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,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK; THE HONORABLE SUSAN JOHNSON, DISRICT JUDGE; AND THE HONORABLE VERONICA BARISICH, DISTRICT JUDGE,
Respondents,
and
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.

No. 83306

ANSWER TO PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

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NRAP 26.1 DISCLOSURE

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

1. All parent corporations and publicly-held companies owning 10 percent or more of the party's stock: None; real parties in interest are individuals.

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

Lemons, Grundy & Eisenberg

Lauria Tokunaga Gates & Linn

McBride Hall

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

DATED: Oct. 8, 2021

/s/ Robert L. Eisenberg
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FACTUAL AND PROCEDURAL BACKGROUND

The writ petition challenges four district court orders in different cases. This answer will address the four cases in the same order as presented in the petition. The petitioners will be referred to collectively as "Plaintiffs."

Daniel M. Kirgan, M.D.

Plaintiff Ziegler filed a complaint against Dr. Kirgan, arising from medical treatment provided by Dr. Kirgan in his capacity as an employee with the University of Nevada School of Medicine. 1 P.App. 1, 3-4. Ziegler contended that Dr. Kirgan improperly performed surgery involving a colostomy that Dr. Kirgan had previously performed; and as a result, a second corrective procedure was required. *Id.*

The complaint sought to avoid mandatory arbitration by claiming a medical malpractice exemption from arbitration. 1 P.App. 1. The first page of the complaint stated: **"Arbitration Exempt – Professional Negligence/Medical Malpractice Case, Chapter 41A."**[1] *Id.* (bold in original).

Although the lawsuit only involved medical treatment and alleged medical negligence, Ziegler added claims for breach of contract, unjust enrichment, negligent

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[1] All four complaints in this writ proceeding asserted an exemption from arbitration for medical malpractice cases, using identical language in the complaints: **"Arbitration Exempt – Professional Negligence/Medical Malpractice Case, Chapter 41A."** 1 P.App. 1; 1 P.App. 177; 1 P.App. 234; 2 P.App. 309 (bold in originals)

infliction of emotional distress, and neglect of a vulnerable person. 1 P.App. 4-6. The complaint was accompanied by an expert declaration opining Dr. Kirgan's medical treatment fell below the standard of care for physicians. 1 P.App. 10.

Dr. Kirgan moved to dismiss the non-malpractice claims, all of which dealt with medical judgment and treatment. 1 P.App. 12. The district court granted the motion. 1 P.App. 71.

Muhammad Saeed Sabir, M.D.

This lawsuit was filed by the same attorney who filed the Kirgan lawsuit. The complaint arose out of alleged medical malpractice while Plaintiff Nelson was under the care of Dr. Sabir and other defendants. 1 P.App. 77. Nelson alleged medical malpractice during treatment for a fractured vertebra and during follow-up care. *Id.*

Although the lawsuit only involved medical treatment and alleged medical negligence, Nelson added additional claims for "ordinary negligence," breach of contract, unjust enrichment, and "neglect of an older person." 1 P.App. 81-83. Nelson's complaint was accompanied by an expert affidavit opining Dr. Sabir did not use the care that reasonably prudent physicians would have provided under similar circumstances. 1 P.App. 90-91.

Dr. Sabir moved to dismiss the non-malpractice claims on the ground that these claims all arose out of the allegedly substandard medical care, and the claims

were duplicative of the malpractice claim and were subsumed by that claim. 1 P.App. 92. The district court granted the motion. 1 P.App. 222.

Stephanie Jones, D.O.

Plaintiffs filed a complaint arising from medical treatment provided by Dr. Jones to Errys Davis. 1 P.App. 234. This lawsuit was filed by the same attorney who filed the Kirgan and Sabir lawsuits. Dr. Jones was a physician member of the faculty (assistant professor of pediatric surgery) at the UNLV School of Medicine. 2 P.App. 249. The treatment consisted of two surgeries on the four-month-old patient. Plaintiffs contended that Dr. Jones improperly performed a hernia repair surgery, requiring a second surgery. 1 P.App. 236-47. The complaint was accompanied by an expert declaration opining that Dr. Jones's treatment of the patient was below the standard of care for physicians. 1 P.App. 245.

Although the lawsuit only involved medical treatment and alleged medical negligence, the complaint included claims for breach of contract, battery, and neglect of a vulnerable person. 1 P.App. 238-41.

Dr. Jones moved to dismiss the non-malpractice claims. 2 P.App. 248. The district court granted the motion and dismissed the non-malpractice claims. 2 P.App. 303.

Ira Schneier, M.D.

Plaintiff Bickham filed a complaint arising from medical treatment provided by Dr. Schneier, who is a spine surgeon. 2 P.App. 309. The complaint was filed by the same attorney as in the other three complaints discussed above. The medical treatment consisted of two surgeries. The complaint was accompanied by an expert declaration opining that Dr. Schneier's treatment was below the standard of care for physicians. 2 P.App. 322.

Although the lawsuit only involved medical treatment and alleged medical negligence, Bickham added claims for alleged breach of contract, battery, breach of fiduciary duty/fraud, and neglect of a vulnerable person. 1 P.App. 314-18.

Dr. Schneier moved to dismiss the non-malpractice claims, contending that the complaint's artful (or imaginative) pleading was not sufficient to avoid statutory protections for doctors. 2 P.App. 324. The district court granted the motion but allowed Plaintiff to file a more definite statement on the fiduciary duty/fraud claim. 2 P.App. 397-98. Plaintiff amended the complaint, but Dr. Schneier again moved to dismiss the non-malpractice claims. 2 P.App. 403, 416. The district court granted the motion and dismissed all claims except the medical malpractice and fraud claims. 2 P.App. 455.

ARGUMENT

A. Summary of argument

In 2002, a special legislative session addressed a medical malpractice insurance crisis in Nevada. *Zohar v. Zbiegien,* 130 Nev. 733, 334 P.3d 402, 405 (2014). Two years later, in 2004, Nevada voters passed Ballot Measure No. 3, otherwise known as KODIN (Keep Our Doctors in Nevada), in further response to the health care crisis that was impacting the availability of health care in Nevada.

As a result of the special legislative session and KODIN, statutes enacted in NRS Chapters 41A and 42 granted important protections for doctors who are sued for malpractice, such as caps on damages and modification of the collateral source rule. In opposing the motions to dismiss, Plaintiffs' counsel conceded that his purpose for asserting the non-malpractice claims was to avoid statutory caps on damages (including the sovereign immunity cap on damages against doctors who are state employees) and other statutory protections for doctors in malpractice cases.

This court has consistently recognized that artful or imaginative pleading is not appropriate to avoid statutory medical malpractice protections for doctors. To permit such artful pleading – which could have the effect of avoiding protections enacted by the voters and the Legislature – would vitiate the intent of those protections in the first place. Where the gravamen of the action sounds in medical malpractice, this is the claim on which the case should proceed. Other claims are

unnecessary, redundant, and contrary to the purposes for which statutory protections were enacted.

The writ petition in this case essentially seeks to overturn this well-established body of caselaw and eliminate protections the Legislature itself has not eliminated. Furthermore, the petition seeks evade statutory sovereign immunity limits on damages involving the two defendants who are state employees. The district judges did not abuse their discretion by dismissing the non-malpractice claims. Public policy supports the statutory protections for doctors, and this court should deny the writ petition.[2]

B. Extraordinary relief is neither available nor appropriate.

"Extraordinary relief should be extraordinary." *Walker v. Second Judicial Dist. Court*, 136 Nev. Adv. Op. 80, __, 476 P.3d 1194, 1195 (2020).

Plaintiffs seek writs of mandamus and prohibition. Their petition contains barely two pages of conclusory arguments regarding applicability of writs generally, with virtually no discussion of the requirements for these remedies. Pet. 8-9. Neither remedy is available.

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[2] The petition repeatedly contends that the defendant doctors asserted an "exclusive remedy" argument. *E.g.* Pet. 1, 2, 3, 5. The defendants did not use that phrase and did not make that argument.

1. There is a high standard for mandamus.

This court's power to issue extraordinary relief is "purely discretionary." *Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991) (mandamus and prohibition). Petitioners bear the burden to demonstrate that such relief is warranted, and the bar is high. *See Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004) (denying mandamus).

Mandamus compels the performance of an act required by law. *Walker* at __, 476 P.3d at 1196. The petitioner must demonstrate clear legal error. *See id.* The petitioner must show: (1) a legal right to have the act done; (2) a plain legal duty of the district court, without discretion; and (3) the lack of a plain, speedy, and adequate remedy. *Id.*

As discussed in more detail below, the Plaintiffs cannot demonstrate that the district courts failed to comply with a mandatory duty to deny the motions to dismiss. As such, Plaintiffs have not satisfied the first requirement. Regarding the second requirement, Plaintiffs cannot establish a plain legal duty that exists, requiring the district courts to deny the motions to dismiss.

Plaintiffs also fail to satisfy the third requirement – the lack of a plain, speedy, and adequate remedy. Unburdened by citations to legal authorities, Plaintiffs argue that an appeal from a final judgment will be inadequate because they will not be permitted to raise the dismissed claims at the trials. Pet. 9. The right to appeal from

a final judgment is generally an adequate legal remedy that precludes mandamus. *Walker* at __, 476 P.3d at 1198. It may be true that mandamus would be easier and more expeditious than an appeal, "but this is not the standard." *Id.* "A remedy does not fail to be speedy and adequate, because, by pursuing it through the ordinary course of law, more time probably would be consumed than in a mandamus proceeding." *Id.* If an interlocutory order may ultimately be challenged on appeal, this generally precludes writ relief. *Id.*

Accordingly, Plaintiffs fail to satisfy any of the three requisites for this court to exercise its discretion by granting mandamus.

2. Plaintiffs ignore the requirements for prohibition.

Prohibition is available where the district court exceeded its jurisdiction. NRS 34.320. The petition makes no attempt to establish a lack of jurisdiction.

C. Standards for dismissal under NRCP 12(b)(5)

An NRCP 12(b)(5) dismissal is appropriate where a complaint's allegations "are insufficient to establish the elements of a claim for relief." *Stockmeier v. State, Dep't of Corr.*, 124 Nev. 313, 316, 183 P.3d 133, 135 (2008). Each separate cause of action must contain "facts, which if true, would entitle the plaintiff to relief." *Id.* "Threadbare 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)).

D. Statutory protections are important parts of Nevada public policy.

As noted above, NRS Chapter 41A was amended in 2002 as part of a special legislative session that addressed a medical malpractice insurance crisis in Nevada. *Zohar, supra.* Two years later, in 2004, Nevada voters approved the "Keep our Doctors in Nevada" (KODIN) initiative, Ballot Question No. 3, leading to enactment of additional statutes limiting liability for health care providers. *See Segovia v. Eighth Judicial Dist. Ct.*, 133 Nev. 910, 912, 407 P.3d 783, 786 (2017). These statutes contained several protections for doctors, including a shortened statute of limitations, a requirement for an expert opinion accompanying a complaint, a cap on noneconomic damages, abrogation of joint and several liability, and modification of the collateral source rule.

Plaintiffs routinely challenged these statutes as being unconstitutional, but this contention was put to rest by this court in *Tam v. Eighth Judicial Dist. Court*, 131 Nev. 792, 803, 358 P.3d 234, 242 (2015), where the court held that statutory limitations are constitutional and apply to claims for medical malpractice.

Since this court's decision in *Tam*, attorneys representing malpractice plaintiffs have sought other ways to avoid the protections of NRS 41A, and to frustrate the intent behind those provisions. This is most often done by plaintiffs trying to insert a variety of different imaginative labels to causes of action, which, at their core, are actually claims premised upon medical professional negligence. This

is precisely what Plaintiffs' attorney sought to do in the cases in this writ proceeding – by taking claims that were clearly and undoubtedly premised upon rendering medical care, and trying to reframe the claims as other causes of action.

E. Artful and imaginative pleading cannot circumvent statutory protections.

This court has addressed attempts to circumvent the provisions of NRS 41A in several decisions, all of which favor dismissal of the artfully pleaded and imaginatively phrased causes of action, when the gravamen of the action is actually one for medical negligence.

1. This court looks to the gravamen or essence of the claim, not its form.

In determining whether a claim sounds in medical professional negligence, courts "must look to the gravamen or substantial point or essence of each claim rather than its form." *Szymborski v. Spring Mountain Treatment Ctr.*, 133 Nev. 638, 643, 403 P.3d 1280, 1285 (2017) (internal quotation marks omitted); *see generally State Farm Mut. Auto. Ins. Co. v. Wharton*, 88 Nev. 183, 186, 495 P.2d 359, 361 (1972) (holding that it is the nature of the grievance rather than the form of the pleadings that determines the character of the action). If a complaint states a tort cause of action, and if this is the gravamen of the complaint, the nature of the action is not changed by artful pleading of other allegations, such as breach of a contract.

Id. In other words, to determine the nature of the lawsuit, the controlling factor is the object of the action, not the theory or the title of a claim. *Id.*

Professional medical negligence is "the failure of a provider of health care, in rendering services, to use the reasonable care, skill or knowledge ordinarily used under similar circumstances by similarly trained and experienced providers of health care." NRS 41A.015. A claim is a medical malpractice claim if it involves medical diagnosis, judgment, or treatment. *Szymborski*, 133 Nev. at 641-42, 403 P.3d at 1284. "When the duty owing to the plaintiff by the defendant arises from the physician-patient relationship or is substantially related to medical treatment, the breach thereof gives rise to an action sounding in medical malpractice as opposed to simple negligence."[3] *Id.* at 642, 403 P.3d at 1284, quoting *Papa v. Brunswick Gen. Hosp.*, 132 A.D.2d 601, 517 N.Y.S.2d 762, 763 (1987).

As indicated above, all four complaints in this writ proceeding were accompanied by expert affidavits or declarations opining that the defendants provided medical care falling below the standard of care. The claims involved

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[3] In *Schwarts v. University Medical Center*, 2020 WL 1531401 (Nev., March 26, 2020; Nos. 77554, 77666; unpublished disposition), the complaint alleged civil conspiracy based upon alleged falsification of medical records. This court affirmed dismissal of the claim, looking at the gravamen of the allegations. The conspiracy claim involved medical diagnosis, judgment, or treatment; and the claim required proof of malpractice – medical treatment below the standard of care. Thus, the claim was a medical malpractice claim subject to NRS Chapter 41A. *Id.* at *1-2.

medical diagnosis, judgment, or treatment. As such, the claims consisted of claims for medical negligence.

Plaintiffs' petition cites four cases for the proposition that this court "has repeatedly found that a claimant may plead a cause of action against a doctor for both professional negligence and another cause of action." Pet. 12-13 (emphasis in original). First, the petition cites *Egan v Chambers*, 129 Nev. 239, 299 P.3d 364 (2013) as a case in which this court "discussed" a breach of contract claim filed against a physician. Pet. 12. The petition concedes that *Egan* merely discussed the contract claim "in passing." Pet. 14-15. Actually, the precise holding in *Egan* was that NRS 41A.071 does not apply to podiatrists. *Id.* at 242-43, 299 P.3d at 366-67. The court did mention that the complaint contained a claim for breach of contract. The court held, however, that this claim was based on failure to comply with the standard of care, and therefore the claim "sounded in tort," making NRS Chapter 41A applicable. *Id.* at 241 n.2, 299 P.3d at 366 n.2. Contrary to the petition's contention, *Egan* does not authorize a breach of contract claim in a medical malpractice case.

Second, Plaintiffs cite *Goldenberg v. Woodard*, 2014 WL 2882560 (Nev., June 20, 2014; Nos. 57232, 58151; unpublished disposition), as authorizing a fraud claim. Pet. 12. Because *Goldenberg* was a 2014 unpublished decision, Plaintiffs should not have cited it for any purpose. NRAP 36.

Third, the petition cites *Johnson v. Egtedar*, 112 Nev. 428, 915 P.2d 271 (1996) as a case in which this court "permitted" a battery claim. Pet. 13. The petition's assertion is false. *Johnson* mentioned the word "battery" only once, in the opinion's introductory paragraph, merely as a background fact indicating that the complaint contained a battery claim. *Id.* at 429, 915 P.2d at 273. The appellate issues had nothing to do with the battery claim, and the opinion never mentioned that claim again. *Johnson* did not "permit" a battery claim, as the petition asserts.

Fourth, the petition cites *Estate of Curtis v. S. Las Vegas Med. Inv'rs, LLC*, 136 Nev. 350, 466 P.3d 1263 (2020) as a case in which this court "discussed" an elder abuse claim, thereby suggesting that the court authorized such a claim. Pet. 13. Far from approving such a claim, the *Curtis* court actually found the complaint did **not** state an elder abuse claim because the gravamen of the action was alleged medical negligence. *Id.* at 358 n. 5, 466 P.3d at 1270 n. 5.

All four cases belie Plaintiffs' contention that this court has repeatedly found that a claimant may plead a cause of action against a doctor for both professional negligence and another cause of action. Pet. 12-13.

2. A breach of contract claim does not eliminate statutory protections.

Some of the plaintiffs in this writ proceeding alleged breach of contract as a strategy for avoiding statutory protections for doctors. The district courts did not err by rejecting this strategy. If the gravamen of a complaint is an action in tort, the

nature of the action is not changed by pleading another claim such as breach of contract. *Wharton*, 88 Nev. at 186, 495 P.2d at 361.

In *Egan, supra,* this court recognized that both a breach of contract claim and a negligence claim were subject to the requirements of NRS 41A.071, and the court noted that the protection afforded by the statutory affidavit requirement was applicable to the "entire complaint." 129 Nev. at 241 n.2, 299 P.3d at 366 n.2 (2013).

> Egan's complaint asserted causes of action for both professional negligence and breach of contract. However, because both causes of action were based on Chambers' alleged "failure to perform medical care which rose to the level of compliance with the established care owed to [Egan]," her entire complaint in fact sounded in tort, and issues regarding NRS 41A.071's affidavit requirement thus apply equally to both causes of action. *Id.*

In asserting their breach of contract claims in the present cases, Plaintiffs alleged that the contract required "that medical services would be provided at a professional level within the standard of care." *E.g.* 1 Appx. 4:16-18. Plaintiffs alleged the contract-breaching conduct of the defendant doctors was "beneath the standard of care." *E.g.* 2 Appx. 314, ¶38. Obviously, determining if a defendant doctor's services complied with the contract would require expert evidence establishing the standard of care and establishing compliance or non-compliance with that standard.

Further, the claims for breach of contract contained an allegation that the breach caused "additional pain" and "discomfort," in addition to medical expenses. *E.g.* 1 Appx. 239, ¶32. Pain and suffering are tort damages not recoverable in a contract claim.

Plaintiffs rely on *Szekeres v. Robinson*, 102 Nev. 93, 715 P.2d 1076 (1986), for the proposition that a breach of contract claim is viable in a medical malpractice case. Pet. 13-14. Plaintiffs correctly concede that *Szekeres* "is an unusual case." Pet. 14. The doctor in *Szekeres* "contracted to prevent a pregnancy from occurring." *Id.* at 98, 715 P.2d 1079. As a practical matter, this was the equivalent of a guaranteed medical result, for which the *Szekeres* court denied tort recovery but allowed limited damages on the contract claim.

Plaintiffs cite three other cases for the proposition that this court "has repeatedly recognized and permitted a breach of contract theory of recovery from a physician." Pet. 14-15. Plaintiffs first cite *Egan, supra.* But *Egan* did not permit a breach of contract claim against a medical doctor. The case involved a podiatrist who was not within statutory medical malpractice protections. In any event, the court held that the breach of contract claim was based upon failure to comply with the duty of care owned by the doctor, and therefore the entire complaint sounded in tort, not contract. *Id.* at 241 n.2, 299 P.3d 366 n.2.

Second, Plaintiffs cite *Busick v. Trainor* (Pet. 15), without informing this court that *Busick* was unpublished. *See* NRAP 36. 2019 WL 1422712 (Nev., March 28, 2019; No. 72966; unpublished disposition). *Busick* provides no support for Plaintiff's contention that the case "permitted a breach of contract theory." Pet. 15. The *Busick* order merely recited the fact that there were four theories in the complaint. The court did not indicate which of those theories survived (or did not survive) pretrial proceedings. The unpublished order did not mention anything else about the contract claim, and the order cannot be read as this court's endorsement of a contract-based claim in a medical malpractice case.

Third, Plaintiffs cite *Kang v. Eighth Judicial Dist. Ct.*, again without identifying it as unpublished. Pet. 15. 2020 WL 1492847 (Nev., March 25, 2020; No. 79690; unpublished disposition). *Kang* is easily distinguishable. The patient sued for breach of contract because the doctor used an implant device that was different from the one to which the doctor and the patient had specifically agreed. The claim did not involve any issue dealing with medical judgment, and the claim did not involve a question of whether the doctor complied with the applicable standard of care; and no expert was needed to explain that the doctor did not implant the device to which the parties had agreed. *Id.* at *1. As such, NRS 41A.071 (affidavit requirement) was not applicable.

Accordingly, there is no support for Plaintiffs' contention that a routine medical malpractice case can morph into a breach of contract case – eliminating all the statutory protections enacted by the Nevada legislature and Nevada citizens – simply by the plaintiff asserting a breach of contract claim.

3. An ordinary negligence claim does not avoid statutory protections.

The principle of looking to the gravamen of the complaint was recently applied in the context of actions for medical negligence in *Turner v. Renown Reg'l Med. Ctr.*, 2020 WL 1972790 (Nev., April 23, 2020; No. 77312/77841; unpublished disposition). In *Turner*, a hospitalized patient had a high risk for falling, but the hospital failed to take adequate precautions to prevent her from getting out of bed unassisted. The patient fell, suffering a head injury and death. The wrongful death complaint alleged, among other things, ordinary negligence in not preventing the patient from getting out of bed and falling. The district court dismissed the complaint for not complying with the shortened medical malpractice statute of limitations in NRS Chapter 41A.

This court affirmed, rejecting the plaintiff's contention that the claim sounded in ordinary negligence. The court held:

> "Allegations of breach of duty involving medical judgment, diagnosis, or treatment indicate that a claim is for medical malpractice." *Szymborski v. Spring Mountain Treatment Ctr.*, 133 Nev. 638, 642, 403 P.3d 1280, 1284 (2017) (explaining that "if the jury can only evaluate the plaintiff's claims after presentation of the standards

> of care by a medical expert, then it is a medical malpractice claim"). To determine whether a claim is for medical malpractice or negligence, "we must look to the gravamen or substantial point or essence of each claim rather than its form." *Id.* at *2.

The *Turner* court concluded that the gravamen of the plaintiff's claims was that the hospital failed to provide adequate medical care to the patient by not providing sufficient fall-prevention measures. *Id.* at *2. Despite the plaintiff's effort to phrase the claim as an ordinary negligence case not involving medical malpractice, the *Turner* court held that the gravamen of the claims involved "medical judgement and treatment and require expert testimony," and the district court properly determined that the claims fell within NRS 41A. *Id.*

This court also rejected artful or imaginative pleadings – as a way of avoiding medical malpractice statutory protections – in *Estate of Curtis, supra,* where a patient was mistakenly given a drug intended for another patient. The first patient died. Among other things, the complaint alleged that the death was caused by mismanagement of the health care facility, with allegations of negligence in understaffing and failure to properly train and supervise the staff.

Curtis held that the claims for mismanagement of the facility were all inextricably linked to the underlying alleged negligence – which was medical professional negligence – and therefore the protections in Chapter 41A were applicable. *Id.* at 353-54, 466 P.3d at 1266-67. Such claims "cannot be used

to circumvent NRS Chapter 41A's requirements governing professional negligence lawsuits when the allegations supporting the claims sound in professional negligence."[4] *Id.* at 353, 466 P.3d at 1267.

Accordingly, there is no basis for Plaintiffs' contention that they can avoid statutory protections by phrasing their claims as ordinary negligence instead of professional medical negligence.

4. Statutory protections are not eliminated by claims based upon abuse or neglect of vulnerable or elderly patients.

In the cases in this writ proceeding, Plaintiffs' counsel used imaginative pleading to claim abuse or neglect of vulnerable or elderly patients under NRS 41.1395 (penalties for abuse of elderly or vulnerable persons). This court rejected such a claim in *Lewis v. Renown Regional Medical Center*, 2018 WL 6721372 (Nev., December 18, 2018; No. 74300; unpublished disposition), where the plaintiff's wife committed suicide while she was a hospital patient. The plaintiff sued for medical malpractice, with a claim for abuse and neglect of a vulnerable person. Specifically, he alleged that his wife was vulnerable, and the hospital rendered substandard care

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[4] The claim in *Curtis* based upon the mistake in giving the drug to the wrong patient was allowed to survive. This was a mistake that did not involve medical judgment; rather, it was a mistake falling within the narrow exception for matters of common knowledge and experience that do not call for expert testimony. *Id.* at 356-57, 466 P.3d at 1269.

that constituted abuse and neglect under the statute. The district court dismissed, finding that the claim was within statutory protections (the shortened statute of limitations) for doctors.

This court affirmed, rejecting the plaintiff's contention that the abuse/neglect claim was distinct from his claim of professional negligence. *Id.* at *1. "[W]e must look to the gravamen or substantial point or essence of each claim rather than its form," to determine the claim's character. *Id.* The court then held that the "claim for abuse and neglect [of a vulnerable person] sounds in professional negligence," subject to statutory protections in NRS Chapter 41A. *Id.* at *2.

> The gravamen of Lewis' claim for abuse and neglect is that Renown failed to adequately care for Sheila by failing to monitor her. *** We are not convinced by Lewis' arguments that a healthcare provider's failure to provide care to a patient [by failing to monitor her] presents a claim distinct from a healthcare provider's 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." *Id.*

In *Curtis, supra*, where an elderly patient was mistakenly given another patient's medication, the medical malpractice complaint included a claim for "abuse and neglect of an older person." *Curtis*, 136 Nev. at 351-52, 466 P.3d at 1265-66. *Curtis* found the complaint did not state an elder abuse claim because the gravamen of the action was alleged medical negligence. *Id.* at 358 n. 5, 466 P.3d at 1270 n. 5 (holding that the record did not support an elder abuse claim because the nurse's

actions were grounded in negligence, rather than in willful abuse or the failure to provide a service).

Other courts have rejected attempts to plead creatively by using different terminology – such as elder abuse or abuse of vulnerable persons – to avoid statutory protections for medical malpractice defendants. For example, a discussion of the distinction between claims for medical negligence and elder abuse is set forth in an opinion by Nevada federal judge Larry Hicks, in *Brown v. Mt. Grant Gen. Hosp.*, 2013 WL 4523488 (D. Nev., Aug. 26, 2013; unpublished). The decedent in *Brown* was an elderly patient in a hospital, and the alleged negligence by the hospital resulted in severe bedsores and infections. The plaintiff included a claim for elder abuse.

The federal court dismissed the elder abuse claim, observing that "the [Nevada] elder abuse statute was not intended as a remedy for torts that sound in medical malpractice." *Id.* at *6. The court ruled that "the Nevada Supreme Court has signaled a disapproval of artful pleading for the purposes of evading the medical malpractice limitations." *Id.* at *8. "For example, the [Nevada Supreme] Court concluded that medical malpractice claims extend to 'both intentional and negligence-based actions.'" *Id.* [internal citation omitted]. "This means that a plaintiff cannot escape the malpractice statutes' damages or timeliness limitations" by artful pleading. *Id.* "If the Nevada Supreme Court casts a jaundiced eye on the

artful pleading of intentional torts, it is likely to view the artful pleading of elder abuse similarly."[5] *Id.*

NRS 41.1395 deals with abuse of an "older person" or a "vulnerable person." An "older person" is someone over the age of 60. NRS 41.1395(d). A "vulnerable person" is someone who has an impairment that limits a major life activity and has a medical record of the impairment. NRS 41.1395(e). Under Plaintiffs' theory in this writ proceeding, every medical malpractice case involving a patient over the age of 60 could be considered an elder abuse case outside statutory protections for medical malpractice defendants. And almost every patient who seeks treatment for a medical condition that impairs any major life activity (such as a broken arm that impairs the patient's ability to get dressed) could be considered "vulnerable," eliminating statutory protections for the defendant doctor. Plaintiffs provide no showing that Nevada citizens or the Legislature intended such sweeping exceptions to the statutory safeguards enacted in KODIN – exceptions that would open the floodgates to additional medical malpractice lawsuits.

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[5] After the decision in *Brown*, the plaintiffs in that case moved to amend their complaint to assert the previously dismissed elder abuse claim, arguing that additional evidence justified an amendment. *Brown v. Mt. Grant Gen. Hosp.*, 2015 WL 5286987 (D. Nev., Sept. 9, 2015; unpublished). Judge Hicks rejected the amendment as futile, confirming his earlier ruling in 2013 that the elder abuse statute is not intended for medical malpractice cases, and confirming that the Nevada Supreme Court had disapproved artful pleading intended to evade statutory medical malpractice limitations. *Id.* at *2.

Therefore, the district courts did not abuse their discretion by dismissing the claims based on abuse of older or vulnerable persons under NRS 41.1395.

5. A battery claim does not avoid statutory protections.

As noted above, the complaints against doctors Jones and Schneier included claims for battery. But the gravamen of those claims was professional negligence. NRS 41A.015 provides:

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

By contrast, a battery is "an intentional and offensive touching of a person who has not consented to the touching." *Humboldt Gen. Hosp. v. Sixth Judicial Dist. Ct.*, 132 Nev. 544, 549, 376 P.3d 167, 171 (2016). In *Humboldt*, the patient had an IUD inserted at a hospital. She later discovered that the IUD was not approved by the FDA, because it had been shipped to a location outside the United States, although the device was identical to FDA-approved IUDs. She sued for medical negligence and battery, contending that she had not consented to insertion of an IUD that lacked FDA approval. The district court denied a motion to dismiss, and the hospital petitioned for a writ of mandamus.

The *Humboldt* court granted the writ and ordered the district court to dismiss the claim. The plaintiff had admitted that she consented to the procedure, but she

contended that it was not performed in the way she had consented. This court found that the essence of the plaintiff's claim was medical professional negligence and not a claim for battery. *Id.* at 548-49, 376 P.3d at 170-71. As such, the battery claim was within the protections of NRS Chapter 41A.[6] *Id.*

As noted above, Dr. Jones is a pediatric surgeon who performed surgeries on a child; and Dr. Schneier is a spine surgeon who performed surgeries on the patient's spine. There were no allegations or evidence of a lack of consent for these surgeries. As in *Humboldt*, the battery claims fail.

6. Other claims – despite their titles – are really claims for medical malpractice.

Plaintiffs have also attempted to assert claims for unjust enrichment, negligent infliction of emotional distress, and breach of fiduciary duty/fraud.

(a) Unjust enrichment

The petition makes only a passing reference to the claims for unjust enrichment, merely acknowledging that the claims were made. Pet. 2-3. But the petition cites no case, from Nevada or any other jurisdiction, holding that a medical malpractice claim labeled as unjust enrichment is outside statutory protections for

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[6] The *Humboldt* court did recognize the possibility that a battery claim might not be considered medical professional negligence, for purposes of the statutory protections in NRS Chapter 41A. But this is only where the plaintiff "claims not to have consented at all" to the treatment. *Id.* at 550, 376 P.3d at 172.

doctors. Indeed, the petition is completely silent on any legal basis for the unjust enrichment claim.

(b) Negligent infliction of emotional distress

The petition also fails to provide any analysis of the claim for negligent infliction of emotional distress, other than a passing reference to California statutes, not Nevada statutes. Pet. 24. Research has revealed no Nevada case recognizing such a claim as a proper strategy for avoiding statutory protections for Nevada doctors.

(c) Breach of fiduciary duty

Regarding the claim for breach of fiduciary duty, the only Nevada cases cited in the petition are *Massey v. Litton*, 99 Nev. 723, 669 P.2d 248 (1983) and *Hoopes v. Hammargren*, 102 Nev. 425, 725 P.2d 238 (1986). Pet. 22. The sole issue in *Massey* dealt with the date when the plaintiff discovered her cause of action, for purposes of the discovery component of the statute of limitations. The court made a passing reference to the fact that a doctor-patient relationship is a fiduciary relationship, but this reference had nothing to do with whether the plaintiff's case was a medical malpractice case.

Hoopes involved a surgeon who induced a patient into a sexual relationship and provided her with mind-altering drugs. The court recognized a claim for breach of fiduciary duty in this extreme context, which was far beyond anything within the

realm of a normal doctor-patient experience. The doctor and the patient first met during the doctor-patient relationship. However, their sexual relationship – which was initiated and induced by the doctor – was completely outside the medical relationship.

Massey and *Hoopes* provide no support for the petition's contention that a case is beyond the scope of statutory malpractice protections merely because of conclusory allegations of a fiduciary relationship. Indeed, a fiduciary relationship would exist in every medical malpractice case involving a patient and a doctor, and a fiduciary relationship exception would therefore swallow the statutory rules protecting doctors.

Other courts recognize that where the crux of a fiduciary duty claim is medical malpractice, the fiduciary duty claim cannot proceed as a separate claim. In *Neade v. Portes*, 739 N.E. 2d 496 (Ill. 2000), a medical malpractice complaint included a claim for breach of fiduciary duty, alleging that the doctor had a contract that gave him a financial incentive to minimize treatment. The trial court dismissed the claim. The Illinois Supreme Court upheld the dismissal, holding there is no separate cause of action for breach of fiduciary duty in a medical malpractice case. *Id.* at 440-41. The court cited numerous cases from other jurisdictions holding that a breach of fiduciary duty claim is duplicative of a medical negligence claim. *Id.*

The *Neade* court also cited the United States Supreme Court's decision in *Pegram v. Herdrich*, 530 U.S. 211, 120 S.Ct. 2143 (2000), where the Court refused to recognize a breach of fiduciary duty claim in an ERISA medical malpractice case. The *Pegram* Court held that every claim of breach of fiduciary duty by a doctor involves the question of appropriate treatment, and such a claim "would boil down to a malpractice claim, and the fiduciary standard would be nothing but the malpractice standard traditionally applied in actions against physicians." 530 U.S. at 235, 120 S.Ct. at 2157.

These cases are persuasive. There is no separate claim for breach of fiduciary duties in a medical malpractice case, and the district courts did not err by dismissing those claims.

F. The district courts did not abuse their discretion by determining that dismissal was the appropriate remedy.

Plaintiffs contend that even if their claims were medical malpractice claims within the scope of NRS Chapter 41A, the district courts erred by dismissing the claims. Pet. 11. Plaintiffs argue that a complaint's failure to satisfy the "gravamen" analysis merely means that the complaint must comply with the statute of limitations and the affidavit requirements of NRS Chapter 41A, and all other statutory protections for doctors can essentially be ignored. Pet. 11.

Plaintiffs' argument is a myopic view of important statutory protections for doctors in malpractice cases. NRS Chapters 41A and 42 establish a comprehensive body of statutory law that:

(1) imposes a limitation on awards for noneconomic damages [NRS 41A.035];

(2) eliminates joint and several liability [NRS 41A.045];

(3) imposes a three-year limit on bringing a case to trial, instead of the usual five-year limit [NRS 41A.061(1)];

(4) mandates expedited resolution of such cases [NRS 41A.061(3)];

(5) requires an expert affidavit to be filed with the complaint [NRS 41A.071;

(6) requires a judicial settlement conference [NRS 41A.081];

(7) establishes a statute of limitations [NRS 41A.097]; and

(8) modifies the collateral source rule for medical malpractice defendants [NRS 42.021].

In addition to these statutory protections for medical malpractice defendants generally, doctors who are state employees are entitled to the sovereign immunity cap on damages to which all state employees are entitled. *See Martinez v. Maruszczak*, 123 Nev. 433, 438, 168 P.3d 720, 723-24 (2007) (doctor employed by state university medical school). The cap on damages for doctors employed by the

state is important to protect the state treasury and to encourage qualified professionals to accept state employment. *Id.* at 449-50, 168 P.3d at 731.

In opposing the motions to dismiss in the four cases in this writ proceeding, Plaintiffs' counsel expressly conceded that his purpose in asserting the additional claims was to avoid statutory protections for the defendants. For example, he conceded he was trying to avoid the sovereign immunity cap on damages against the doctors who are state employees (doctors Kirgan and Jones). 1 Appx. 31:4-6 ("Therefore, it benefits Plaintiff Ziegler to plead and prove alternate claims such as breach of contract and breach of statute in this action to maximize his recovery under the governmental immunity caps"). And he conceded that he asserted the claim for abuse of elderly or vulnerable people to obtain "double the damages." 1 Appx. 216:9-10 ("I can get double the damages"). Plaintiffs make the same concessions in their writ petition. *E.g.*, Pet. 10, 24, 25.

There is no meaningful distinction between the various statutory protections for medical malpractice defendants, for purposes of this writ case. This court has rejected artful or imaginative pleading used by medical malpractice plaintiffs as a strategy to evade the statute of limitations and the affidavit requirement. It would be absurd for this court to hold that such plaintiffs **can** use the same strategy to evade other important statutory protections – such as caps on damages, several liability, and the modified collateral source rule. The additional claims might also

open the door to expanded discovery (including discovery relating to punitive damages for the intentional tort claims). Plaintiffs provide no compelling reason for such a result, which would be a radical departure from the public policy established in the statutory protections.

Additionally, if the facts show one primary right of the plaintiff and one wrong done by the defendant, the plaintiff has only a single cause of action, "no matter how many forms and kinds of relief he may claim that he is entitled to." *Reno Club, Inc. v. Harrah,* 70 Nev. 125, 130, 260 P.2d 304, 306 (1953). "[A] plaintiff can recover only once for a single injury even if the plaintiff asserts multiple legal theories." *Elyousef v. O'Reilly & Ferrario, LLC*, 126 Nev. 441, 444, 245 P.3d 547, 549 (2010).

Here, Plaintiffs' artful pleading of multiple legal theories does not allow them to receive double or duplicative recovery, and should not allow them to avoid statutory protections for medical malpractice defendants. The district courts did not abuse their discretion by dismissing the non-malpractice claims.

CONCLUSION

The complaints in this writ case reveal that every separate cause of action was premised upon a claim of medical negligence, and expert testimony would be required to establish a prima facie case. Indeed, all four complaints were accompanied by expert affidavits or declarations opining that the defendant doctors

failed to meet the standard of care for doctors. Plaintiffs cannot be allowed to engage in an imaginative pleading strategy that is intended for the sole purpose of evading statutory protections for doctors, such as caps on damages, modifications of the collateral source rule, and the rule governing joint and several liability. The petition should be denied.

Dated:10/8/2021

/s/ Robert L. Eisenberg
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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this answer complies with the formatting requirements of NRAP 32(a), including the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6), because this answer has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman type style. This answer complies with NRAP 21(d), because it contains 6,993 words.

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

Dated: Oct. 8, 2021

/s/ Robert L. Eisenberg

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CERTIFICATE OF SERVICE

I certify that I am an employee of LEMONS, GRUNDY & EISENBERG and that on this date the foregoing document was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows:

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I further certify that on this date I served copies of the foregoing, postage prepaid, by U.S. mail to:

Hon. Veronica Barisich
Department 5
Eighth Judicial District Court
200 Lewis Avenue
Las Vegas, NV 89155

Hon. Susan Johnson
Department 22
Eighth Judicial District Court
200 Lewis Avenue
Las Vegas, NV 89155

DATED this 8th day of October, 2021.

Margie Nevin

EMPLOYEE OF LEMONS, GRUNDY & EISENBERG