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 AMICUS CURIAE BRIEF OF NEVADA JUSTICE ASSOCIATION

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As allowed by this court's order of October 28, 2021, real parties in interest Jones, Kirgan, Schneier, and Sabir hereby submit the following answer to the brief of amicus curiae Nevada Justice Association (NJA).

ARGUMENT

A. NJA's brief fails to demonstrate that writ relief is appropriate.

The answers filed in this writ proceeding showed that Plaintiffs' petition failed to prove entitlement to writ relief. NJA's brief does not rebut this showing.

Even if this court denies the petition and upholds the district courts' discretionary decisions to dismiss all of Plaintiffs' non-malpractice claims, Plaintiffs will still enjoy the right to pursue every remedy authorized under the law for medical malpractice claimants. Denial of the petition will deprive Plaintiffs of absolutely nothing to which Plaintiffs are presently entitled under Nevada law. No denied remedies; no denied discovery; and no denied damages.

The only things Plaintiffs will lose by denial of the petition will be an opportunity to obtain judicial amendment of medical malpractice statutes and an opportunity to evade important statutory protections for doctors. NJA is an extremely powerful lobbying force in the Nevada Legislature. NJA's efforts to change medical malpractice laws should be directed to the Legislature, not the Nevada Supreme Court.

Despite NJA's bald assertion that medical malpractice defendants are "repeatedly" taking positions that are contrary to Nevada rules (NJA Br. at 2, 6), there is no actual evidence supporting this assertion. Nor is there any evidence supporting NJA's suggestion that the issues here have broad implications beyond the four Plaintiffs who filed the petition – Plaintiffs who filed complaints that are essentially mirror images of each other, all filed by the same attorney.

Writ relief is neither available nor appropriate in this case. Plaintiffs have plain, speedy, and adequate remedies in the ordinary course of law, precluding writ relief. And none of the other factors weighing in favor of writ relief are applicable here, for the reasons established in the answers already on file. NJA's brief does not prove otherwise.

B. NJA's brief improperly evaluates NRCP 8.

1. NJA's brief improperly expands Plaintiffs' NRCP 8 argument.

An amicus brief that essentially duplicates or explains arguments in a party's brief is improper because it merely extends the length of the party's brief. *See Ryan v. Commodity Futures Trading Com'n,* 125 F.3d 1062, 1063 (7th Cir. 1997). Also, an appellate court should reject amicus arguments that were not raised by the parties on appeal. *Potter v. Potter,* 121 Nev. 613, 619 n. 16, 119 P.3d 1246, 1250 n. 16 (2005). This court's order of October 28, 2021 already determined that the

court will disregard any improper arguments in the amicus brief when the court decides this case.

Here, the writ petition mentioned NRCP 8 only in passing. The petition provided snippets of quotations from the rule in only six lines on only one page. Pet. 13. The petition contained no substantive analysis of the rule and no attempt to apply the rule to the issues in the petition.

On the other hand, NJA's amicus brief discusses Rule 8 numerous times on at least six different pages. The brief cites Rule 8 so many times that the table of authorities has the word *passim* instead of page numbers. The brief attempts to provide analyses of Rule 8 that were never provided in the petition. In other words, NJA's amicus brief merely attempts to beef up the petition's minimalist arguments regarding Rule 8, by greatly expanding arguments far beyond anything contemplated in the petition. This court should disallow and ignore the new arguments.

2. NJA's arguments regarding NRCP 8 are not persuasive.

The gist of NJA's argument is that Rule 8 merely requires a complaint to provide a short conclusory statement of a claim, and thereby to provide adequate notice to the defendant. NJA Br. 4-5. NJA's argument is founded on the contention that a medical malpractice plaintiff, "**like any plaintiff**," satisfies

pleading requirements even if the complaint contains multiple alternative causes of action. NJA Br. 5 (bold added).

There is no merit to NJA's argument that a medical malpractice plaintiff is "like any plaintiff." Medical malpractice is a unique field of tort law in Nevada. It has its own body of procedural requirements and statutory protections mandated by citizens through enactment of KODIN in 2004 (Ballot Question No. 3) and by the Legislature through enactment of NRS Chapter 41 provisions in the 2002 special legislative session. These important procedural requirements, as well as statutory protections for doctors, should not be lightly pushed aside by NJA's doomsday arguments about the unavailability of adequate remedies for medical malpractice plaintiffs in our state. Nor should these important protections – such as caps on damages, modification of the collateral source rule, and abrogation of joint and several liability – be negated by NJA's unsupported contention that a medical malpractice plaintiff is merely like any other plaintiff in Nevada.

NJA takes the simplistic approach that NRCP 8 is the sole governing rule for a complaint, and that the rule allows "additional" and "alternative" causes of action, with no requirements as to the form of the complaint. NJA Br. 6. Although Rule 8(a) does provide some general rules for pleading a complaint, Rule 8(a) must be read in harmony with NRCP 12(f). This rule prohibits a party from pleading "any redundant, immaterial, impertinent, or scandalous matter." *See Torres v. City*

of Albuquerque, 2015 WL 13662387 at *10 (D.N.M. 2015; unpublished) (court struck claim that was redundant and duplicative of other claims).

NJA ignores that fact that 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 v. Spring Mountain Treatment Ctr.*, 133 Nev. 638, 641-42, 403 P.3d 1280, 1284 (2017). "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." *Id.*

Tested against these principles of law, the focus of a medical malpractice case should be on whether the defendant's treatment of the patient fell below the applicable standard of care. But instead of being satisfied with asserting claims for professional medical negligence, Plaintiffs filled their complaints with redundant, immaterial, and impertinent matters. These additional claims, such as claims for elder abuse and battery, are irrelevant, extraneous, and simply beside the point of the complaints. Plaintiffs readily concede (*e.g.* Pet. 10, 24, 25), that their sole purpose in adding these immaterial matters was to evade important statutory

protections for medical malpractice defendants – such as caps on various damages. NJA's amicus brief does not deny the fact that Plaintiffs' sole purpose in asserting the additional claims was to evade statutory protections for doctors.[1]

Plaintiffs' extraneous causes of action could, if allowed to stand, result in negative implications for medical malpractice defendants. These implications include opening up discovery to myriad new areas of inquiry (such as discovery regarding punitive damages), requiring additional motions in limine, adding new jury instructions, and potentially exposing doctors to professional and financial damage far beyond anything contemplated by statutes. NJA's argument regarding NRCP 8 ignores all these implications.

C. NJA's other arguments against dismissal are without merit.

Along with its Rule 8 argument, NJA also argues that "duplicative" and "even contradictory" claims are allowed in a complaint. NJA Br. 9. As such, NJA argues that the additional non-malpractice claims should not have been dismissed. NJA's argument is without merit. For one thing, the argument ignores the fact that medical malpractice cases have their own governing rules and limitations in Nevada, as explained above.

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[1] Indeed, NJA expressly concedes that a medical malpractice plaintiff will assert additional or alternative claims – in addition to medical malpractice claims – for the purpose of obtaining different burdens of proof, damages, jury instructions, discovery, and remedies. NJA Br. 18. These purposes are directly contrary to the public policy behind statutory protections for doctors in medical malpractice cases.

In any event, dismissal is appropriate for the additional claims. In *Iacangelo v. Georgetown University*, 760 F. Supp. 2d 63 (D.D.C. 2011), a medical malpractice plaintiff added an additional claim for breach of fiduciary duty. The defendant moved to dismiss the additional claim. The federal court granted the motion, holding that the fiduciary duty claim was already encompassed by the theory underpinning the malpractice claim – failure to act as a prudent physician. *Id.* at 66. The fiduciary duty claim was "entirely duplicative" of the malpractice claim, resting on the same factual allegations and the same standard of care. *Id.* As a matter of judicial economy, "courts should dismiss such duplicative claims." *Id.* (internal quotations omitted). A malpractice plaintiff cannot "recast his malpractice claim" as another type of claim, and a court should dismiss the additional claim. *Id.*

Similarly, in *Stelman v. United States*, 2016 WL 5315196 (S.D.N.Y. 2016; unpublished), a medical malpractice plaintiff added additional claims to her malpractice claims. The court ruled that the additional claims were "duplicative of her malpractice claims," and therefore the court dismissed the additional claims. *Id.* at *6-7. *See also Colon v. New York State Dept. of Corr.*, 2017 WL 4157372 at *10-11 (S.D.N.Y. 2017; unpublished) (court dismissed ordinary negligence claim because it was "duplicative of the medical malpractice claims").

The district courts did not err by dismissing the non-malpractice claims.

D. This court should ignore NJA's arguments about wrongful death cases.

As noted above, an appellate court will disregard amicus arguments that were not raised by the parties on appeal. Here, NJA's brief contains a separate section with three pages of arguments dealing with wrongful death pleading requirements in medical malpractice cases. NJA Br. 16-18. The brief provides extensive discussion of the wrongful death statute, NRS 41.085.

None of the four lawsuits in this case were wrongful death cases, and the district court motions did not deal with wrongful death pleading requirements. Also, the writ petition itself does not cite or discuss the wrongful death statute or any wrongful death pleading requirements. Thus, NJA's brief is seeking an advisory opinion on an irrelevant issue that was never raised in the district court and never raised by Plaintiffs in the writ petition. Accordingly, this court should disregard the entire section in NJA's brief dealing with wrongful death pleading and the wrongful death statute.

CONCLUSION

For the reasons in the original answers and in this answer to NJA's amicus brief, the court should deny the writ petition in its entirety.

Dated: November 12, 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 this court's order of October 28, 2021, because it contains eight pages.

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: November 12, 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:

Breeden & Associates, PLLC
Hall Prangle & Schoonveld, LLC/Las Vegas
McBride Hall
Claggett & Sykes
Lauria Tokunaga Gates & Linn, LLP/Las Vegas

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

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

Hon. Susan Johnson
Department 22
Eighth Judicial District Court
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DATED this 12th day of November, 2021.

/s/ Margie Nevin
Margie Nevin