

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 NEVADA JUSTICE ASSOCIATION'S AMICUS BRIEF

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VERIFICATION

Under penalties of perjury, the undersigned declare that they are counsel for Respondent Jayson Paulo Alberto Agaton, APRN; that they know the contents of this Answer to Amicus Brief; that the pleading is true of their own knowledge, except as to those matters stated on information and belief, and that as to such matters they believe them to be true. This verification is made pursuant to NRS 15.010 and NRAP 21(a)(5).

DATED this 12th day of November, 2021.

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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 12th day of November, 2021.

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ANSWER TO NEVADA JUSTICE ASSOCIATION’S AMICUS BRIEF

Introduction

Like the Petitioners it seeks to support, the Nevada Justice Association’s (“NJA”) Amicus Brief plainly mischaracterizes the district courts’ rulings. None of the orders granting Real Parties In Interests’ motions to dismiss contained language, much less held, expressly or impliedly, that professional negligence claims are the “sole and exclusive” means of redress against a provider of healthcare. (Am. Br. at 2, 8). Nor did any of these district courts hold, expressly or impliedly, that professional negligence plaintiffs are prohibited from pleading additional causes of action against providers of healthcare when such claims are supported by the alleged facts.

Rather, all of these district court orders simply rejected the Petitioners’ patent attempt to put four (or more) different labels on their professional negligence claim. Thus, the district court properly dismissed Petitioner Jane Nelson’s¹ “Ordinary Negligence,” “Breach of Contract,” “Unjust Enrichment” and “Neglect of an Older Person” claims pursuant to NRCP 12(b)(5) because none of these “additional” or “alternative” claims were supported “under the facts alleged,” but were instead four alternatively-titled versions of the same professional negligence claim.

¹ Real Party In Interest Jayson Paulo Alberto Agaton, APRN, files this Answer only to that portion of NJA’s Amicus Brief offered in support of Plaintiff Nelson’s Petition for writ of mandamus/prohibition.

As demonstrated more fully below, this decision (like those of the other district courts) was *consistent* with the rules of civil procedure and this Court's precedent. Accordingly, for these reasons and those that follow, and those set forth in the Real Parties in Interest Stephanie A. Jones, D.O.'s, Daniel M. Kirgan, M.D.'s, Ira Michael Schneier, M.D.'s, and Muhammad Saeed Sabir, M.D.'s Answer to NJA's Amicus Brief², none of NJA's assertions support an exercise of this Court's extraordinary and discretionary intervention.

ARGUMENT

I. The Facts As Alleged By Petitioner Nelson Did Not Support Any Of Her Alternative Claims.

NJA's Amicus Brief presents the Court with a false issue. The district court did not dismiss Petitioner Nelson's ordinary negligence, breach of contract, unjust enrichment and neglect of an older person claims because professional negligence is the "sole and exclusive remedy of a patient filing suit against a provider of healthcare." (Am. Br. at 8). Nor did the district court dismiss those claims because professional negligence plaintiffs are prohibited from pleading in the alternative or asserting claims other than professional negligence against a provider of health care. Rather, the district court dismissed Petitioner Nelson's claims because not only did

² Pursuant to NRAP 21(b)(2) and 28(i), Real Party In Interest 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") Answer to NJA's Amicus Brief.

the gravamen of each of those claims sound in professional negligence, but her factual allegations did not support separate claims based on separate theories “under the facts alleged.” (Pet. Appx. at 224-25).

Indeed, Petitioner Nelson’s ordinary negligence claim alleged that the defendants “failed to address a critical and dangerously low platelet count result” and that as a result of this negligence, she had been injured. (Pet. Appx. at 81). Contrary to her assertion, this purported “failure to act” did not fall within the common knowledge exception. Rather, as the district court found, (Pet. Appx. at 224), it was simply a recasting of her professional negligence claim because it “pertains to alleged actions *or inactions* that occurred within the course of a professional relationship and [] raises questions of medical judgment beyond the realm of common knowledge and experience,” *e.g.*, what constitutes a “critical and dangerously low platelet count result” and/or what constitutes “proper supervision for a patient.” *See Estate of Curtis v. South Las Vegas Medial Investors, LLC*, 136 Nev. 350, 358, 466 P.3d 1263, 1270 (2020).

Likewise, Petitioner Nelson’s breach of contract and unjust enrichment claims also could not be separately maintained because they too were merely a recasting/duplication of her professional negligence claim. They alleged that Defendants agreed to provide medical services “at a professional level within the standard of care” and/or “paid for medical services” but that such services/medical

care were “performed in a substandard way” such that Petitioner Nelson was injured. (Pet. Appx. at 82). Even ignoring the fact that Petitioner Nelson did not allege that she entered into an express agreement with Nurse Agaton guaranteeing a specific result, the district court correctly found that the gravamen of these claim was for professional negligence, that they were merely a recasting/duplication of her professional negligence claim, and thus the factual allegations did not support them being separately maintained. *See State Farm Mut. Auto. Ins. Co. v. Wharton*, 88 Nev. 183, 186, 495 P.2d 359, 361 (1972) (“If the complaint states a cause of action in tort, and it appears that this is the gravamen of the complaint, the nature of the action is not changed by allegations in regard to the existence of or breach of a contract. In other words, it is the object of the action, rather than the theory upon which recovery is sought (,) that is controlling.”)

Lastly, the district court also correctly found that Petitioner Nelson’s neglect of an older person claim could not be separately maintained because it too was merely a recasting/duplication of her professional negligence claim. Like her professional negligence claim, she again alleged that Defendants failed to address critical blood laboratory results, diagnose thrombocytopenia, and conduct a proper patient evaluation. (Pet. Appx. at 79-80, 83-84). Accordingly, based on these allegations the district court correctly concluded that the facts alleged did not support

a separate cause of action for neglect of an older person under NRS 41.1395. *See Estate of Curtis*, 136 Nev. at 358 n.5, 466 P.3d 1270 n.5.

These holdings do not run contrary to the rules of civil procedure or this Court's precedent. Indeed, while NRCP 8 allows for the pleading of separate claims, Nevada's pleading rules do not allow for the recasting or duplication of claims under alternative titles. *See e.g., Estate of Curtis*, 136 Nev. at 358 n.5, 466 P.3d at 1269-70 n.5, wherein similar attempts to recast a professional negligence claim as claim for neglect of an elder person under NRS 41.1395 was rejected because the allegations did not support it being maintained as a separate claim; *Lewis v. Renown Regional Medical Center*, 134 Nev. 973, *1-2, 432 P.3d 201, __ (Nev. December 8, 2018) (unpublished disposition) (abuse and neglect claim arising out of NRS 41.1395 was not "distinct" from claim for professional negligence because both claims involved a breach of a duty involving medical judgment, diagnosis, or treatment); *Turner v. Renown Reg'l Med. Ctr.*, Nos. 77312, 77841, 461 P.3d 163, 2020 WL 1972790 (Nev. April 23, 2020) (unpublished disposition) (upholding dismissal of complaint under NRS 41A.097(2) because notwithstanding plaintiff's recasting of claims as ordinary negligence, negligence per se, wrongful death and survival, all of the claims sounded in medical malpractice and thus were subject to statute of limitations applicable to such claims). *See also* NRCP 12(f) ("The court

may strike from a pleading an insufficient defense or *any redundant*, immaterial, impertinent, or scandalous matter”) (emphasis added).

Accordingly, contrary to NJA’s assertion, Petitioner Nelson was not erroneously prohibited from pleading multiple causes of action in violation of NRCP 8 or Nevada law. Rather, the district court properly dismissed her additional/alternative claims because, consistent with the aforementioned authority, they were not “distinct” claims supported by the appropriate and necessary facts, but were instead four essentially identical versions of her professional negligence claim improperly recast/relabelled under different names.

II. Every Cause Of Action Requires An Adequate Factual Basis.

As demonstrated by the authorities cited *supra*, simply recasting a cause of action under multiple titles does not establish separate and distinct claims capable of surviving dismissal under NRCP 12(b)(5). Rather, in order to properly state a claim upon which relief can be granted, each individual cause of action must be supported by appropriate factual allegations necessary to support that claim and it is the gravamen of those allegations, not the form or title of the theory assigned them, that is controlling.

NJA cites *Estate of Curtis, Zhang v. Barnes*, No. 67219, 382 P.3d 878, 2016 WL 4926325, *4, 6 (Nev. September 12, 2016) (unpublished disposition), and *Szymborski v. Spring Mountain Treatment Center*, 133 Nev. 638, 403 P.3d 1280,

(2017), and argues that they establish that separate factual allegations and separate injuries for each cause of action pled are not required. NJA's reliance on these cases is misplaced. Indeed, while both claims sought recovery for the same injury, the plaintiff's ordinary negligence claim in *Estate of Curtis* arose from the set of facts surrounding the nurse's administration of morphine to the wrong patient, while its professional negligence claim arose from the separate set facts underlying the nurse's alleged failure to monitor the plaintiff *after* the morphine was administered. *Estate of Curtis*, 136 Nev. at 357-58, 466 P.3d 1269-70. Similarly, even though it was derivative/inextricably intertwined with the underlying employee negligence claim(s), the plaintiff's negligent hiring/training/supervision claim was still a separate and distinct theory for imposing liability on another defendant (the nurse's employer) that was dependent on its own set of material facts, *e.g.*, the principal's conduct surrounding its hiring/training/supervision of the nurse.

This same rationale applies to the negligent hiring/training/supervision claim at issue in *Zhang, supra*. Again, there was no basis for the Court to contemplate/discuss much less dismiss that claim as duplicative or a recasting of the underlying employee negligence claim because it was a separate and distinct claim, against a different defendant, that was seeking to hold the defendant-employer liable for its employee's conduct based on its own separate and distinct set of material

facts/conduct, *i.e.*, the *employer's* conduct in hiring/training/supervising the allegedly negligent employee.

Likewise, while the various ordinary negligence claims in *Szymborski, supra*, all sought recovery for the same injury, *i.e.*, \$20,000 in property damage to the plaintiff's home, the plaintiff's ordinary negligence claims sought recovery for that injury based on the performance of certain *nonmedical* functions in the discharge of the plaintiff's son, while his professional negligence claim sought recovery based on a separate and distinct set of facts concerning the alleged negligent provision of medical care at the time of his son's discharge. *Szymborski v. Spring Mountain Treatment Center*, 133 Nev. at 644, 646, 403 P.3d at 1286-87. Thus, contrary to NJA's assertions (Am. Br. at 9-16), *Szymborski* (and *Estate of Curtis, Zhang*) undermines, rather than supports, its assertion that separate factual allegations for each cause of action pled are not required.

Ultimately, based on *Estate of Curtis, Zhang*, and *Szymborski*, each individual cause of action must be supported by appropriate factual allegations necessary to support the theory of liability alleged no matter how those allegations are titled or labeled.³

³ In further support of its assertion that a claim need not be based on separate facts or separate injuries, NJA's Amicus Brief also contains an argument section discussing Nevada's Wrongful Death Statute, NRS 41.085. None of the four lawsuits at issue in these writ proceedings involve a wrongful death claim. Thus, the wrongful death statute, and the propriety of pleading such a claim alongside a claim

CONCLUSION

The Nevada Justice Association's Amicus Brief asks the Court to issue a decision that rejects conclusions that were patently not the basis of any of the district courts' rulings dismissing Petitioners' claims. It further asks the Court to issue of a decision that would ultimately run contrary to NRCP 8 and this Court's precedent. Accordingly, for the aforementioned reasons, those presented in 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 to NJA's Amicus Brief, and those presented in the Real Parties in Interest's Answers to the Petition, the Amicus Brief provides no basis for this Court to grant extraordinary and discretionary writ relief, and the Petition should be denied.

DATED this 12th day of November, 2021.

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for professional negligence is not properly before the Court. In any event, NJA's assertion is still without merit because the wrongful death statute merely provides the decedent's heirs and estate standing to bring suit to recover damages arising from the decedent's death and is not an independent theory of liability. Thus, the wrongful death claim is not a duplicative liability theory, but is instead simply the statutory vehicle through which damages for wrongful death may be recovered by the decedent's heirs and estate.

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this Answer to Amicus 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), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page 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 Nevada Rules of Appellate Procedure.

I further certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the typestyle requirements of NRAP 32(a)(6) as this brief was prepared in a proportionally spaced typeface using Times New Roman 14 pt font. I also certify that this brief complies with the page or type volume limitations of NRAP 32(a)(7) as it contains 2,198 words.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of HALL PRANGLE & SCHOONVELD, LLC; that on the 12th day of November, 2021, I served a true and correct copy of the foregoing ANSWER TO NEVADA JUSTICE ASSOCIATION'S AMICUS BRIEF 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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