, M.D. AND MICHAEL SCHNEIER NEUROSURGICAL CONSULTING, P.C.'S
REPLY TO OPPOSITION TO MOTION TO DISMISS CERTAIN CAUSES OF ACTION OF PLAINTIFF'S FIRST AMENDED
COMPLAINT

1 D. Lauria, Esq. of the law firm Lauria Tokunaga Gates & Linn, LLP, and hereby file this Reply to
2 Opposition to Motion to Dismiss Certain Causes of Action of Plaintiff's First Amended Complaint.

3 **I**

4 **THE FIRST AMENDED COMPLAINT DOES NOT STATE A VALID CLAIM FOR**
5 **FRAUD/FIDUCIARY DUTY**

6 According to the allegations of the First Amended Complaint, the treatment of Mr. Bickham
7 consisted of two surgical procedures on the thoracic spine. Plaintiff essentially contends that on
8 December 31, 2019 Dr. Schneier improperly performed thoracic laminectomy, failed to recognize the
9 surgery was performed at the wrong level, and failed to address the correct level during a second
10 procedure on January 23, 2020 to remove a pedicle screw. (First Amended Complaint at ¶s 16 to 21)
11 In essence, Plaintiff seeks to turn a medical malpractice claim into a fraud claim to avoid the provisions
12 of NRS 41A and 42.021 relating to damages and evidence of payment of medical expenses without a
13 valid basis for doing so. Under the theory espoused by Plaintiff, every time a physician did not
14 immediately recognize an alleged mistake and informed the patient, the NRS 41A and 42.021
15 protections are lost. If a doctor diagnoses a viral infection and it turns out the infection is bacterial,
16 under Plaintiff's theory the doctor would be liable for "Fraud". That is entirely inconsistent with the
17 intent of these provisions and Nevada law.

18 It is curious that Plaintiff's First Amended Complaint even uses the title of "Fraud" for the
19 Second Cause of Action but the Opposition to the Motion to Dismiss cites to NRCP Rule 8 which is
20 the general rule for pleading but is not applicable to claims for "Fraud". Fraud claims are governed by
21 the provisions of Rule 9(b) which the Opposition entirely ignores. In fact, Plaintiff's Opposition wholly
22 fails to address the applicable pleading standard for his claim for Fraud or the lack of pleading of the
23 required elements of a Fraud claim as set forth in the moving papers quoting *Barmettler v. Reno Air,*
24 *Inc.*, 114 Nev. 441, 446-47, 956 P.2d 1382, 1386 (1998). Further, as Defendant is not seeking dismissal
25 of the entire action, but only the improperly plead cause of action, the Opposition's citations to cases
26 regarding hesitancy to dismiss cases in their entirety at the pleading stage have no applicability.
27 Curiously, Plaintiff cites *Buzz Stew Buzz Stew, LLC v. City of N. Las Vegas* 124 Nev. 224, 228 (2008)

1 in which, the Court upheld the dismissal of all of the various causes of actions brought against the
2 Defendant except the one cause of action it found to be appropriate. (*Id.* 124 Nev. at 231)

3 Plaintiff does not even allege that he reviewed the Operative Reports in this case or when any
4 false representations were made to him. Nor does he allege facts indicating a reliance on some
5 knowingly false representation or that his reliance caused him damage. These are essential elements
6 which must be stated with particularity under Rule 9(b) including the time and place of these elements.
7 (*Barmettler, supra; Brown v. Kellar* 97 Nev. 582, 636 P.2d 874 (1981)). Plaintiff's Opposition does
8 not address these requirements and the First Amended Complaint does not meet these requirements.

9 Instead, the Opposition suggests this Court has somehow errored in its analysis and cites the
10 recent case of *Dezzani v. Kern & Assoc.*, 412 P.3d 56, 64 (Nev. 2018) to supposedly support that
11 proposition. Plaintiff's reliance on the *Dezzani* case is entirely misplaced. First of all, the Nevada
12 Supreme Court in *Dezzani* upheld the dismissal of the improper complaint in its entirety. Second, the
13 Opposition's citation to the *Dezzani* case fails to mention that the proposition for which Plaintiff cites
14 it was in the Dissent and not in the Majority Opinion which was joined by 6 of the 7 Justices. In
15 addition, Plaintiff's Opposition entirely misstates the "*Iqbal* standard" and the proposition for which
16 *Iqbal* was quoted in the moving papers. Since it apparently was not clear, Defendant will restate it here:

17
18 "A pleading that offers "labels and conclusions" or "a formulaic recitation of the
19 elements of a cause of action will not do." (citation). Nor does a complaint suffice if it
20 tenders "naked assertion[s]" devoid of "further factual enhancement." (*Ashcroft v.*
Iqbal, 556 U.S. 662 at 678, citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556, 127 S.
Ct. 1955, 1965, 167 L. Ed. 2d 929 (2007).)

21 And that the court is not bound to accept as true a plaintiff's legal conclusions, and
22 "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements,
23 do not suffice." (*Ashcroft v. Iqbal*, 556 U.S. at 678.)) Moreover, the court may not take into
24 consideration matters outside of the pleading being attacked. (*Breliant v. Preferred Equities Corp.*,
25 109 Nev. 842, 847, 858 P.2d 1258, 1261 (1993).)

26 Plaintiff's First Amended Complaint fails to meet the specificity of pleading a claim for Fraud
27 as required by Rule 9(b). The First Amended Complaint does not allege what, if anything, Plaintiff
28 was told about his surgery, what was false or misleading, or how Plaintiff purportedly relied to his

1 detriment. No times or dates of communications between Plaintiff and Dr. Schneier are alleged. ¶41
2 alleges that: “Dr. Schneier made “intentionally false or misleading statements or omissions of material
3 fact upon which Plaintiff reasonably relied. . .” but fails to identify the false or misleading statement,
4 when they were supposedly made, precisely what was said, and how Plaintiff relied on what was said.
5 In fact, there is no factual specificity and Plaintiff has not met the statutory requirements of Rule 9(b).

6 II

7 CONCLUSION

8 For the foregoing reasons and based upon the authorities cited herein, Defendants respectfully
9 requests that the Court Dismiss the Second Cause of Action of Plaintiff’s First Amended Complaint for
10 failure to state a claim upon which relief can be granted.

11 DATED: 5/11/2021

LAURIA TOKUNAGA GATES & LINN, LLP

12 /s/ Anthony D. Lauria

13 By: _____

14 Anthony D. Lauria, Esq.
15 Nevada Bar No.: 4114
16 601 South Seventh Street
17 Las Vegas, NV 89101
18 *Attorney for Defendants,*
19 *Ira Michael Schneier, M.D. and Michael*
20 *Schneier Neurosurgical Consulting, P.C.*
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28

CERTIFICATE OF SERVICE

Pursuant to N.R.C.P. 5(b), I certify that I am an employee of Lauria Tokunaga Gates & Linn, and that on this 11TH day of May, 2021, I served a true and correct copy of the foregoing **DEFENDANTS IRA MICHAEL SCHNEIER, M.D. AND MICHAEL SCHNEIER NUEROSURGICAL CONSULTING, P.C.'S REPLY TO OPPOSITION TO MOTION TO DISMISS CERTAIN CAUSES OF ACTION OF PLAINTIFF'S FIRST AMENDED COMPLAINT:**

☐ By placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepared in Las Vegas, Nevada; and/or

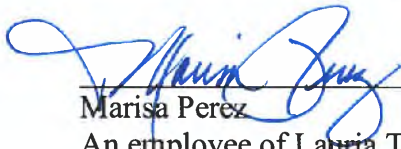
☒ By mandatory electronic service (e-service), proof of e-service attached to any copy filed with the Court; and/or

☐ By facsimile, pursuant to EDCR 7.26 (as amended); and/or

☐ By personal service

as follows:

<i>Attorneys for Plaintiff</i> Adam J. Breeden, Esq. BREEDEN & ASSOCIATES, PLLC 376 E. Warm Springs Road, Suite 120 Las Vegas, NV 89119 Tel. (702) 819-7770 Fax. (702) 819-7771 Adam@BreedendAssociates.com	
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Marisa Perez
An employee of Lauria Tokunaga
Gates & Linn, LLP

DISTRICT COURT
CLARK COUNTY, NEVADA

CASE NO. A-20-827155-C

DEPT. XXII

Defendant.

BEFORE THE HONORABLE SUSAN JOHNSON, DISTRICT COURT JUDGE
MAY 18, 2021

***DEFENDANTS IRA MICHAEL SCHNEIER, M.D. AND MICHAEL SCHNEIER
NEUROSURGICAL CONSULTING, PC'S MOTION TO DISMISS CERTAIN
CAUSES OF ACTION OF PLAINTIFF'S FIRST AMENDED COMPLAINT***

ADAM J. BREEDEN, ESQ.
Via Video Conference

ANTHONY D. LAURIA, ESQ.
Via Video Conference

Case Number: A-20-827155-C

1 May 18, 2021 AT 9:52 A.M.

2
3 THE COURT: Okay. Let's go to page 7. And that is Bickham versus
4 Schneier, case number A20-827155-C. Would counsel who is present please
5 identify yourself for the record.

6 MR. BREEDEN: Good morning, Your Honor. This is attorney, Adam
7 Breeden, bar number 8768 on behalf of the Plaintiff, Mr. Bickham.

8 MR. LAURIA: And Anthony Lauria on behalf of Dr. Schneier, bar number
9 4114, Your Honor.

10 THE COURT: Okay. And this is Defendant's Motion to Dismiss Certain
11 Causes of Action within the Plaintiff's First Amended Complaint, and from what I
12 recall it was about the fraud claim, right?

13 MR. LAURIA: That is correct, Your Honor.

14 THE COURT: Okay. I'll listen to what you have to say.

15 MR. LAURIA: Thank you, Your Honor. I am -- in the interest of time, and I
16 know you've been on the bench for a long time this morning hearing argument, I'm
17 gonna keep this as short as possible. Basically the Court granted leave to -- for a
18 more definite statement as to the fraud claim, I would submit that the first amended
19 complaint still does not comply with requirements of Rule 9(b). Basically this is a
20 medical malpractice claim. Counsel is pleading a fraud claim to try and avoid the
21 provisions of the limitation on damages and medical malpractice actions and the
22 introduction of collateral source benefits by trying to squeeze a fraud claim where
23 he's not pled the elements and the facts to support those elements. In fact, there
24 were two grounds stated. One is that, oh, a pedicle screw was breaching the
25 pedicle and -- but that's not in the report by the doctor. Well, the fact is the doctor

1 went in and did the second surgery according to the first amended complaint to
2 remove the pedicle screws. So, whether he put it in a report or not has nothing to
3 do with a fraud claim and there's no allegation or facts that the Plaintiff in any way
4 was aware of that or relied on it except that counsel wrote it in a pleading sometime
5 later. Same is true with the second surgery; they have not pled the elements -- the
6 required elements under Rule 9(b) for a fraud claim which must be stated with
7 specificity. That is that the -- that the doctor knew he was making a false statement.
8 If the doctor was simply at the incorrect level or didn't recognize the level he was at
9 that's not fraud, that's malpractice and we're not arguing they haven't stated a claim
10 for malpractice but that is not sufficient to state a fraud claim; there must be a
11 knowing misrepresentation. Plaintiff doesn't even identify what misrepresentation
12 was made, when it was made, to whom it was made, how he relied on it. There's
13 nothing in these pleadings to specify the fact required under Rule 9(b) to state that
14 cause of action.

15 It's curious that the opposition cites Rule 8 pleading, the general rules
16 of pleading which are simply not applicable to a fraud claim. It's also curious that
17 the opposition by its proposition attacking the U.S. Supreme Court decision in Iqbal.
18 That is a decent from a six to one decision in which the Court upheld its dismissal of
19 the cause of action. So, it has no bearing on this case whatsoever.

20 THE COURT: Mr. Lauria, I do have a question. I'm looking at the first
21 amended complaint and I -- this is what my rub is. It's not just the doctor didn't know
22 about it and didn't put it in a -- a report, we have that he did not inform the Plaintiff
23 that the screw caused him additional problems and in fact he wrote in a report that
24 "upon exploration of the patient the medial breach did not exist" and that is was false
25 and that it was falsified, an intent to conceal, that he had injured the patient. So, I'm

1 having a problem. This sounds to me that he intentionally falsified a medical record.
2 I see that as different.

3 MR. LAURIA: Well --

4 THE COURT: Go ahead.

5 MR. LAURIA: I disagree. And that's not what's pled, Judge. What's pled is
6 because the patient had complaints and because these pre-operative films were
7 taken the doctor actually went in and removed the hardware including the pedicle
8 screw. Now, while it may have appeared to have been penetrating on a study, on
9 an image, at the time of surgery the doctor didn't find in fact that the pedicle screw
10 was breaching the pedicle. So, what counsel is saying is, look, somebody read a
11 film and said, oh, it looks like this screw is breaching. The doctor said at the time of
12 surgery while he removed the screw, while he treated it, there was no reliance on
13 this report by the patient. They don't even allege that he relied on [indecipherable]
14 and somehow the doctor saying the screw didn't breach it because the screw had
15 already been removed at that point.

16 So -- but the doctor said, "yeah, I went in there and I removed the
17 hardware because we thought it may be causing a problem. When I actually looked
18 at it it wasn't breaching the pedicle." So -- and again, there's nothing to say that the
19 patient relied upon that, somehow changed his course of treatment, didn't take
20 some other course of action, didn't do anything based upon some representation
21 about the breaching of a pedicle screw. The screw was removed at that time.

22 THE COURT: Well, the fact that he did nothing doesn't that show reliance
23 upon the alleged fraudulent statement? I mean, if he -- if you don't do anything
24 because the doctor doesn't say that he needs surgery at a different level, I mean,
25 you're suffering, that's a damage.

1 MR. LAURIA: Well, those are two entirely separate issues. So, we're talking
2 about -- I think, Judge, we're talking about a pedicle screw.

3 THE COURT: Right.

4 MR. LAURIA: So, the pedicle screws have been removed. So, what's the
5 patient gonna do at that point? There's nothing to do except sue which the patient
6 ultimately did. So, there's no reliance, whatever on this alleged misrepresentation to
7 whether the pedicle screw breached or not because the pedicle screw was
8 removed. And so the patient didn't change his course of action, they don't even
9 allege he changed the course of action. The other issue that they allege is the
10 doctor operated at the wrong level but there's no indication that there's any
11 knowledge or awareness or intent to mislead regarding the level in which the
12 surgery was performed. There simply are no facts pled to establish that or when the
13 patient relied upon that, what he was told by the doctor. All those essential
14 elements of Rule 9(b) that are required in a pleading of fraud you don't get to just
15 generally say he made some statements and we relied on them, you have to be
16 specific as to what statement, what time it was made, how specifically he relied on it,
17 what difference it made and that is all not pled here.

18 THE COURT: Okay. Thank you. Mr. Breeden.

19 MR. BREEDEN: Yeah. Your Honor, I think Mr. Lauria's approach here is
20 incorrect and he's framing this issue in one way, you know, because he perceives it
21 an advantage to his client. But really the analysis here -- this is a breach of fiduciary
22 duty claim, not really a common law fraud claim. Now, a breach of fiduciary duty is
23 a per se fraud under the law. So, if you look at the way this is pled it says "breach of
24 fiduciary duty/fraud" and that's why. So, I don't think you really even analyze this
25 pleading under common law fraud rules. If you want to we -- we can do that but

1 essentially we know that physicians have a fiduciary duty to patients so we have to
2 ask ourselves, well, what is a fiduciary -- breach of fiduciary duty claim by a
3 physician look like? I mean, it's going to have some relationship to the medical
4 care. You know, you're not going to sue your physician for breach of fiduciary duty
5 for a bad investment advice --

6 THE COURT: Well -- well -- well, wait, wait, wait --

7 MR. BREEDEN: -- on your 401K.

8 THE COURT: -- Mr. Breeden -- Mr. Breeden, I'm gonna tell you that the fraud
9 thing is the key here. To be -- to be honest with you I see breach of fiduciary duty
10 as part of the professional negligence. Fraud is a concern for me if the doctor made
11 a misrepresentation to the patient, put something in a report. That has got me
12 concerned. To me that's different than professional negligence. So, I -- and I will
13 say you don't say with specifically what was said, what report that the doctor put
14 things in, you know, what was said to the patient, what was put into a report and that
15 kind of thing. I will say that. That's gotta concern for me as well on your end. So --
16 but breach of fiduciary duty I see as part of professional negligence.

17 MR. BREEDEN: Well, we have a unreconcilable difference in what the law is
18 on that point. But -- then I'll just tell you, you know, there are two parts of this claim.
19 The one part is that the doctor recognized that he had committed a serious medical
20 error and had operated on the wrong body part. When he realized that he literally
21 said nothing to the patient. The patient then felt that he had simply had a --

22 THE COURT: Oh, oh. Mr. Breeden, you cut out. So, let's find out what's
23 going on. Mr. Breeden, I don't know if you can hear me but you are frozen on your
24 end. Okay. Mr. Breeden.

25 MR BREEDEN: Yeah. Your Honor, I apologize, we have technical problems.

1 THE COURT: Stuff happens.

2 MR. BREEDEN: Murphy's Law I guess that I would sit through an hour and a
3 half and then when it was my five minute turn I'd have problems.

4 So, I'm not sure where you broke off, Your Honor, so I'll continue. The
5 first part is that this patient had a surgery and the wrong body part was operated on.
6 The doctor realized that and literally said nothing to the patient about that. He did
7 not reveal that to the patient. As a result, the patient suffered for an additional five
8 months and had additional spinal cord damage until he saw another neurosurgeon
9 who identified what the problem was. Up and till that time he had simply believed
10 that they had attempted the surgery and unfortunately the surgery was
11 unsuccessful. So, we have an omission here -- and I'm sorry, Judge, the video feed
12 has gone out. Can you hear me?

13 THE COURT: I can hear you fine.

14 MR. BREEDEN: Okay. I'll continue then. So, we have an omission here
15 which is a damage to client when the doctor had a duty to advise the client of the
16 medical error. The other issue is this issue with the pedicle screw that was placed
17 during the original procedure. This was clearly identified by a radiologist as
18 intruding into the spinal canal; it's clearly visible on x-ray. There's a picture of it and
19 yet the doctor when he removed the screw he writes to assist himself and
20 presumably to cut off -- or try to cut off any action against him he says, "you know,
21 when I opened up the patient I palpated and I actually didn't feel any breach of the
22 spinal canal" when that breach is very evident on radiology. It's not even a close
23 case. So, we have a record here that the doctor has not been truthful on as well.

24 And so those are the reasons that this is pleaded, Your Honor. It's not
25 simply the fact that the operation was performed on the wrong body level and that a

1 screw was misplaced, it is the fact that the doctor attempted to cover up those facts
2 and not reveal them to the patient and that's why we filed this claim as a breach of
3 fiduciary duty/fraud claim.

4 THE COURT: Okay. Mr. Lauria.

5 MR. LAURIA: Thank you, Judge. So, the last sentence we heard was "the
6 doctor attempted to cover up those facts" but there's no -- nothing pled, there are no
7 facts pled to establish that. It's a conclusory allegation by Mr. Breeden made
8 without specific facts to indicate that. As we indicated before, Rule 9(b) requires
9 specificity and it's not here. It's just like the conclusory claim that the doctor
10 recognized he was at the wrong level. Based on what, Mr. Breeden? Based on
11 what in the complaint? What facts are there that are provided to this Court upon
12 which the Court can conclude, yes, there are facts saying that the doctor recognized
13 he's at the wrong level? Or what facts are there before this Court that are pled in
14 the first amended complaint upon which the Court can say, oh, the doctor was trying
15 to cover up that? There's nothing. It's only conclusory allegations which the Courts
16 have consistently said are insufficient especially when you're trying to claim
17 something like fraud. In regard to the pedicle screw, we've -- I've addressed that.
18 The radiologist said I -- it looks like the screw is in a certain position. The doctor
19 does surgery to remove the screw based on that report and his interpretation of the
20 film. When he gets in there and he palpates it, physically touches it, not look at an
21 image but touches it says, it doesn't seem to be -- it doesn't seem that it is
22 penetrating the pedicle but he removes it anyway. So, there's no indication, no
23 pleading that the patient relied on that in any way, that it harmed him in any way or
24 make any difference in his care.

25 And then the second part is simply again on this presumption without

1 any facts that the doctor "realized he was at the wrong level" but covered it up by not
2 saying I'm at the wrong level. Again, there are no facts to support that. What we
3 have is an allegation the doctor operated at the wrong level and failed to recognize
4 he was at the wrong level but there are no facts pled to establish that he had some
5 scienter or knowledge or was aware this was at the wrong level and intentionally
6 covered it up. There are not facts pled to support that, it's simply a conclusory
7 allegation made in the complaint and on that basis I'll rest, Your Honor.

8 THE COURT: Okay. Counsel, I'm gonna tell you this is a close one for me
9 and things may be hashed out at trial. But I'm looking at paragraphs 39 and 40 of
10 the first amended complaint and I think that there is enough there to support a claim
11 of fraud, but we're at the motion to dismiss level. I don't know what's gonna be
12 hashed out in discovery. I assume I'm gonna be seeing a motion for summary
13 judgment on this one and I will say that if it ends up going to trial that we will need to
14 discuss how we're gonna deal with this because I am not gonna be getting into
15 punitive damage issues until a claim has been at least proven and a jury comes
16 back to indicate that there was some intentional misconduct and some fraud done
17 here.

18 So, I am denying your Motion to Dismiss the Fraud Claim, I am granting
19 it though with respect to the breach of fiduciary duty. To me that is subsumed within
20 professional negligence. I think every doctor has got some sort of a duty to the
21 patient and I think we're just being clever here in terms of calling it breach of
22 fiduciary duty. So with that said, the fraud claims stays in at least at this juncture of
23 the Motion to Dismiss, all right?

24 MR. LAURIA: Thank you, Your Honor.

25 THE COURT: All right. Mr. Lauria, will you compile the order and pass it by

1 Mr. Breeden for review?

2 MR. LAURIA: I will.

3 THE COURT: All right.

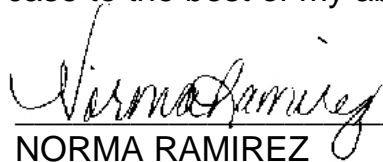
4 MR. LAURIA: I will, Your Honor.

5 THE COURT: Thank you.

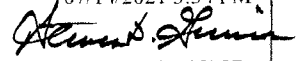
6 [Proceedings concluded at 10:08 a.m.]

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11
12 ATTEST: I do hereby certify that I have truly and correctly transcribed the
13 audio/video recording in the above-entitled case to the best of my ability.

14 

15 NORMA RAMIREZ
16 Court Recorder
17 District Court Dept. XXII
18 702 671-0572
19
20
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CLERK OF THE COURT

[ORDR]

Anthony D. Lauria, Esq.
NV State Bar No. 4114
LAURIA TOKUNAGA GATES & LINN, LLP
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Attorneys for Defendants, *Ira Michael Schneier, M.D. and
Michael Schneier Neurosurgical Consulting, P.C.*

DISTRICT COURT
CLARK COUNTY, NEVADA

FREDERICK BICKHAM, individually,
Plaintiff,

vs.

IRA MICHAEL SCHNEIER, M.D., an
individual; MICHAEL SCHNEIER
NEUROSURGICAL CONSULTING, P.C., a
Nevada professional corporation; IMS
NEUROSURGICAL SPECIALISTS LLC, a
Nevada limited liability company; and DOES I
through X; and ROE CORPORATIONS I
through X, inclusive,

Defendants.

CASE NO. A-20-827155-C
DEPT. NO. XXII

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANTS IRA
MICHAEL SCHNEIER, M.D. AND
MICHAEL SCHNEIER
NEUROSURGICAL CONSULTING,
P.C.'S MOTION TO DISMISS CERTAIN
CAUSES OF ACTION OF PLAINTIFF'S
FIRST AMENDED COMPLAINT**

COMES NOW, Defendants, Ira Michael Schneier, M.D. and Michael Schneier Neurosurgical Consulting, P.C., a Nevada professional corporation's Motion to Dismiss Certain Causes of Action of Plaintiff's Amended Complaint came on for hearing on May 18, 2021, in Department 22, the Honorable Susan Johnson presiding. Plaintiff Frederick Bickham, an individual, appearing telephonically by and

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT DEFENDANTS IRA MICHAEL SCHNEIER, M.D. AND MICHAEL SCHNEIER NEUROSURGICAL CONSULTING, P.C.'S MOTION TO DISMISS CERTAIN CAUSES OF ACTION OF PLAINTIFF'S AMENDED COMPLAINT

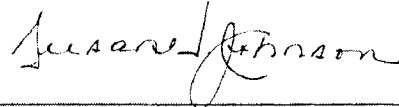
1 through his counsel Adam J. Breeden of the law firm Breeden & Associates, PLLC. Defendants Ira
2 Michael Schneier, M.D. and Michael Schneier Neurosurgical Consulting, P.C., a Nevada professional
3 corporation, appearing telephonically by and through his counsel Anthony D. Lauria of the law firm
4 Lauria Tokunaga Gates & Linn, LLP. The Court having reviewed the pleadings and papers on file, and
5 having heard oral argument of the parties regarding causes of action and whether or not there was a
6 failure to state a claim upon which relief could be granted, being fully advised and good cause appearing
7 therefore, finds as follows:

8 The Court finds that the gravamen of Plaintiff's Cause of Action for Breach of Fiduciary Duty
9 is one for professional negligence. Therefore, this causes of action is subsumed into Plaintiff's cause
10 of action for Professional Negligence and the Breach of Fiduciary Duty claim is hereby Dismissed

11 The Motion to Dismiss Plaintiff's Cause of Action entitled Fraud is Denied at this stage of the
12 pleadings. The Court finds that Paragraphs 39 and 40 of the Amended Complaint are sufficient to
13 support a claim for fraud at the initial pleading stage.

14 **IT IS HEREBY ORDERED** that Defendants Ira Michael Schneier, M.D. and Michael
15 Schneier Neurosurgical Consulting, P.C., a Nevada professional corporation's Motion to Dismiss
16 Plaintiff's Amended Complaint is Granted in Part and Denied in Part as set forth above.

Dated this 14th day of July, 2021



DISTRICT COURT JUDGE

20 APPROVED AS TO FORM AND CONTENT:

21 DATED: July 14, 2021

22 BREEDEN & ASSOCIATES, PLLC

23 /s/ Adam J. Breeden

24 By: _____

25 Adam J. Breeden, Esq.
26 Nevada Bar No. 8768
27 376 E. Warm Springs Road, Suite 120
28 Las Vegas, NV 89119
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Attorney for Plaintiff, Frederick Bickham

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT DEFENDANTS IRA MICHAEL
SCHNEIER, M.D. AND MICHAEL SCHNEIER NEUROSURGICAL CONSULTING, P.C.'S MOTION TO
DISMISS CERTAIN CAUSES OF ACTION OF PLAINTIFF'S AMENDED COMPLAINT

1 Respectfully Submitted by:

2 DATED: July 14, 2021

3 LAURIA TOKUNAGA GATES & LINN, LLP

4 */s/ Anthony D. Lauria*

5 By: _____

6 Anthony D. Lauria, Esq.

7 Nevada Bar No.: 4114

8 601 South Seventh Street

9 Las Vegas, NV 89101

10 Tel. (916) 492-2000

11 *Attorney for Defendants*

12 *Ira Michael Schneier, M.D.*

13 *and Michael Schneier Neurosurgical*

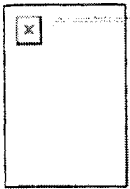
14 *Consulting, P.C.*

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ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT DEFENDANTS IRA MICHAEL
SCHNEIER, M.D. AND MICHAEL SCHNEIER NEUROSURGICAL CONSULTING, P.C.'S MOTION TO
DISMISS CERTAIN CAUSES OF ACTION OF PLAINTIFF'S AMENDED COMPLAINT

Marisa E. Perez

From: Adam Breeden <adam@breedenandassociates.com>
Sent: Wednesday, July 14, 2021 11:25 AM
To: Marisa E. Perez
Cc: Kristy Johnson; Anthony D. Lauria
Subject: Re: Bickham v. Schneier

I approve this draft order, please submit to the Court with my e-signature.



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On Wed, Jul 14, 2021 at 11:19 AM Marisa E. Perez <mperez@ltglaw.net> wrote:

Hi Mr. Breeden,

Attached please find an Order Granting in Part and Denying in Part Defendants' Motion to Dismiss Certain Causes of Action of Plaintiff's First Amended Complaint for your review. If you approve as to form and content, please advise if we have permission to attach your electronic signature.

Thank you.



Marisa Perez

Legal Assistant to Anthony D. Lauria

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1 CSERV

2 DISTRICT COURT
3 CLARK COUNTY, NEVADA
4

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6 Frederick Bickham, Plaintiff(s) | CASE NO: A-20-827155-C
7 vs. | DEPT. NO. Department 22
8 Ira Schneier, M.D., Defendant(s)
9

10 **AUTOMATED CERTIFICATE OF SERVICE**

11 This automated certificate of service was generated by the Eighth Judicial District
12 Court. The foregoing Order was served via the court's electronic eFile system to all
13 recipients registered for e-Service on the above entitled case as listed below:

14 Service Date: 7/14/2021

15 Adam Breeden adam@breedenandassociates.com

16 Anthony Lauria, Esq. alauria@ltglaw.net

17 Marisa Perez mperez@ltglaw.net

18 Kristy Johnson kristy@breedenandassociates.com
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