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

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

Electronically Filed
Nov 26 2021 05:06 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

SUPREME COURT CASE NO. 83306

PETITIONERS' COMBINED REPLY TO ALL RESPONSE BRIEFS FILED PERTAINING TO AMICUS CURIAE BRIEF OF THE NEVADA JUSTICE ASSOCIATION

ADAM J. BREEDEN, ESQ.
Nevada Bar No. 008768
BREEDEN & ASSOCIATES, PLLC
376 E. Warm Springs Road, Suite 120
Las Vegas, Nevada 89119
Phone (702) 819-7770
Fax (702) 819-7771
Adam@breedenandassociates.com
Attorney for Petitioner

Petitioners' position is a simple one. One core set of facts can support multiple causes of action. This is the fundamental concept that the Real Parties in Interest fail to acknowledge in their Response briefs. There is no medical malpractice exception to this rule. While Real Party in Interest Agaton tries to allege that the District Court did not in fact rule that NRS Chapter 41A was the exclusive remedy of an injured patient, that is exactly what the basis of the District Court's rulings were. In the Bickham case, Judge Johnson expressly stated at oral argument[1] and in her subsequent written order[2] that the basis for her ruling was simply that the alternate claims against a physician are "subsumed" in professional negligence claims and therefore fail to state a claim upon which relief can be granted. But the Real Parties in Interest repeatedly argued this "subsumed" standard in all of Petitioners' cases as well, as if NRS Chapter 41A contained an exclusive or sole remedy provision, which it does not.[3]

Real Party in Interest Agaton argues that the Petitioner Nelson's claims were properly dismissed because they were not factually supported. This argument truly exposes what was going on in Petitioners' cases, an improper factual review at the

[1] Bickham Transcript of Second Motion Hearing at APPX.000453 Line 19.

[2] Bickham Order Granting Second Motion to Dismiss at APPX.000456 Line 8-10.

[3] Argued by Real Party in Interest Kirgan at 000018, ln. 25; Argued by Real Party in Interest Sabir at 000094, ln. 14-15 ("these claims must be dismissed as they are subsumed by Plaintiff's claim for Professional Negligence.").

pleading stage. Petitioners have two responses. This appellate court should step back and ask itself why the District Court is assessing factual allegations (which are assumed to be true in favor of Petitioners at the pleading stage on a motion for failure to state a claim. Furthermore, what really went on at the District Court level is that the District Court wanted to apply the incorrect federal standard contained in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) to dismiss Petitioners' claims as not "plausible" without any presentation of evidence or discovery. The Real Parties in interest repeatedly cited to *Iqbal* in briefs[4] and certainly how the District Court handled the dismissal can only be described as applying *Iqbal*. If the District Court was not simply applying *Iqbal*, it is unclear how it was able to prospectively assess Petitioners' claims and adjudicate both that they did not factually present alternative claims for relief and that their claims were subsumed into professional negligence.

The Real Parties in Interest also seemingly beg the Supreme Court not to hear this writ at all, thus increasing the time, effort and expense of having these issues reviewed in Petitioners' various cases. Argument is made that the issue in these writs affect only four claimants all represented by one attorney. The Petitioners strongly disagree. The broader perspective is that this legal issue will affect every medical malpractice claim in the state. It is a threshold pleading issue. It may affect

[4] Cited by Real Party in Interest Kirgan at 000014; cited by Real Party in Interest Agaton at 000134 ln. 10-11; cited by Real Party in Interest Jones at 000251 ln. 2; cited by Real Party in Interest Dr. Schneier at 000326 ln. 2 and 000418 ln 20.

discovery that is allowed. It may affect instructions given to the jury. It may affect how damage caps are applied. Justice is best served to have these issues resolved prior to a trial and potentially having to re-try all of the cases involved in this Petition.

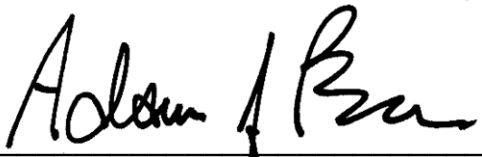
The Real Parties in Interest refer to and argue NRCP 8 at length in their brief. It is well-accepted that alternate causes of action can be pleaded. Neither KODIN nor NRS Chapter 41A replaces NRCP 8. The Real Parties in Interest argue about the public policies behind the KODIN initiative. It is well-accepted that KODIN was the work of doctors and their insurance companies. Perhaps the drafters of KODIN should have consulted lawyers when writing KODIN, however, because while the medical malpractice defense industry asserts that alternative causes of action to professional negligence now do not exist at all (the only way they could be dismissed under a NRCP 12(b)(5) motion) there is literally nothing in KODIN that makes NRS Chapter 41A an exclusive remedy or abolishes all other common law causes of action that the same core facts support. KODIN might have been drafted in that manner but was not. Moreover, given that KODIN is simply patterned on California's MICRA and California has recognized that MICRA did not abolish all other causes of actions against providers of health care, the argument of the Real Parties in Interest that allowing these alternate causes of action will decimate the purpose of KODIN rings untrue. California has survived, somehow, with the

pleading rules the Petitioners urge this Court to adopt for no less than 40 years.

In closing, if the Petitioners' alternate causes of action are dismissed because they have not complied with KODIN or NRS Chapter 41A, Petitioners are still waiting to learn how. If KODIN or NRS Chapter 41A is the exclusive remedy against a provider of health care and by statute supersedes the numerous authority from this Court allowing for those causes of action, the Real Parties in Interest should be able to point to the language in the statute that says that. However, they cannot. The Petitioners asserted valid, alternate claims that should not have been dismissed for failure to state a claim and request that the Supreme Court issue a writ directing those claims to be restored.

Respectfully submitted this 26th day of November, 2021.

BREEDEN & ASSOCIATES, PLLC



ADAM J. BREEDEN, ESQ.
Nevada Bar No. 008768
376 E. Warm Springs Road, Suite 120
Las Vegas, Nevada 89119
Phone: (702) 819-7770
Fax: (702) 819-7771
adam@breedenandassociates.com
Attorney for Petitioners

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:

[X] 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:

[X] Proportionately spaced, has a typeface of 14 points or more, and contains approximately 1,000 words; or

[ ] Monospaced, has 10.5 or fewer characters per inch, and contains _____ words or _____ lines of text; or

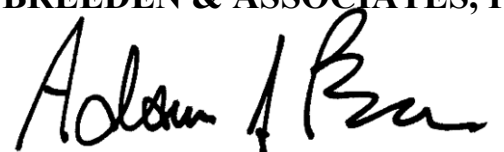
[X] Does not exceed 15 pages.

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 26th day of November, 2021.

BREEDEN & ASSOCIATES, PLLC



ADAM J. BREEDEN, ESQ.
Nevada Bar No. 008768
376 E. Warm Springs Road, Suite 120
Las Vegas, Nevada 89119
Phone: (702) 819-7770
Fax: (702) 819-7771
Adam@breedenandassociates.com
Attorney for Petitioners

CERTIFICATE OF SERVICE

Pursuant to Nev. R. App. 25, I hereby certify that on the 26th day of November, 2021, a copy of the foregoing **PETITIONERS' RESPONSE** was served via electronic service and/or U.S. First Class Mail on all registered users as follows:

Hon. Susan Johnson, Department 22
EIGHTH JUDICIAL DISTRICT COURT
200 Lewis Avenue
Las Vegas, Nevada 89155
Respondent

Ian M. Houston, Esq.
HALL PRANGLE & SCHOONVELD
1140 N. Town Center Drive, Suite 340
Las Vegas, Nevada 89144
Counsel for Real Party in Interest Jayson Agaton, APRN

Hon. Veronica Barisich, Department 5
EIGHTH JUDICIAL DISTRICT COURT
200 Lewis Avenue
Las Vegas, Nevada 89155
Respondent

Micah S. Echols, Esq.
CLAGGETT & SYKES LAW FIRM
4101 Meadows Lane, Suite 100
Las Vegas, Nevada 89107
Counsel for Nevada Justice Association

Robert L. Eisenberg, Esq.
LEMONS GRUNDY & EISENBERG
6005 Plumas Street, 3rd Floor
Reno, Nevada 89519
Counsel for Real Party's in Interest Stephanie A. Jones, D.O., Daniel M. Kirgan, M.D., Ira Michael Schneier, M.D., and Muhammad Saeed Sabir, M.D.

Anthony D. Lauria, Esq.
LAURIA TOKUNAGA GATES & LINN
601 South 7th Street
Las Vegas, Nevada 89101
Counsel for Real Party's in Interest Stephanie A. Jones, D.O., Daniel M. Kirgan, M.D., Ira Michael Schneier, M.D.

Sean M. Kelly, Esq.
McBRIDE HALL
8329 W. Sunset Road, Suite 260
Las Vegas, Nevada 89113
Counsel for Real Party in Interest Muhammad Saeed Sabir, M.D.

/s/ Adam J. Breeden
Attorney or Employee of
Breeden & Associates, PLLC