IN THE SUPREME COURT OF THE STATE OF NEVADA

VALLEY HEALTH SYSTEM, LLC, A NEVADA LIMITED LIABILITY CORPORATION, D/B/A CENTENNIAL HILLS HOSPITAL MEDICAL CENTER, Appellant, v. DWAYNE ANTHONY MURRAY, INDIVIDUALLY, AS AN HEIR, AS GUARDIAN AND NATURAL PARENT OF BROOKLYN LYSANDRA MURRAY, AND AS SPECIAL ADMINISTRATOR OF THE ESTATE OF LAQUINTA ROSETTE WHITLEY-MURRY, Respondents.	)	Supreme Court 80968 District Case No. A699586

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YOUR NEVADA DOCTORS AMICUS BRIEF

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Docket 80968 Document 2021-12506

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(1), and must be disclosed:

Your Nevada Doctors has no parent company and is not publically traded. There is no publically traded company that owns more than 10% of the stock of Your Nevada Doctors.

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These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

DATED this 30 day of April, 2021.

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STATEMENT OF THE CASE

This is an appeal from a final judgment in an action arising from a claim of wrongful death arising from medical malpractice and an ancillary claim of breach of fiduciary duty. 35A 7091. Eighth Judicial District Court, Clark County, Department VI, the Honorable Jacqueline M. Bluth, District Judge.

IDENTITY OF AMICUS

Amicus Your Nevada Doctors is a coalition of health care providers from across Nevada. They work with all stakeholders to advocate for improved access and availability of health care for all Nevadans.

Your Nevada Doctors is not directly connected with any party to this action, although it has a relationship with many hospitals, including Centennial Hills Hospital.

This amicus brief supports the position of the appellant, and seeks reversal of the judgment. The district court's rulings in this case give Your Nevada Doctors serious concerns about the future of medicine in Nevada, and the availability of affordable healthcare for all Nevadans. This amicus brief addresses the policy this Court should adopt for Nevada.

INTRODUCTION

One Nevada policy is to allow doctors and healthcare providers to practice medicine without fear, to limit claims against them, and to cap damages so long as

claims are based in medical treatment and judgment. This policy protects both the healthcare providers, and every Nevadan's right to affordable healthcare. Another Nevada policy is to compensate the injured when another person is at fault. These policies must be balanced.

Protections against runaway liability and punitive damages for healthcare providers have been enacted by the legislature and strengthened by the voters for the benefit of all Nevadans; these protection must not be set aside lightly.

In this case, statutory protections were set aside by the district court based on the thinnest of semantic pleading and the shakiest of reasoning. A label is not an argument, but this Court will search the record in vain for anything other than labels to justify plaintiffs' breach of fiduciary duty claim.

When plaintiffs began pursuing theories outside of professional negligence, they relied on the label "fiduciary duty." The label "intentional" got plaintiffs to the jury, and the label "profit motive" sealed the deal. But these are just labels.

There is no fiduciary duty with respect to the medical treatment of a patient. Centennial owed only a statutorily defined duty of care. Whether medical injury is the result of intentional conduct is a misdirection if that conduct is the exercise of medical judgment. The exercise of medical judgment may be flawed, but it will always be intentional.

This Court has already set the standard. It need only apply the correct

standard. Your Nevada Doctors believes this Court will agree that this is a garden-variety medical malpractice action, manipulated to make an end run around NRS Chapter 41A.

Your Nevada Doctors does not argue that a healthcare provider could never owe a fiduciary duty to a patient. Your Nevada Doctors argues that such a duty (if applied as a standard of care rather than a statement of attitude[1]) must arise only in a context so divorced from medical treatment and/or the exercise of medical judgment as to not threaten the public policy of protecting our healthcare system by protecting our doctors and hospitals from unlimited liability and unreasonable punitive damages.

This Court must strike a balance between healthcare actions involving treatment and judgment that are protected, and the rare action of injury in a healthcare context not involving medical treatment and judgment. A policy must be carefully crafted that protects our healthcare providers and facilities, because that protects us, even if the standard impacts the recovery of non-economic damages of the injured. It must draw a line between those who cause harm not part of medical treatment and judgment, without reducing protection for conduct

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[1]Everyone should act toward everyone else with good intentions and fairness, but to the extent plaintiffs want to impose "absolute good faith" as a standard of care in a case involving medical injury, this Court should reject the attempt to change the standard of care adopted by the legislature and strengthened by the people.

that involves medical treatment and judgment. The delivery of healthcare services involves unavoidable risk and danger. A medical judgment that prevents harm in one case may not avoid injury in another.

The standard should be that (1) if medical treatment–including the delivery of medical services–or the exercise of medical judgment is related to the injury, the statutory protections apply; and (2) conduct not in any way related to medical services or judgment is actionable under standard non-medical related tort law.

STATEMENT OF THE ISSUE

> What is Nevada's policy for protecting healthcare providers from runaway liability and punitive damages in cases where a patient is harmed as a result of medical treatment or judgment.

STATEMENT OF FACTS

This is not a complete statement of the facts. These easily verifiable facts provide a sufficient bases to allow this Court to reach an appropriate decision regarding the policy of Nevada in this area.

On April 20, 2013, LaQuinta Rosette Whitley-Murray was admitted to Centennial Hills Hospital for treatment of severe pain caused by her chronic sickle cell anemia. 2A 230 (Amend. Complaint ¶11). Murray died in the hospital on April 24, 2013. 2A 230 (Amend. Complaint ¶19).

On April 22, 2014, Murray's heirs and estate ("plaintiffs") filed a wrongful death action alleging medical negligence against a number of defendants,

including Centennial.[2] 1A 2. Plaintiffs alleged that Centennial's conduct "fell below the standard of care" in failing to manage Murray's sickle cell anemia. 1A 7.

On December 28, 2015, less than three months before the scheduled trial, plaintiffs filed a motion for leave to amend their complaint to assert against Centennial a new cause of action for breach of fiduciary duty. 1A 91. At the hearing on the motion, plaintiffs relied on a nurse's report that mentioned a "staffing crisis" on the day Murray died. Plaintiffs argued this was an intentional tort not subject to the protections of NRS 41A. 1A 211-13.

On January 19, 2016, over Centennial's objections, the district court, Judge Rob Bare, accepted the argument that an intentional tort would not be subject to the limitation of NRS Chapter 41A, and allowed plaintiffs to file the proposed amended complaint. 1A 227. The amended complaint alleges only that Centennial "failed to properly staff the floor on which LAQUINTA was a patient" and as a result "the nurses failed to be proper advocates for LAQUINTA, and failed to carry out orders in a timely fashion."[3] 2A 240 (Amend. Complaint, ¶79).

On October 26, 2017, Centennial moved for partial summary judgment,

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[2]By the time of trial, Centennial was the sole remaining defendant.

[3]After trial, the district court found that the allegations of "failure to carry out orders" were treatment related, and subsumed by the professional negligence claim. 30A 6229.

arguing that the breach of fiduciary duty claim was an unfounded attempt to avoid the non-economic damages cap and the several liability provisions for professional negligence claims set forth in NRS Ch. 41A. 7A 1358. Centennial argued both that hospitals owe no fiduciary duties to their patients above and beyond the duty imposed by NRS Chapter 41A, and that the staffing issue was the type of issue NRS Chapter 41A was intended to cover. *Id.*

On November 15, 2018, at the hearing on the motion, Judge Cadish, now Justice Cadish, who was not going to be the trial judge but was sitting in for the motion hearing only, noted multiple times that she was bound by Judge Bare's prior determinations both that fiduciary duties existed and that an intentional tort fell outside the parameters of NRS Chapter 41A. 10A 1791-1982. Plaintiffs argued that Centennial's policy regarding staffing resulted in a nursing crisis. The nursing crisis, they argued, was an intentional tort that did not fall under the shield of NRS Chapter 41A. Specifically, counsel argued:

> No. Actually, no. Because breach of fiduciary duty is a breed of fraud, which is the intention – it's an intentional tort. And our point is, is they created the staffing crisis, and knowing they had a staffing crisis, they didn't staff it right; and on top of that, their people didn't react right to the staffing crisis.
>
> . . . .
>
> It's not a breach of fiduciary duty merely because they gave her Toradol. Okay? The breach of fiduciary duty is having this

staffing crisis and doing nothing about it.[4]

10A 1929. Judge Cadish questioned:

> Well, I guess, ultimately, I mean, what – I understand the concept of a claim for breach of fiduciary duty and intentional tort being different, perhaps, than a medical malpractice claim.[5] But how do you get to this being an intentional tort?

10A1935.

In response, counsel just repeated the same argument: "First of all, they have a staffing crisis, and they create who's going to be on duty and who's not. Then when they have a staffing crisis they do nothing. They do nothing."

10A1935.

Judge Cadish, relying on *Goldenberg v. Woodard*, 2014 WL 2882560 (unpublished, June 24, 2014),[6] which she misapprehended, denied summary

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[4]These assertions all proved to be false; there never was a staffing crisis. 30A 6229. But even if all of these allegations were true, they could not more squarely fit into the definition of medical malpractice, now called professional negligence. *See Est. of Curtis v. S. Las Vegas Med. Invs., LLC*, 136 Nev. ___, 466 P.3d 1263, 1269 (Adv. Op. 39, 2020) (claims inextricably intertwined with medical treatment are subject to NRS 41A.); *Zhang v. Barnes*, 2016 WL 4926325 (Nev. 2016, unpublished). Labeling these actions administrative and intentional does not alter that fact.

[5]This is quoted because this is the problem. Because medical malpractice is now called professional negligence, application of the label "intentional"could exempt any medical injury claim from the protections of the statute, but that label alone cannot be the distinction, or the statute is rendered meaningless.

[6]*Goldenberg*, an unpublished decision, was relied on by plaintiffs and the district court at every level of the proceedings below. Thus we are compelled to discuss it in this brief. This Court has specifically disapproved of citing

judgment because she concluded that intentional torts are not covered by NRS Chapter 41A. 10A1938-39.[7]

The alleged staffing crisis was the only basis for an intentional tort asserted to this point in the litigation or at any time before trial. A supposed nursing shortage, and the adoption of a policy regarding the number of nurses to have on duty at any given time, was the intentional tort horse plaintiffs rode to trial. At trial, plaintiffs changed horses.

At trial, plaintiffs' experts opined that the administration of an NSAID medication, Toradol, based on the timing of the doses, led to kidney failure. Specifically, the black box warning on Toradol states that it should be administered at six hour intervals, and not more than 120 mgs. per day. Because Toradol was not on the list of "time critical medications," hospital policy allowed it to be administered by nurses one hour before or after the six hour recommended dosage, and a day for the hospital went from 7:00 a.m. to 7:00 a.m., to match the

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Goldenberg. *See Risher v. Eighth Jud. Dist. Ct.*, 134 Nev. 1002, 426 P.3d 32 (unpublished, 2018) ("We note, however, that the petitioners' reliance on *Goldenberg v. Woodard* . . . is misplaced as *Goldenberg* was decided before January 1, 2016, and, therefore, may not be cited for persuasive value. *See* NRAP 36(c)(3).").

[7]Judge Cadish never entered a written order. The written order, which was summary in nature, was entered by Judge Bonaventure. 11A 2090.

shifts of the nurses. Centennial's nurses did not violate Centennial's policies.[8]

Murray received her first dose in the emergency room on April 20, at 2:10 p.m., and her second dose in her room at 6:49 p.m. For the next three days, doses were administered in compliance with the protocol, but that meant that in the first 24 hour period, from 2:10 p.m. on April 20 to 2:10 p.m. on April 21, Murray receive 150 mg. The hospital's procedure that allegedly allowed for the "overdose" is the basis for the judgment on plaintiffs' claim of intentional breach of fiduciary duty and punitive damages, although the administration of medication is the quintessential definition of medical treatment, and the classification of medications and adopting policies as to administration undoubtedly involves medical judgment.

The breach of fiduciary duty claim had been pleaded as a failure by Centennial to properly "staff the floor," resulting in the nurses failing to "be proper advocates" and to "carry out orders in a timely fashion." 2A 240 (Amend. Complaint, ¶79). But at trial, plaintiffs' asserted in closing argument that the breach of fiduciary duty claim was supported by evidence of the medication administration policy used by Centennial to allow an overdose. 18A 3551-55.

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[8]This fact is the basis on which punitive damages were awarded; *i.e.*, the policy led to Murray's death, that such a policy could lead to death was foreseeable, *ergo*, the adoption of the policy is despicable conduct motivated by profit.

The jury returned a verdict finding Centennial guilty of both professional negligence and intentional breach of fiduciary duty, in the amount of $16,210,000.00, and assessed punitive damages in the amount of $32,420,000.00. 19A 3707. Trial Judge Bonaventure entered a judgment for that amount. 19A 3718.

Centennial moved to alter or amend the judgment. 21A 4113-16. At the hearing, plaintiffs reaffirmed that their sole basis for asserting a breach of fiduciary duty was that Centennial's conduct was intentional:

> This is an intentional act. They say I'm going to say intentional act, game over. And I am. Because this is so different -- the fact that we brought them [the professional negligence claim and the breach of fiduciary duty claim] as alternative theories is not enough to say that it is bound by 41A, the statute, and has to be capped because it's an intentional act.
>
> . . . .
>
> I'm saying once it crosses the line into an intentional act, we're not looking at 41A, either the caps or the requirements of proof.

30A 6197.

Judge Bluth, who replaced Judge Bonaventure, concluded that a breach of fiduciary duty could be pleaded under these circumstances, but further found that there was no evidence that there had ever been a staffing crisis, much less a staffing shortage.[9] Specifically, Judge Blugh found:

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[9]She also found that any failure to carry out orders was related to treatment, and thus subsumed in the professional negligence claim. 30A 6229.

> This COURT found no record of any evidence that established intentional conduct on behalf of Defendant. Furthermore, no evidence was presented that an actual understaffing occurred, let alone, that one occurred and was done with the goal of increasing Defendant's profits.

30A 6230. This finding, from which Judge Bluth never retreated "as it relates to intentional understaffing,," 33A 6794 (second order), cannot be squared with her later decision that the procedure was implemented to avoid hiring nurses.

Judge Bluth dismissed the claim of breach of fiduciary duty for lack of evidence to support it, and reduced the verdict and the punitive damages award according to the limitations of NRS Chapter 41A and the punitive damages caps.[10]

Plaintiffs moved to alter or amend the altered and amended judgment, arguing that they had proven negligent breach of fiduciary duty, which was a complete change of theory. 31A 6384-99. Previously, they had insisted that the breach was intentional, and Judges Bare and Cadish accepted that argument in allowing the claim to go to the jury. Plaintiffs also argued that the district court overlooked the medicine administration policy as a basis for the breach of fiduciary duty claim. *Id.*

Reversing herself, and reinstating the original judgment, Judge Bluth made a number of clearly erroneous determinations. 33A 6781. First, she held that there

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[10]The amounts of the limitations and caps are not the subject of this brief, but will presumably be addressed by the parties.

was sufficient evidence to support a negligent breach of fiduciary duty claim, and that a claim of negligent breach of fiduciary duty would have been viable. 33A 6797. However, because plaintiffs pleaded and argued in prior hearings only an intentional breach, she would not allow them to prevail based on a showing of negligence. *Id.* Next, she reaffirmed that there was no evidence of a staffing crisis or shortage, or of any intentional breach related to the staffing issue raised in the amended complaint. 33A 6794. However, Judge Bluth addressed the issue of the drug administration procedure and concluded (1) that the classification of Toradol as a non-time sensitive medication was motivated by profit (if more drugs were put on the time-sensitive list, Centennial would have to hire more nurses); (2) the decision of how to classify Toradol and how many nurses to employ was unrelated to medical treatment and judgment, and (3) the jury could conclude from the evidence that adoption of the drug administration procedure was motivated by profit, and thus a breach of Centennial's fiduciary duties. 33A 6797-804.

DISCUSSION

I. The Voters Declare Nevada's Policy.

The history of NRS 41A.035 is well known to this Court. In 2002, because of spiraling healthcare costs and unaffordable insurance premiums as a result of ever-increasing jury verdicts in medical malpractice cases, Nevada faced a healthcare crisis. The crisis was not just a threat to the profits of healthcare

providers, as plaintiffs pretend. It was a threat to the system itself, and to every Nevada citizen. In special session, the Nevada legislature enacted NRS 41A.035 to keep our doctors in Nevada, and to insure affordable healthcare to all Nevadans.[11]

NRS 41A.035 limited liability non-economic damages, and NRS 41A.045 prohibited joint liability. But the statutes included exceptions to the limits and caps in cases involving "clear and convincing evidence" of "gross negligence or exceptional circumstances." *Id.* Lawyers through creative pleading could drive a bus through these loopholes.

In 2004, the people, through an initiative known as KODIN, closed those loopholes. The voters mandated that tort damages from injuries resulting from or related to medical treatment, no matter how the treatment is characterized, must be limited.

As to liability limits, lawyers should not be allowed by creative pleading to defeat the statute by substituting the word intentional for gross negligence, thereby resurrecting the loopholes. As to punitive damages, the suggestion that such damages should escape the caps is unfounded in light of the fact that punitive damages, by definition, are non-pecuniary damages. Unless this conduct is

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[11]Although plaintiffs will downplay the significance of the healthcare crisis, the legislature took the threat seriously, as did the voters.

unrelated to medical treatment and judgment, the people have spoken: Liability is limited and the amount of any penalty is capped.

II. The Policy Must Not Be Defeated by Creative Pleading.

The arguments below and the decisions of the district judges are based on semantic distinctions crafted by lawyers to defeat the policy enacted by the voters. This Court must slam the door on creative evasion of the law in this area, or the professional negligence statute will be a footnote exception to the medical fiduciary duty jurisprudence that will spring from this case, and cases like it. The exception will swallow the protections the voters enacted.

III. In the Healthcare Arena, The Policy of Unlimited Compensation for Injured Persons Must Give Way to the Policy of Limiting Medical Malpractice Liability and Punitive Damages.

As much as plaintiffs do not like and denigrate any type of tort reform because it allegedly interferes with an injured person's ability to obtain unlimited compensation, tort reform is neither evil, unfair, nor out of step with the policies of this state. This state must protect injured persons, but at the same time preserve the integrity and viability of the healthcare system to the benefit of every citizen. This is not an issue of injured party versus healthcare providers' profit margins; it is an issue of fair compensation that does not endanger the rights of every citizen to affordable healthcare.

The people have made the determination of which policy must prevail.

Every person in Nevada is threatened by any incursion into the protections the voters put in place. It is inevitable that injuries will happen in the delivery of healthcare services, some the fault of doctors, some not. The healthcare system is essential to the well-being of everyone, and must be protected. Therefore, a balance must be reached. NRS Chapter 41A defines that balance by limiting liability for medical injuries, providing for several liability, and capping non-economic damages, including punitive damages.

Plaintiffs will emphasize the public policy of compensating victims of professional negligence and punishing those who intentionally cause harm, but the real issue is what must be shown in order to evade the limitations on medical malpractice liability and punitive damages in cases involving alleged medical malpractice. No one would question that if a doctor intentionally injures another in a context unrelated to medical treatment or judgment, Chapter 41A does not apply.

When there has been medical error, that balance has already been struck by the legislature and the voters. The balance weighs in favor of the rights of the system, and the people, to protection. That apple cart should not be easily upended by labeling conduct intentional. *See Est. of Curtis v. S. Las Vegas Med. Invs., LLC*, 136 Nev. ___, 466 P.3d 1263, 1269 (Adv. Op. 39, 2020) (claims inextricably intertwined with medical treatment are subject to NRS 41A.);

Szymborski v. Spring Mountain Treatment Ctr., 133 Nev. 638,641,403 P.3d 1280, 1284 (2017).

Only if there is a separate claim standing on its own, with no relation to the delivery of healthcare, should the citizens' protections be compromised. Citizens have a right to protection against unlimited damages that impact the practice of medicine and the delivery of affordable healthcare. No matter how one views the facts, this case comes under the purview of the professional negligence statutes and protections because it involves medical injury. Otherwise, every medical malpractice case is in danger of losing protection.

Where the line is drawn is important because this Court, in determining when the conduct of a healthcare provider is so outside medical treatment and judgment that it loses the protections of NRS Chapter 41A, must be careful not to eviscerate the protections the legislature and the people imposed, not for the benefit of doctors, but for the protection of Nevadans.

On the one extreme, murder or sexual assault are clearly not protected. On the other, a mistake in the administration of a drug is clearly protected. This Court has the drawn the line. *Szymborski v. Spring Mountain Treatment Ctr.*, 133 Nev. 638,641,403 P.3d 1280, 1284 (2017). This Court should reaffirm and clarify that the line is injury to the plaintiff not related to medical treatment or judgment.

IV. The Scope of NRS Chapter 41A's Protections Cannot Be Determined by Applying the Labels Intentional vs Negligent.

NRS 41A renamed medical malpractice as professional negligence,[12] making it tempting to draw a superficial distinction between negligent and intentional torts. But "professional negligence" was intended to encompass medical malpractice, and is not limited to simple negligence; the history of medical malpractice should inform what conduct is, and what conduct is not, professional negligence. *See Tam v. Eighth Jud. Dist. Ct.*, 131 Nev. 792, 803, 358 P.3d 234, 242 (2015) ("medical malpractice is incorporated into professional negligence, making NRS 41A.035 applicable to medical malpractice actions.").

Allowing all intentional torts to qualify as an exception opens the door to all sorts of actions against medical providers, in just about any context imaginable. Almost any mistake or negligent act or error of judgment is based on a determination or policy somewhere that can be described as intentional. Medical judgment is necessary at every step of the process. The exercise of medical judgment will always involve an element of choice, and choice can always be labeled intentional.

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[12]This change is unfortunate, because the word malpractice connotes misconduct or culpable error, whereas professional negligence, although less judgmental and therefore politically correct, but brings with it the baggage of general negligence law. Characterizing medical mistakes as malpractice may be distasteful to some, but removing the stigma by the euphemism "professional negligence" leads to the intentional vs. negligent debate in this case.

The labels negligent or intentional do not create a workable demarcation. One can imagine negligent acts unrelated to medical treatment that should not be protected, and resourceful attorneys can characterize any action as intentional, no matter how related to medical treatment. The district court determined that classifying Toradol, directing its administration, and deciding how many nurses to have on a floor were all unrelated to medical treatment. This would come as a shock to the voters who thought they were limiting liability in just such cases.

The determination of how many nurses are necessary to provide adequate care to the level required by the standard of care is a medical judgment. But the district court said that decision is unrelated to medical care. The determination of which drugs must be administered under a strict schedule, and which can be administered under a less restrictive schedule is the quintessential determination of the medical professional in the exercise of medical judgment. The district court said that decision has nothing to do with medicine.

A balance must be reached that is not dependent on whether the actions can be characterized as negligent or intentional. That balance must give doctors and other healthcare providers autonomy to make decisions and to render care so long as there is a connection between the decision and the exercise of medical judgment at any level.

The policy chosen by the legislature and the voters is to limit medical

professionals liability based on the delivery of medical care. The strategy of some lawyers is to find a way to circumvent that policy. There will be cases that do not fall within the limits of liability set by the statutes as amended by the people, but those cases must be the rare exceptions, not the result of creative pleading.

V. Centennial Owes No Fiduciary Duty to Murray.

The district court relied on two Nevada cases for its legal analysis, one published, and one unpublished. *Hoopes v. Hammargren*, 102 Nev. 425, 725 P.2d 238 (1986); *Goldenberg v. Woodard*, 2014 WL 2882560 (unpublished, June 24, 2014). Neither supports the district court' conclusions.

This Court recognized a fiduciary-like duty of a doctor to a patient in matters unrelated to the delivery of medical treatment in *Hoopes*.[13] The district court extended this holding to hospitals. Assuming a hospital owes a fiduciary duty to a patient, the duty recognized in *Hoopes* does not apply here.

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[13]The holding that a doctor owes a patient a fiduciary duty has been rejected by other courts. *See Gunter v. Huddle*, 724 So. 2d 544, 546 (Ala. Civ. App. 1998); *Newland v. Azan*, 957 S.W.2d 377, 379 (Mo.Ct.App.1997); *Korper v. Weinstein*, 57 Mass. App. Ct. 433, 438, 783 N.E.2d 877, 881 (2003) ("The Nevada approach appears to stand alone in imposing liability for breach of fiduciary duty for physician sexual misconduct occurring outside the realm of medical treatment."); *Clemente v. Roth*, No. WGC-01-CV-865, 2005 WL 4099829, at *12 (D. Md. Mar. 30, 2005) ("The holding in *Hoopes* is not persuasive."), aff'd, 171 F. App'x 999 (4th Cir. 2006).

In *Hoopes*, plaintiff alleged Dr. Hammargren "used the physician patient relationship to induce her into a sexual relationship [which] constitute[d] malpractice." *Id.* at 430. The claim against Dr. Hammargren was in the context of sexual advantage not involving medical injury. *Id.* Such conduct is outside of medical treatment or judgment, and would present an issue foreign to a medical injury case. The term "professional negligence" in NRS 41A.035 applies to medical malpractice actions "for injury or death," clearly meaning medical injury as opposed to injury outside of and incidental to the patient-physician relationship. Judge Bluth's conclusion imposing an additional standard of care for the treatment of patients, the delivery of healthcare, or the exercise of medical judgment is not supported by *Hoopes*.

Both of plaintiffs' claims (professional negligence and breach of fiduciary duty) involve the same claim of a medical injury (failure to treat sickle cell), as opposed to malpractice by sexual advantage. *Hoopes* does not suggest that a fiduciary duty exists in the context of a hospital's medical treatment of a patient.

In *Goldenberg v. Woodard*, 2014 WL 2882560 (unpublished, June 24, 2014), Dr. Goldenberg, without supervision, conducted a colonoscopy on a patient though he did not have the requisite credentials to do so at any medical facility. Dr. Goldenberg did not disclose to the patient that he had never performed a colonoscopy, and only had conditional privileges to perform them with

supervision at one treatment center. This Court ruled: "Whether a cause of action brought against a health care provider under an intentional tort theory is 'qualitatively different' than a claim for professional negligence subject to NRS Chapter 41A's limitations should be evaluated on a case-by-case basis."[14] *Id.* at *3 (citing *Smith v. Ben Bennett, Inc.*, 133 Cal.App.4th 1507 (2005)). Plaintiff's fraud claim arose from Dr. Goldenberg's representation that he could perform the procedure, despite his knowledge that he did not have the proper clearance or training to do so. *Id.*[15]

The district court concluded that *Goldenberg* turned on whether the conduct was part of the medical treatment, or was not part of medical treatment, but this analysis is too narrow. Plaintiff's injury certainly arose out of Dr. Goldenberg's medical treatment, but his fraud was not part of the treatment, nor did it involve medical judgment. In this case, although plaintiffs insisted that breach of fiduciary duty is a type of fraud, they never articulated how Centennial was guilty of a fraud.

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[14]This is a clear recognition that not all intentional torts fall outside the protections of NRS Chapter 41A.

[15]One might argue that Dr. Goldenberg was performing medical treatment, but that argument would be flawed. If a lawyer performed a colonoscopy and caused injury, no one would argue that constituted medical treatment. If Dr. Goldenberg had been qualified but caused the same injury, the case would have fallen under the protections of NRS 41A. *Goldenberg* turns on the lack of qualification, not the injury. In contrast, this case is based exclusively on medical injury.

Instead, they argued that adopting a policy regarding the general classification and administration of Toradol that eventually injured Murray was a breach of duty. If the policy was flawed or the classification was inappropriate, Centennial is guilty of a breach of medical duty, but not fiduciary duty. The one subsumes the other.

Dr. Goldenberg's direct lie to a specific patient regarding his qualifications–which had nothing to do with treatment or medical judgment–could not be more different from Centennial's classification of Toradol and adoption of a policy as to the proper administration of non-critical drugs. Centennial lied to no one. No one relied on a promise, express or implied, imposing a higher standard of care. Murray relied on Centennial to perform to the standard of care required by law.

Plaintiffs may argue that at some point, conduct becomes so inappropriate that it is not protected from liability. This is not such a case. The line cannot be negligent vs intentional tort. The line must be medical treatment and judgment vs. actions unrelated to, or outside the scope thereof.

In this case, the claim of professional negligence is indistinguishable from the claim of breach of fiduciary duty. The underlying facts and damages are the same. The protections enacted by the legislature and strengthened by the voters are in jeopardy if every professional negligence claim can be converted to a breach of fiduciary duty.

Centennial is not responsible, even in the exercise of the most extreme good

faith, to save every patient, to prevent every risk, or to foresee every consequence of every policy, especially decisions regarding medical personnel staffing and administration of drugs. The hospital is responsible to deliver medical care that does not fall below the applicable standard of care. The argument that medical providers owe a fiduciary duty of good faith is circular, and intended to impose a higher standard of conduct by labeling the duty a doctor owes a patient fiduciary. The standard of care is "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. It is not, "to exercise the utmost good faith in caring for and treating" a patient. As an ideal, this goal is laudable. As a legal standard, it is not imposed when the claim arises from the treatment of a patient, or medical judgment that affects the treatment of a patient. Neither label, intentional or fiduciary, should be allowed to change the standard of care.

Finally, the district court was persuaded by the argument that Centennial had a profit motive in classifying Toradol as a non-critical drug and adopting a policy regarding administration of the drug that would not require it to increase its nursing staff. This connection was far from evident; there was no expert testimony or other evidence to support counsel's argument that any such choice was ever made. The district court rejected the notion that understaffing had ever occurred. Instead, the jury was allowed to speculate such a motive based on the argument

that if Centennial had hired more nurses, Centennial could have classified and administered Toradol differently. The leap from there to "Centennial breached a fiduciary duty to hire more nurses" would overarch the Grand Canyon.

Financial motives are involved in most, if not all, policy decisions. Accepting the district court's conclusion would mean a hospital would have a non-medical, fiduciary duty to adopt all policies, including those involving medical staffing and administration of medications, in a manner that would insure that no patient would ever suffer harm.

One can easily imagine a clever lawyer characterizing every policy a hospital adopts–how many beds to have, how to determine on which floor to place a patient, what equipment to purchase, procedures for checking on patients, etc., as a breach of fiduciary duty, because hiring more doctors, nurses, and staff could, with hindsight, arguably prevent a variety of injuries.

The district court concluded that deciding how many nurses to have on shift has nothing to do with medical treatment or judgment, and everything to do with profit. If such reasoning prevails, there is no end to the applications of a ruling that hospitals and doctors owe fiduciary duties with respect to their policies of how to operate, what level of care to provide, how many nurses to have on shift and a host of other matters, limited only by the imagination and creativity of lawyers. And these duties are owed to individual patients allegedly affected by

general policies. (In this case, the district court confirmed there was no staffing issue that affected Murray.)

Suppose the policy were one nurse for every three patients, instead of one to six. A situation could arise where the argument would be raised that one per every two would have allowed for better service, and prevented an injury. Indeed, the nurses testified that a one to one ratio would be required to classify all drugs as critical and administer them on the dot. Why not two to one? After all, with enough nurses, aspirin could be administered on the dot.

Of course, this is ridiculous. It is as ridiculous as the district court concluding that Centennial breached a fiduciary duty to Murray by classifying Toradol as a non-critical drug and allowing a flexible administration schedule, even though sufficient nurses were on the premises at all times, just because hiring more nurses might allow Centennial to adopt a different policy.

VI. The Standard this Court Has Adopted.

This Court has already set the standard in *Szymborski v. Spring Mountain Treatment Ctr.*, 133 Nev. 638,641,403 P.3d 1280, 1284 (2017).[16] In order to prove that a claim does not fall within the parameters of professional negligence, a plaintiff must prove conduct outside the scope of "medical diagnosis, judgment, or

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[16]Relying on *Szymborski*, this Court recently held that "administering medication constitutes medical treatment." *Est. of Curtis v. S. Las Vegas Med. Invs., LLC*, 136 Nev. ___, 466 P.3d 1263, 1269 (Adv. Op. 39, 2020).

treatment." *Id.* This standard should apply regardless of whether the conduct is alleged to have been negligent or intentional.

In *Schwarts v. Univ. Med. Ctr. of S. Nevada*, 460 P.3d 25 (Unpublished, Nev. 2020), plaintiffs claimed a hospital and a doctor altered medical records after a patient died under their care to defeat plaintiffs' claims of professional negligence, which amounted to a civil conspiracy. This Court, citing *Szymborski*, concluded that in order to prove the post-death claim of civil conspiracy, "the Schwartses would necessarily have to prove the underlying medical malpractice—that Valdez acted in contravention of appropriate standards of medical care when she removed the decedent's drain tube. Because proving that Valdez's actions fell below the relevant standard of medical care 'involve[s] medical diagnosis, judgment, or treatment,' the claim is subject to NRS 41A.071." It cannot be argued in this case that plaintiffs did not have to prove their claim of professional negligence in order to prevail on their claim of breach of fiduciary duty. This Court should not retreat from the standard set in *Szymborski* and relied on in *Schwarts*.

The line has been drawn by the legislature, the voters and this Court. NRS 41A.035 applies to any action involving injury or death related to what the legislature and the voters intended the term "professional negligence" to encompass, which is any action involving medical treatment, the delivery of

medical services, and/or medical judgment. Any other construction of the statute defeats its primary purpose.

Assuming the administration of Toradol contributed to Murray's death, the error in administering too much Toradol–if that error was made–involves medical judgment and treatment. No amount of clever pleading can change that fact.

The policy this Court should adopt must protect the rights of Nevadans to affordable healthcare. By its very nature, the practice of medicine includes risk and danger. Injury and death are inevitable, resulting both from the best efforts of healthcare professionals, and from mistakes that will be made. It is impossible to make the practice of medicine risk free, for doctors, hospitals, or patients.

Hospitals must make choices. These include staffing issues, equipment choices, what services are offered, and what risks must be taken. To protect ourselves, we must protect those who courageously provide services and save lives.

Plaintiffs assert that this is an unusual case and that cases involving intentional conduct will be few, but if a staffing decision that did not result in under-staffing or fall below any standard of staffing care, and a decision regarding how to classify and administer a drug are sufficiently unrelated to medical treatment as to be subject to a claim of negligent or intentional breach of fiduciary

duty, any medical malpractice case can so characterized.[17]

When the gravamen of a complaint is injury resulting from medical treatment or judgment, this Court cannot allow a standard of good faith to replace the statutory standard of care. Whatever standard this Court adopts, it will result in reversal of the judgment, because there is no evidence of any decision being made that was not a medical judgment.

The decision of how to administer a drug involves medical judgment. If that judgment was in error, Murray's death is at most the result of professional negligence as that term should be construed by this Court.

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[17]The alleged staffing crisis allowed plaintiffs to get to the jury, but the district court determined as a matter of law that no evidence of a staffing crisis was presented at trial, and there was no evidence that the staffing policy violated any standard of care. Then, paradoxically, the district court relied on the alleged need for more nurses as the reason why the drug was classified and administered as it was, and ascribed a financial motive unrelated to the delivery of medicine.

How could this decision be more internally inconsistent. Every decision a hospital makes with respect to staffing, how many rooms to build, what services to provide, to what floor to assign a patient, what medicines to prescribe, what procedures to conduct has a financial impact on the profitability of the facility. That does not make the decisions unrelated to the practice of medicine.

CONCLUSION

This Court should declare that NRS Chapter 41A applies in any case where the gravamen of the claim is based on the delivery of medical services and the exercise of medical judgment.

DATED this 30 day of April, 2021.

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ATTORNEY'S CERTIFICATE

1. I 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 it has been prepared in a proportionally spaced typeface using WordPerfect X4 in 14 point Times New Roman font.

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3. Finally, I certify that I have read this appellate 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 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 the

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accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 30 day of April, 2021.

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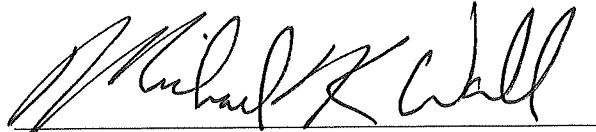

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CERTIFICATE OF SERVICE

I certify that I am an employee of HUTCHISON & STEFFEN, PLLC and that on this date the **YOUR NEVADA DOCTORS 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.

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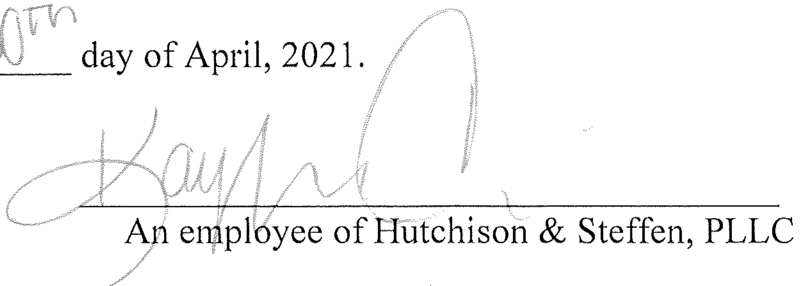

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