

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
IN AND FOR THE COUNTY OF CLARK;
THE HONORABLE SUSAN JOHNSON,
DISTRICT 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.

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Case No. 83306

**ANSWER TO PETITION FOR WRIT OF MANDAMUS OR
PROHIBITION**

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SCHNEIER, M.D.; MUHAMMAD
SAEED SABIR, M.D.; AND JAYSON
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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 party in interest is an individual.

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

HALL PRANGLE & SCHOONVELD, LLC

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

DATED this 13th day of October, 2021.

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ANSWER TO PETITION FOR WRIT OF MANDAMUS OR PROHIBITION¹

Introduction

Petitioners seek the extraordinary remedy of a Writ of Mandamus or Prohibition to review district court orders that properly rejected Petitioners' patent attempt to circumvent through creative pleading the legislatively enacted protections afforded providers of healthcare under NRS 41A and 42. In accordance with this Court's controlling precedent, the district court dismissed Petitioners' "Ordinary Negligence," "Breach of Contract," "Unjust Enrichment," and "Neglect of an Older Person" causes of action because the gravamen of those claims sounded in professional negligence, and thus they could not be maintained separately to avoid the statutory protections afforded to providers of health care "*under the facts alleged.*" (Pet. Appx. at 224-25) (emphasis added).

Furthermore, contrary to the Petitioners' assertion (Pet. 8-9), the district court did not hold that NRS Ch. 41A is always "the exclusive remedy" in actions against a provider of health care, and writ relief is obviously not available to a review a decision that the district court never made.

¹ Real Party in Interest Jayson Paulo Alberto Agaton, APRN, is a defendant in the action filed by Petitioner Jane Nelson only, and thus files this Answer in response to that portion of the Petition addressing the order dismissing her claims against him and his co-defendant therein, Real Party In Interest Muhammad Saeed Sabir, M.D.

Accordingly, for these reasons, those that follow, and those set forth in the Real Parties in Interest Stephanie A. Jones, D.O., Daniel M. Kirgan, M.D., Ira Michael Schneier, M.D., and Muhammad Saeed Sabir, M.D.’s Answer, none of Petitioners’ assertions warrant an exercise of this Court’s extraordinary intervention.

STATEMENT OF FACTS

The Petition challenges four district court orders in four different cases. Pursuant to NRAP 28(i), Real Party In Interest Jayson Agaton, APRN (“Nurse Agaton”) adopts and incorporates by reference Real Parties in Interest Stephanie A. Jones, D.O., Daniel M. Kirgan, M.D., Ira Michael Schneier, M.D., and Muhammad Saeed Sabir, M.D.’s (“Real Parties in Interest Physicians”) “FACTUAL AND PROCEDURAL BACKGROUND” Section of their brief as if fully restated herein. Nurse Agaton provides the following additional facts and procedural history relevant to Petitioner Jane Nelson’s action against him and Dr. Sabir:

Petitioner Nelson’s Complaint.

On October 19, 2020, Petitioner Nelson filed a complaint for monetary damages against Defendants Nurse Agaton, and Muhammed Saeed Sabir, M.D., and Pioneer Health Care, LLC (collectively “Dr. Sabir”), arising out of certain treatment she received in January 2020 while undergoing physical and occupational therapy at Spanish Hills Wellness Suites following back surgery at Spring Valley Hospital Medical Center. (Pet. Appx. at 77-91).

Specifically, Petitioner Nelson alleged that following her admission at Spanish Hills, a complete blood count was obtained on January 11, 2020 showing a platelet count of 238,000/uL; that on January 14, 2020 another complete blood count was obtained showing a platelet count of 74,000/uL which was abnormally low and possibly constituted a condition known as thrombocytopenia requiring treatment; that despite noting that he had reviewed the blood count results, Nurse Agaton did not diagnose the thrombocytopenia, address the condition, or otherwise administer any treatment prior to her discharge; that Dr. Sabir also did not diagnose, address or otherwise order treatment for her thrombocytopenia; and that as a result of these failures, Petitioner Nelson was subsequently hospitalized and ultimately diagnosed with bilateral pulmonary emboli and bilateral deep venous thrombosis of the lower extremities, and was required to undergo an emergent left pulmonary artery thrombectomy and placement of an inferior vena cava filter. (*Id.*).

Based on these factual allegations, Petitioner Nelson's Complaint asserted five causes of action against Nurse Agaton and Dr. Sabir: Professional Negligence, Ordinary Negligence, Breach of Contract, Unjust Enrichment, and Neglect of an Older Person pursuant to NRS 41.1395. (*Id.*). The complaint further stated that the case was exempted from arbitration on the grounds that it was a "**Professional Negligence/Medical Malpractice Case Chapter 41A.**" (*Id.* at 77) (emphasis in original).

Petitioner Nelson’s “Professional Negligence” claim asserted, *inter alia*, that “[t]he negligent care of Dr. Sabir and Mr. Agaton resulted in additional pain, discomfort, medical procedures, and expenses to Ms. Nelson that she otherwise would not have incurred”; that Pioneer Health Care is responsible for the acts of its agents, Dr. Sabir and Nurse Agaton under principles of respondeat superior and NRS § 41.130; that “[i]n support of Plaintiff’s Complaint, Plaintiff submits the report of Matthew Wright, M.D.”; and that [a]s a redirect result of Defendants’ negligence, Plaintiff has been damaged in an amount in excess of Fifteen Thousand Dollars (\$15,000), which will be proven at trial.” (*Id.* at 79-81(¶¶23-27)).

Petitioner Nelson’s “Ordinary Negligence,” “Breach of Contract,” “Unjust Enrichment,” and “Neglect of an Older Person” causes of action all “re-state[d] and re-allege[d] each and every paragraph of the Complaint as if fully restated herein,” thereby adopting and incorporating the allegations offered in support of her “Professional Negligence” claim, including the attached affidavit of merit authored by Matthew W. Wright, M.D. (*Id.* at 80-83(¶¶13, 25, 28, 36, 42, and 48)). Moreover, like her “Professional Negligence” claim, these alternative theories also sought damages for breaches of duty to provide “medical services . . . at a professional level within the standard of care”; for providing “substandard medical care and treatment”; and/or for “failing to address critical blood laboratory result[s], note the new diagnosis of thrombocytopenia, failing to conduct a proper patient evaluation

for the new diagnosis of thrombocytopenia, and failure of Dr. Sabir to appropriately supervise the nurse practitioner, Mr. Agaton.” (Pet. Appx. at 81(¶¶29, 38, 39, 40, 44, 45, 56).

As stated above, Plaintiff attached an affidavit of authored by internal medicine physician Matthew W. Wright, M.D. in support of her entire complaint. (*Id.* at 86-91). As against Nurse Agaton specifically, Dr. Wright asserted that:

“It is my professional opinion that Mr. Agaton deviated from the standard of care by:

- A. Failure to note the new diagnosis of thrombocytopenia on January 14.
- B. Failure to conduct a proper patient evaluation for the new diagnosis of thrombocytopenia. More likely than not, an appropriate workup of the thrombocytopenia would have led to the diagnosis of heparin-induced thrombocytopenia, with subsequent admission to an acute care hospital before the patient developing [sic] the complication of submassive pulmonary embolism.”

Dr. Wright further opined that,

“based upon a reasonable degree of medical probability, it is my opinion that Mr. Agaton did not use such care as reasonably prudent nurse practitioners practicing in the same field would have provided under similar circumstances. The standard of care would require him to recognize the thrombocytopenia, raise the issue with Dr. Sabir, properly diagnose the underlying cause, and address it, none of which was done.” (Pet. Appx. at 91).

Nurse Agaton and Dr. Sabir File Motions To Dismiss.

Both Dr. Sabir and Nurse Agaton filed motions to dismiss pursuant to NRCPC 12(b)(5) seeking the dismissal of all of Petitioner Nelson's claims but for her claims for professional negligence. (Pet. Appx. at 92-99, 129-47, 148-50). In support of these motions, Dr. Sabir and Nurse Agaton asserted, *inter alia*, that dismissal of Petitioner Nelson's non-professional negligence claims was required because the gravamen of those claims sounded in professional negligence, and thus could not be maintained separately to avoid NRS 41A's protections/limitations on damages under the facts alleged. (Pet. Appx. at 92-99, 129-47, 180-204).

Petitioner Nelson filed responses, asserting that "even if alternate causes of action depend on the 'medical diagnosis, judgment, or treatment' of the Defendants, Plaintiff's causes of action for Breach of Contract, Unjust Enrichment and Neglect of an Older Person/NRS § 41.1395 are valid causes of action and should not be dismissed." (Pet. Appx. at 156).

After entertaining full briefing, the district court granted Dr. Sabir and Nurse Agaton's motions. (*Id.* at 220). In its written order filed February 1, 2021, the district court noted that Petitioner Nelson exempted her case from arbitration on the grounds that it is a medical malpractice case and held that "under the facts alleged":

- the gravamen of Petitioner Nelson's complaint is "professional negligence" as defined by NRS § 41A.015;

- her “Professional Negligence” claim concerned deviations from the standard of care involving medical diagnosis, judgment and treatment which could not be evaluated without the assistance of medical expert testimony, and thus fell squarely within Chapter 41A;
- her claim for “Ordinary Negligence” did not fall within the “common knowledge” exception but rather occurred in the course of a professional relationship, involved the exercise of medical judgment, and thus could not be maintained separately to avoid the statutory protections afforded to providers of health care under the facts alleged;
- the gravamen of her “Neglect of an Older Person” cause of action pursuant to NRS 41.1395 is professional negligence because it arises out of the same underlying care and treatment that Petitioner Nelson contends constituted medical malpractice, and thus could not be maintained separately to avoid the statutory protections afforded to providers of health care under the facts alleged; and
- the gravamen of her claims for “Breach of Contract” and “Unjust Enrichment” was also professional negligence; that Petitioner Nelson did not allege that she entered into an express agreement with Nurse Agaton guaranteeing a specific result but instead alleged that they entered into an agreement that medical services would be provided consistent with the standard of care and contends

that the breach arose therefrom; and that since both sound in professional negligence, they cannot be maintained separately to avoid the requirements of NRS 41A under the facts alleged. (Pet. Appx. at 222-233).

ARGUMENT²

I. Nothing In The Petition Justifies The Extraordinary Writ Relief Sought.

A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an officer, trust, or station or to control an arbitrary or capricious exercise of discretion. *International Game Technology, Inc. v. Second Jud. Dist. Ct. ex rel. County of Washoe*, 124 Nev. 193, 197, 179 P.3d 556, 558-59 (2008). A writ of prohibition is proper only when a judicial tribunal acts without or in excess of its jurisdiction. *Smith v. Eighth Jud. Dist. Ct.*, 107 Nev. 674, 677, 818 P.2d 849, 852 (1991). Extraordinary writ relief is purely discretionary and the burden of establishing the propriety of such relief is “a heavy one” and lies with the petitioner. *Id.*; *Poulos v. Eighth Jud. Dist. Ct.*, 98 Nev. 453, 455, 652 P.2d 1177, 1178 (1982). Ultimately, “[e]xtraordinary relief should be extraordinary,” *Walker v. Second Jud. Dist. Ct.*, 476 P.3d 1194, 1195, 136 Nev. Adv. Op. 80 (2020), so when an plain, adequate and speedy legal remedy exists, writ relief is unavailable and the petition should be denied. NRAP 21; NRS § 34.170; *Pan v. Eighth Jud. Dist.*

² Pursuant to NRAP 21(b)(2) and 28(i), Real Party In Interest Nurse Agaton adopts and incorporates by reference the “Argument” section, including subparts “A-F”, of Real Parties in Interest Physicians’ Answer as if fully restated herein.

Ct., 120 Nev. 222, 224, 88 P.3d 840, 841 (2004). An appeal from a final judgment is generally an adequate legal remedy precluding writ relief. *Pan, supra*.

Here, despite the district court's *repeated* pronouncement that its dismissal order was required "under the facts alleged," (Pet. Appx. at 224(¶6), 225(¶¶7, 8), Petitioner Nelson nonetheless asserts that this Court's extraordinary review is warranted because "one judge in the Eighth Judicial District Court has found that NRS Chapter 41A is the *exclusive remedy* for persons injured by a physician, contrary to this Court's controlling precedent [citing cases]." Pet. at 8-9 (emphasis added).

The district court made no such finding. Rather, the district court explicitly found that "under the facts alleged" Petitioner Nelson could not maintain separate causes of action for "Ordinary Negligence," "Breach of Contract," "Unjust Enrichment," or "Neglect of an Older Person" pursuant to NRS § 41.1395, because the gravamen of those claims sounded in professional negligence. (Pet. Appx. at 222-233). This finding is consistent with this Court's controlling precedent. See *Szymborski v. Spring Mt. Treatment Ctr.*, 133 Nev. 638, 645, 403 P.3d 1280, 1286 (2017); *Estate of Curtis v. South Las Vegas Medical Investors, LLC*, 136 Nev. 350, 352-54, 466 P.3d 1263, 1266-68 (2020); *Zhang v. Barnes*, No. 67219, 382 P.3d 878, 2016 WL 4926325, *4, 6 (Nev. September 12, 2016) (unpublished disposition); *Schwartz v. University Medical Center of Southern Nevada*, No. 77554, 460 P.3d

25, 2020 WL 1531401 *1-2 (Nev. March 26, 2020) (unpublished disposition); *Turner v. Renown Reg'l Med. Ctr.*, Nos. 77312, 77841, 461 P.3d 163, 2020 WL 1972790 (Nev. April 23, 2020) (unpublished disposition), all holding that where, as here, Petitioner Nelson's alternative claims are "inextricably linked" to her underlying professional negligence claim against Nurse Agaton and Dr. Sabir, the gravamen of those claims is professional negligence subjecting them to the provisions of NRS Ch. 41A no matter how they are labeled. *Estate of Curtis*, 136 Nev. 354, 466 P.3d at 1267.

Nor are Petitioners without a plain, adequate and speedy remedy at law. In *Risher v. Eighth Jud. Dist. Ct.*, No. 73793, 426 P.3d 32, *1 (Nev. September 21, 2018) (unpublished disposition), the plaintiffs sought review of the district court's dismissal of their "Breach of Fiduciary Duty and Tortious Breach of Fiduciary Duty" claim on the grounds that it was "duplicative and subsumed" by their companion claim for professional negligence/medical malpractice. *Id.*; *Risher v. Straub, APRN, et al*, No. 16A731019, 2017 WL 2321173, *1 (Nev. Dist. Ct. April 26, 2017). This Court found that its extraordinary and discretionary intervention was not warranted and denied the petition because it "was not persuaded that an appeal from a final judgment is an inadequate remedy" to seek review of that order. *Id.*; *see also Walker*, 136 Nev. Adv. Op. 80, ___, 476 P.3d at 1198. The same reasoning applies with equal force here. Indeed, Petitioners could fail to establish that any of the Real Parties In

Interests' conduct fell below the applicable standard of care, thereby precluding recovery under any of the claims asserted. Accordingly, this Court should deny the instant Petition for the additional reason that an appeal from a final judgment is an adequate remedy to seek review of the district court's orders.

CONCLUSION

The instant Petition provides no basis for this Court's grant of extraordinary writ relief. Accordingly, for the aforementioned reasons and those stated in Real Parties in Interest Physicians' Answer, Nurse Agaton respectfully requests that the Petition be denied.

DATED this 13th day of October, 2021.

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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.

2. I hereby certify that this answer complies with NRAP 21(d), because it contains 2,384 words.

3. 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.

4. 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.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of HALL PRANGLE & SCHOONVELD, LLC; that on the 13th day of October, 2021, I served a true and correct copy of the foregoing ANSWER TO PETITION FOR WRIT OF MANDAMUS OR PROHIBITION 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,

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