

**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

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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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Electronically Filed  
Oct 27 2021 02:43 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court  
SUPREME COURT CASE NO. 83306

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**PETITIONER'S RESPONSE TO ANSWERING BRIEF OF REAL  
PARTIES IN INTEREST**

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## **I. WRIT RELIEF IS WARRANTED IN THIS MATTER**

The Real Parties in Interest begin by asserting that procedurally this case is not a proper one for writ relief. Writ relief is an extraordinary remedy and is discretionary. However, this Court has held that “[w]hile an appeal generally constitutes an adequate and speedy remedy precluding writ relief, we have, nonetheless, exercised our discretion to intervene ‘under circumstances of urgency or strong necessity, or when an important issue of law needs clarification and sound judicial economy and administration favor the granting of the petition’” *Cote H. v. Eighth Judicial Dist. Court*, 124 Nev. 36, 39, 175 P.3d 906, 908 (2008) (footnote omitted) (*quoting State v. Second Judicial Dist. Court*, 118 Nev. 609, 614, 55 P.3d 420, 423 (2002)). In fact, the Court has previously found that allowing for writ relief to construe NRS Chapter 41A is appropriate despite the possible remedy of an appeal because a “writ petition could affect the course of the litigation and thus promote sound judicial economy and administration” and that writ relief can be granted where there is an “important legal issue in need of clarification involving public policy, which could resolve or mitigate related or future litigation.” *Tam v. Eighth Judicial Dist. Court*, 131 Nev. 792, 795-96, 358 P.3d 234, 237 (2015) (entertaining and granting writ relief as to the constitutionality and construction of the medical malpractice damages caps in NRS § 41A.035).

Petitioners joined their claims to stress to this Court that writ relief is

appropriate. The various District Court judges of this state have divergent views on whether NRS Chapter 41A is an exclusive remedy which “subsumes” all other causes of action against a provider of medical care or whether other common law actions survive. The issues contained in this writ will affect pleading in hundreds of medical malpractice cases statewide. Further, requiring each Petitioner to litigate their entire case to trial and seek appellate review creates a scenario where the Petitioners are doomed to litigate the entire case twice for the justice they seek, when this writ petition can promote judicial economy and restore the dismissed claims prior to the first trial.

Therefore, Petitioners respectfully disagree with the Real Parties in Interest and submit that this writ petition presents important issues of statewide importance and should be decided by the Court.

## **II. THE DISTRICT COURT IS IMPROPERLY APPLYING THE SZYMBORSKI CASE**

In *Szymborski v. Spring Mt. Treatment Ctr.*, 133 Nev. 638, 403 P.3d 1280 (Nev. 2017) the Supreme Court set a two-step analysis for alternatively pleaded claims against a provider of health care. Step one is to determine whether the “gravamen” of the action involves “medical diagnosis, judgment or treatment.” Step two is to determine, if the answer to step one is affirmative, whether the complaint complies with NRS Chapter 41A. The District Court in Petitioners’ cases applies

step one but forgets about step two entirely and instead simply completely dismisses all causes of action as “subsumed” into professional negligence. None of Petitioners’ claims, for example, were filed beyond the one-year professional negligence statute of limitations and none failed to attach a supporting medical expert affidavit. Therefore, Petitioner are unclear as to why the causes of action are dismissed. The Real Parties in Interest cite to many cases from this Court and others where alternate causes of action were dismissed. A common factual scenario is when the claims were filed too late or without a supporting medical expert affidavit under NRS Chapter 41A. However, the dismissal always occurred after step two of the *Szymborski* analysis, never by stopping with step one the “gravamen” test.

The Real Parties in Interest try to describe the alternate causes of action, all of which have been previously recognized by this court against providers of medical care, as “artful pleading.” Where the Court has used this phrase previously is to address claims that try to circumvent NRS Chapter 41A’s statute of limitations and supporting medical expert affidavit requirements. That is not what any of the Petitioners are doing in these cases.

Buried in footnote 2 of Real Party in Interest’s Answering Brief is a statement that they never used the phrase “exclusive remedy” in any of their briefing. However, they did use the word “subsume” and they did plainly argue that all causes of action against a provider of health care are invalid except for professional

negligence under NRS Chapter 41A. This was also clearly the basis for the District Court's repeated rulings.

**III. THE SUPREME COURT SHOULD CLARIFY WHEN AND TO  
WHAT CAUSES OF ACTION THE NON-ECONOMIC  
DAMAGE CAPS IN NRS § 41A.035 APPLY**

As a statute in derogation of the common law, KODIN and NRS Chapter 41A must be narrowly construed. *Branch Banking & Tr. Co. v. Windhaven & Tollway, Ltd. Liab. Co.*, 131 Nev. 155, 158-59, 347 P.3d 1038, 1040 (2015) (Statutes that operate in derogation of the common law should be strictly construed, and, if there is any doubt as to the statute's meaning, the court should interpret the statute in the way that least changes the common law.) But KODIN never provides for an exclusive remedy and "It is settled that additional causes of action may arise out of the same facts as a medical malpractice action that do not trigger..." malpractice damage caps. *Unruh-Haxton v. Regents of University of California*, 162 Cal.App.4th 343, 352, 76 Cal. Rptr. 3d 146 (2008).

There exist many issues of law in Petitioner's cases as to how various damage caps might be applied to different causes of action. Yet, Petitioners will never get to present those issues as the cases now procedurally stand because their alternate causes of action were dismissed for failure to state a claim upon which relief can be granted.

As for breach of contract actions, when a patient receives medical services they are simply contracting for a service like any other professional service. Where that service is not skillfully performed, a breach of contract case exists. *Szekeres v. Robinson*, 102 Nev. 93 (1986). One of the harshest results at the District Court level was for Petitioners Ziegler and Davis because they were injured by state-employed physicians and thus their tort recovery is limited to \$100,000 under NRS § 41.035. This does not cover hundreds of thousands of dollars in medical expenses the Petitioners paid for and additional medical expenses (consequential damages) they had to incur to fix them. Nevada's governmental immunity cap applies only to *tort* damages, not *contract* actions. This purposeful exception exists because parties would be apprehensive to contract with the state if they had no breach of contract damages. Therefore, Ziegler and Davis should have been allowed to present a breach of contract case to the jury and, if they prevailed, recover on that theory without regard to the tort damages caps in NRS § 41.035. At the very least, they should have been entitled to present that claim and have the District Court resolve how the cap applies. Instead, their breach of contract claims was dismissed at the outset, despite complying with all requirements of NRS Chapter 41A. Respectfully, the dismissal of those claims was error by the District Court.

Medical battery claims are well-defined as separate, recognized causes of



action under Nevada law. Petitioners Bickham and Davis had body parts operated on for which they gave no consent, a clear medical battery claim whether deemed a partial or full lack of consent case. It might be debated whether this amounts to a separate and distinct intentional tort for damage cap purposes, but the jury should be left to decide whether a medical battery occurred. Dismissal of these medical battery claims simply abolishes them, based on no express provision of NRS Chapter 41A or other law. Respectfully, the dismissal of those claims was error by the District Court.

The Real Parties in Interest complain that reading NRS § 41.1395 to apply to physicians and allow for separate, uncapped recovery would be unfair to providers of medical care. However, the statute contains no exception for medical care providers and indeed its primary purpose was to address neglect of patients in care facilities. The Petitioners should be able to present claims to a jury that this statute was violated, and that uncapped liability is the result since breach of that statute does not fall under NRS Chapter 41A. Instead, their breach of statute claims was dismissed at the outset, despite complying with all requirements of NRS Chapter 41A. Especially notable here was the dismissal of Petitioner Nelson's claims. As an older person recuperating in a short-term care facility, her neglect was the exact type of harm the Nevada Legislature meant to curb when enacting NRS § 41.1395. Respectfully, the dismissal of those claims was error by the District Court.

Lastly, on the breach of fiduciary duty claims, it is well-settled that physicians have a fiduciary duty to patients. The dismissal of Petitioner Bickham's breach of fiduciary duty claim is especially notable since he alleged that his surgeon intentionally concealed the fact that he operated on the wrong spinal level from him. If true, this would not sufficiently relate to the *performance* of medical treatment at all. Instead, this would be an intentional breach of fiduciary duty to properly advise the patient of the status of their health. It is distinct enough to be a separate cause of action and should not be subject to the medical malpractice caps in NRS § 41A.035. Respectfully, the dismissal of those claims was error by the District Court.

#### **IV. CONCLUSION**

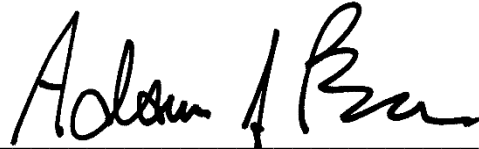
Somehow, the District Court has moved from determining if alternate causes of action comply with NRS Chapter 41A to simply finding those causes of action can never even be pleaded against a physician. How this leap was made given that every decision of this court engages in the two-step analysis described in *Szymborski* is unclear.

In closing, whether the Supreme Court addresses these damage cap arguments in this writ petition or leaves them for the District Court to resolve based on the specific facts of each case is up to the Court. At its heart, this writ petition presents a pleading issue and asks why properly pleaded and recognized causes of action were dismissed by the District Court. The point of the writ petition is that dismissing the

alternative causes of action for failure to state a claim when all pleading requirements of NRS Chapter 41A were met was improper. Petitioners' claims were properly pleaded and complied with all Chapter 41A requirements. Those claims should have been allowed to proceed to trial. Therefore, Petitioner request writ relief directing the District Court to re-instate those claims and have them heard on the merits.

Respectfully submitted this 27<sup>th</sup> day of October, 2021.

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

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

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

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

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

☒ Proportionately spaced, has a typeface of 14 points or more, and contains approximately 2,847 words; or

☐ Monospaced, has 10.5 or fewer characters per inch, and contains \_\_\_\_\_ words or \_\_\_\_\_ lines of text; or

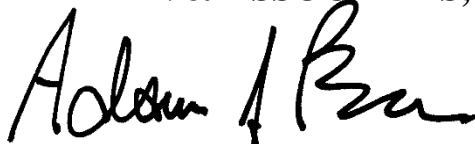
☒ Does not exceed 15 pages.

3. Finally, I hereby certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules

of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 27<sup>th</sup> day of October , 2021.

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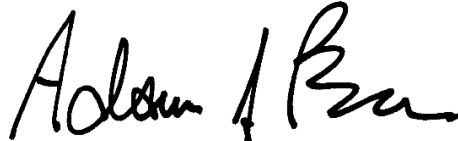
**VERIFICATION OF PETITIONERS' COUNSEL**  
**UNDER NRAP 21(a)(5)**

1. I am Adam J. Breeden, Esq., counsel for the Petitioners in this Writ Petition and in their underlying District Court cases.
2. I hereby verify under oath that the facts set forth herein are true to my knowledge and supported with citations to the Appendix of this Petition.
3. I make this verification for my clients pursuant to NRAP 21(a)(5).

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

Dated this 27<sup>th</sup> day of October, 2021.

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## **CERTIFICATE OF SERVICE**

Pursuant to Nev. R. App. 25, I hereby certify that on the 27<sup>th</sup> day of October, 2021, a copy of the foregoing **PETITIONER'S RESPONSE TO ANSWERING BRIEF OF REAL PARTIES IN INTEREST** was served via electronic service and/or U.S. First Class Mail on all registered users as follows:

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