

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

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Tracie K. Lindeman  
Clerk of Supreme Court

HUMBOLDT GENERAL HOSPITAL and  
SHARON MCINTYRE, M.D.,

Petitioners,

v.

THE SIXTH JUDICIAL DISTRICT COURT  
OF THE STATE OF NEVADA, IN AND FOR  
THE COUNTY OF HUMBOLDT, AND THE  
HONORABLE MICHAEL R. MONTERO,  
DISTRICT JUDGE, Respondents,  
and  
KELLI BARRETT,  
Real Party in Interest.

No.

District Court Case No.: CV 19,460

**Petition for Writ of Mandamus**

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## PETITION FOR WRIT OF MANDAMUS

Petitioners Humboldt General Hospital and Sharon McIntyre, M.D. ("Petitioners"), petition the Court, pursuant to NRAP 21, for an Order of Mandamus directing the Sixth Judicial District Court of the State of Nevada, Department 2, Hon. Michael R. Montero, to vacate its Order denying Petitioners' Motion to Dismiss, and directing the district court to enter an Order dismissing Plaintiff's Complaint without prejudice on the grounds the Complaint, sounding wholly in medical malpractice, was filed without an affidavit supporting the allegations contained in it, submitted by a medical expert who practices or has practiced in an area that is substantially similar to the type of practice engaged in at the time of the alleged malpractice; the district court misapplied the law, and Petitioners have no plain, speedy and adequate remedy at law.

This Petition is made and based on the Memorandum of Points and Authorities in Support, and on all the records, papers and pleadings on file in this action.

Dated this 2<sup>nd</sup> day of May, 2014.

PISCEVICH & FENNER

By:



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Attorneys for Petitioners

## Memorandum of Points and Authorities

### I. Relief Sought

This Petition for a Writ of Mandamus seeks to “compel the performance of an act that the law requires ... to control an arbitrary or capricious exercise of discretion...” *Clay v. The Eighth Judicial District Court*, 129 Nev. Adv.Op. No. 91, 313 P.3d 232 (2013), i.e., directing the Sixth Judicial District Court of the State of Nevada, in and for the County of Humboldt, Department 2, Hon. Michael R. Montero, to vacate its Order denying Petitioners’ Motion to Dismiss, and directing the district court to enter an Order dismissing Plaintiff’s Complaint, on the grounds set forth herein.

### II. Statement of Issues

1. Whether, having found the facts alleged in support of Plaintiff’s negligence claim to sound in medical malpractice, the district court erred in finding Plaintiff’s battery claim, based on those same facts, to be a claim for common-law battery, rather than an “informed consent” claim sounding in medical malpractice;

2. Whether the district court erred failing to apply the expert affidavit requirement to Plaintiff’s battery claim, thereby abrogating a key component of the statutory scheme for medical malpractice actions.

3. Whether Defendants are, in the absence of this requested writ of mandamus, left without any just, speedy and adequate remedy at law.

### III. Statement of the Case and Procedural History

NRS 41A.071 requires that a party complaining of medical malpractice must file with his or her complaint an affidavit submitted by a medical expert who practices or has practiced in an area that is substantially similar to the type of practice engaged in at the time of the alleged malpractice. It requires the district court to dismiss, without prejudice, a complaint filed without such an affidavit. Real Party in Interest Kelli Barrett ("Barrett") filed her Complaint on March 4, 2012, alleging negligent medical treatment arising out of a breach of a "duty to provide Plaintiff with care, treatment, medications and medical devices...." The Complaint also purported to allege a medical "battery," arising out of an alleged lack of consent to implant a medical device i.e., an IUD. Barrett's Complaint did not refer to nor have attached to it any medical expert affidavit.

On June 3, 2013, Defendants moved to dismiss the action pursuant to NRS 41A.071, contending that plaintiff's allegations sounded in medical malpractice and therefore her complaint was required to have a medical expert affidavit attached. Defendants contended that both the negligence and battery claims were clearly medical malpractice claims, unsupported by any medical expert affidavit.

Plaintiff countered that her claims sounded simple negligence and common-law battery, and that she had a right to enforce FDA regulations concerning IUDs. She also contended that no medical expert affidavit was required under NRS 41A.100 because the implanted IUD did not have FDA approval and therefore

1 constituted a foreign object inadvertently left in her body. Defendants responded  
2 that the “negligence” claim was barred for lack of an affidavit; that the purported  
3 *res ipsa* claim was barred by the plain definition in the statute; and that the  
4 “battery” claim was not any different from any run-of-the-mill medical informed  
5 consent claim.  
6

7  
8 By Order dated April 8, 2014, the District Court granted Defendants’ Motion  
9 to Dismiss, but only in part. It construed the negligence claim to be a medical  
10 malpractice claim, and dismissed it. However, with respect to the “battery” claim,  
11 the court erroneously found that “the fact that plaintiff *consented to the procedure*,  
12 does not, in and of itself, warrant dismissal...”<sup>1</sup>  
13

14 Accordingly, Defendants request that this Court issue its Writ of Mandamus  
15 directing the district court to dismiss Plaintiff’s Complaint, and correct the  
16 mistaken understanding of the district court regarding the application of NRS  
17 Chapter 41A.  
18

## 19 20 **IV. Statement of Facts**

21 The following are the operative facts in this action:

22 1. Barrett filed her original Complaint on March 4, 2013.<sup>2</sup> It alleged  
23 medical malpractice on the part of Defendants.  
24  
25  
26

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27 <sup>1</sup> App. p. 6, lns. 16-17 (emphasis added)

28 <sup>2</sup> App. pp 10-15.

1           2.     The Complaint did not refer to, contain or have attached to it any  
2 affidavit of a medical expert as required by NRS 41A.071.<sup>3</sup>

3           3.     The Complaint alleged two “Causes of Action,”<sup>4</sup> the first entitled  
4 “Negligence” and the second entitled “Battery.”  
5

6           4.     The Complaint alleged that Plaintiff “sought medical treatment from  
7 defendants ... and agreed to have a Mirenda (*sic.*) intrauterine device “IUD”  
8 implanted in her body....”<sup>5</sup>  
9

10          5.     Plaintiff signed a “consent” entitled “Consent for Mirena IUD” on  
11 March 11, 2011. <sup>6</sup>  
12

13          6.     The IUD Defendants implanted pursuant to Plaintiff’s consent was a  
14 “Mirena” device, identical except for packaging, which did not bear an FDA  
15 approval code, because it was purchased through a Canadian distributor.  
16

17          7.     The district court found that Plaintiff’s negligence claims sounded in  
18 medical malpractice, based on the facts as alleged.<sup>7</sup>  
19

20          8.     The district court found that “informed consent is at issue in this  
21 case.”  
22  
23

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24           <sup>3</sup>     *Id.*  
25           <sup>4</sup>     The correct terminology under NRCP 8 is “claim for relief,” which replaced  
26 the arcane “cause of action” terminology in 1971 in Nevada.  
27           <sup>5</sup>     App. p. 11[¶ 5].  
28           <sup>6</sup>     App. p. 35.  
             <sup>7</sup>     App. p. 4



1           9.     The district court also found, and the parties did not dispute, that  
2 Plaintiff consented to the medical procedure, i.e., the implantation of the Mirena  
3 device.  
4

5           10.    However, the district court also found that Plaintiff's consent to the  
6 procedure, while it met the statutory requirements defined in NRS 41A.110 for  
7 "informed consent," it left open the issue of whether Plaintiff's consent was  
8 "informed," and decided that the battery claim sounded in ordinary intentional tort  
9 rather than medical battery, thereby negating the application of NRS Chapter 41A.  
10  
11

## 12 13 **V. Summary of Argument.**

14           The district court correctly found that the facts as alleged in the Complaint  
15 sounded in medical malpractice, thus invoking the requirements of Nevada's  
16 statutory scheme for such cases. Having thus determined that Plaintiff's  
17 "negligence" claim was a medical malpractice claim, the district court should also  
18 have determined that Plaintiff's "battery" claim, arising out of the same facts and  
19 circumstances, was a "medical battery" claim, also falling under NRS Chapter  
20 41A. "Informed consent" is a medical malpractice issue as a matter of law, and  
21 subject to the same expert testimony requirements. Plaintiff's Complaint has no  
22 expert affidavit attached, thus rendering it void. Plaintiff consented to implantation  
23 of a Mirena device; and under the statutory definition of "consent," the district  
24 court was obligated to find that her consent was conclusively established. The  
25  
26  
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28

1 district court erred when it found that Plaintiff's battery claim was an ordinary  
2 common-law claim, rather than a "medical battery" claim.  
3

## 4 **VI. Argument**

### 5 **A. Barrett's original Complaint was void when** 6 **filed.**

7 NRS 41A.071 provides:

8 If an action for medical malpractice or dental malpractice is filed in the  
9 district court, the district court *shall dismiss the action*, without prejudice, if  
10 the action is filed without an affidavit, supporting the allegations contained  
11 in the action, submitted by a medical expert who practices or has practiced  
12 in an area that is substantially similar to the type of practice engaged in at  
the time of the alleged malpractice.

13 (Emphasis added).

14 Since *Washoe Med. Ctr. v. State*, 122 Nev. 1298, 148 P.3d 790 (2006) this  
15 Court has had the opportunity to address several variations on the theme of means  
16 to circumvent the statutory requirements imposed on medical malpractice actions.  
17 And although inroads have developed, the basic concept remains the same: in order  
18 to avoid the mischief of unsupported malpractice claims against physicians and  
19 hospitals, plaintiffs are put to the pre-suit requirement of obtaining a meaningful  
20 expert opinion supporting their claims.  
21  
22  
23

### 24 **B. Medical battery claims are medical malpractice** 25 **claims, subject to the same requirements.**

26 The district court correctly held that "informed consent is at issue in this  
27 case," but inexplicably concluded that "the fact that Plaintiff consented to the  
28

1 procedure, does not, in and of itself, warrant dismissal ....”<sup>8</sup> To the contrary, NRS  
2 41A.110 requires the opposite result, as does *Bronneke v. Rutherford*, 120 Nev.  
3 230, 238 89 P.3d 40 (2004)( “failure to obtain a patient’s informed consent is a  
4 malpractice issue” for which expert testimony is required) (emphasis added).  
5  
6 *Bronneke* is controlling law in this case.

7  
8 Virtually no medical battery claim is completely independent of an  
9 associated medical negligence claim. Logically, when the battery claim is  
10 predicated on the same facts and circumstances forming the basis for a medical  
11 malpractice claim,<sup>9</sup> the battery claim is necessarily a “medical battery” claim,  
12 focused on an “informed consent” component. The Legislature cannot have  
13 contemplated any other scenario when it went to the trouble to include definitions  
14 for conclusive consent and implied consent in NRS 41A.110.  
15  
16

17 NRS 41A.110 provides:

18  
19 A physician licensed to practice medicine under the provisions of  
20 chapter 630 or 633 of NRS, or a dentist licensed to practice dentistry  
21 under the provisions of chapter 631 of NRS, has conclusively  
22 obtained the consent of a patient for a medical, surgical or dental  
23 procedure, as appropriate, if the physician or dentist has done the  
24 following:

- 25 1. Explained to the patient in general terms, without specific  
26 details, the procedure to be undertaken;
- 27 2. Explained to the patient alternative methods of treatment, if  
28 any, and their general nature;

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8 App. p. 6, lns. 15-17

9 Of course, a battery claim may arise out of different facts and circumstances,  
even in a hospital setting.

1           3. Explained to the patient that there may be risks, together with  
2 the general nature and extent of the risks involved, without  
3 enumerating such risks; and

4           4. Obtained the signature of the patient to a statement containing  
5 an explanation of the procedure, alternative methods of treatment and  
6 risks involved, as provided in this section.

7           In this case, the district court ruled that the negligence claim sounded in  
8 medical malpractice. Plaintiff does not allege different circumstances for her  
9 battery claim. She begins by incorporating her previous allegations [Complaint,  
10 ¶18].<sup>10</sup> She then alleges Defendants' "knew or should have known of the existence  
11 of a dangerous condition *of using and implanting in Plaintiff Barrett said IUD*  
12 ...." [Complaint ¶19].<sup>11</sup> Accordingly, but for the use and implanting of the Mirena  
13 IUD, Plaintiff's "battery" claim would be non-existent; and the district court held  
14 that the allegations asserting the negligent use and implanting of the Mirena IUD  
15 sounded in medical malpractice. It was therefore arbitrary and capricious for the  
16 district court to find that the "battery" claim sounded in ordinary tort rather than  
17 medical battery.  
18  
19  
20

21           **C. Extraordinary relief is warranted in this case.**

22           It is well-settled that "a writ will not issue if the petitioner has a plain,  
23 speedy and adequate remedy at law." *Millen v. Dist. Ct.*, 122 Nev. 1245, 1250-51,  
24 148 P.3d 694, 698 (2006); *see* NRS 34.170; NRS 34.330. However, this Court will  
25 "determine in each particular case whether a future appeal is sufficiently adequate  
26  
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<sup>10</sup> App. p. 13

1 and speedy by considering a number of factors, including ‘the underlying  
2 proceedings’ status, the types of issues raised in the writ petition, and whether a  
3 future appeal will permit this court to meaningfully review the issues presented.’”  
4 *Beazer Homes Holding Corp. v. Eighth Jud. Dist. Ct.*, 128 Nev.Adv.Op. No. 66,  
5 291 P.3d 128 (2012). The Court will also, within its discretion, issue a writ of  
6 mandamus “to remedy an arbitrary or capricious exercise of discretion.” *Id.*

7  
8  
9 In this case, the district court’s determination that Plaintiff’s battery claim is  
10 not subject to the expert affidavit requirements set forth in NRS 41A.071 was  
11 arbitrary and capricious. In *Mountainview Hosp. v. Eighth Jud. Dist. Ct.*, 128  
12 Nev.Adv.Op. No. 17, 273 P.3d 861 (2012), this Court considered a writ petition  
13 involving the interpretation of NRS 41A.071, noting it “may do so where ... the  
14 issue is not fact-bound and involves an unsettled and potentially significant,  
15 recurring question of law.” The issue here is whether the expert affidavit  
16 requirements of NRS 41A.071 will operate to render void an unsupported claim for  
17 medical battery. This is an issue of first impression that this Court should clarify  
18 to promote sound judicial economy. Absent a writ of mandamus, Petitioners will  
19 be deprived of a plain, speedy and adequate remedy at law.  
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1 **VII. Conclusion**

2 The district court correctly found Plaintiff's negligence claim to be one  
3 sounding in medical malpractice, and properly dismissed it. However, the district  
4 court erroneously found Plaintiff's battery claim not to sound in medical  
5 malpractice, when it did so as a matter of law. Absent a writ of mandamus,  
6 Petitioners are without a plain, speedy and adequate remedy at law.  
7

8 **WHEREFORE,** Petitioners respectfully request relief as follows:  
9

- 10 1. For an Order directing the Sixth Judicial District Court to grant  
11 Defendants' Motion to Dismiss in its entirety; and  
12
- 13 2. For such other and further relief as the Court deems appropriate in the  
14 circumstances.  
15

16 **VIII. Certificate of Compliance**

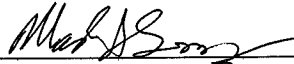
17 I hereby certify that I have read this appellate brief, and to the best of my  
18 knowledge, information and belief, it is not frivolous or interposed for any  
19 improper purpose. I further certify that this brief complies with all applicable  
20 Nevada Rules of Appellate Procedure, in particular, NRAP 28(e), which requires  
21 every assertion in the brief regarding matters in the record to be supported by a  
22 reference to the page of the transcript or appendix where the matter relied on is to  
23 be found. I understand that I may be subject to sanctions in the event that the  
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1 accompanying brief is not in conformity with the requirements of the Nevada  
2 Rules of Appellate Procedure.

3  
4 I also certify, pursuant to NRAP 28.2(a)(4), that the foregoing complies with  
5 the formatting requirements of Rule 32(a)(4) – (6) and the type-volume limitations  
6 of Rule 32(a)(7)(A)(ii), in that it contains 1,962 words.

7  
8 Dated this 2<sup>nd</sup> day of May, 2014.

9 PISCEVICH & FENNER

10 By:   
11 Mark J. Lenz, Esq.  
12 Attorneys for Petitioners  
13  
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## CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of  
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MANDAMUS**

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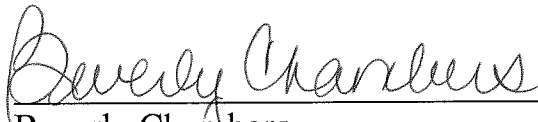
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Hon. Michael R. Montero  
Sixth Judicial District Court  
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50 W. Fifth St.  
Winnemucca, NV 89445

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DATED this 2<sup>nd</sup> day of May, 2014.

  
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Beverly Chambers