

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

HUMBOLDT GENERAL HOSPITAL and )  
SHARON McINTYRE, MD., )

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. 65562

District Court Case No. CV 19,460

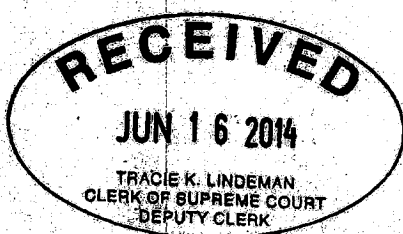
**FILED**

**JUN 17 2014**

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
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**Answer in Opposition to Writ of Mandate**

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1  
2 **ANSWER IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS**  
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4 Real Party in Interest Kelli Barrett ("Real Party" or "Barrett"), hereby  
5 submits her Answer opposing the Petition for writ of mandamus filed by  
6 Petitioners Humboldt General Hospital requesting that the Sixth Judicial District  
7 Court of the State of Nevada, Department 2, Honorable Michael R. Montero,  
8 vacate its Order dated April 8, 2014, denying Petitioners' Motion to Dismiss Real  
9 Party's Complaint.

10 Real Party's Complaint, filed March 4, 2013, alleged two claims, a  
11 negligence cause of action and a battery cause of action alleging defendants  
12 inserted a foreign device in her body, a non-FDA approved Mirenda IUD, and left  
13 this unapproved device in Ms. Barrett's body. *Appendix re: Petition for Writ of*  
14 *Mandamus (hereafter "App.") pp 10-15.*

15 The District Court granted Petitioner's Motion to Dismiss as to the first  
16 cause of action for negligence, holding that the negligence claim was one for  
17 medical malpractice filed without a medical affidavit, but denied Petitioner's  
18 Motion to Dismiss as to the second cause of action for battery as Plaintiff was not  
19 informed that the device implanted in her body lacked FDA approval, a valid  
20 battery claim not requiring a medical affidavit. *App. p. 1-7.*

21 Real Party Barrett respectfully requests that this Court enter its Order  
22 Denying Petitioner's petition for writ of mandamus in its entirety and for such  
23 other relief as the Court deems proper.

24  
25 Dated: June 12, 2014

DAVID ALLEN & ASSOCIATES

26  
27 By: 

28 DAVID ALLEN, Esq.  
Attorneys for Real Party in Interest  
KELLI BARRETT

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5 **REAL PARTY'S MEMORANDUM OF POINTS AND AUTHORITIES**

6 **I. Introduction**

7 Real Party in Interest Kelli Barrett ("Real Party" or "Barrett") submits the  
8 following memorandum of points and authorities in opposition to the Petition for  
9 Writ of Mandamus brought by Humboldt General Hospital and Sharon McIntyre,  
10 M.D. ("Petitioners.")

11 By order of the District Court for the Sixth Judicial District, Honorable  
12 Michael R. Montero, on April 8, 2014, the District Court denied Petitioners'  
13 Motion to Dismiss Barrett's second cause of action for battery, as Real Party  
14 alleged that she did not consent to Petitioner's use of a non-FDA approved device.  
15 *App. p. 5:6-10; p. 6: 1-7:2.*

16 Accordingly, Real Party Barrett respectfully requests that this Court enter its  
17 Order Denying Petitioner's petition for writ of mandamus in its entirety.

18 **II. Statement of the Case**

19 Real Party Ms. Barrett's Complaint filed March 4, 2012, alleged that  
20 Petitioners inserted into Real Party Barrett's body a Mirenda intrauterine device  
21 "IUD" that was a device purchased in violation of federal law (Food and Drug  
22 Administration) and which lacked FDA approval for medical use. *App. p. 13:18-*  
23 *25. The Complaint averred claims for negligence and battery. App. pp. 10-15.*  
24 The Complaint claim for battery alleged that Petitioners' actions constituted  
25 battery since Real Party did not consent to implantation of an IUD lacking FDA  
26 approval. *App. p. 13:18-25.*

27 On June 3, 2013, Petitioners moved to dismiss Real Party's Complaint  
28 pursuant to *NRS 41A.100*, alleging that Barrett's Complaint failed to include a

1 medical affidavit under *NRS 41A.071* and that Real Party consented to insertion of  
2 the IUD. *App. 22:26 - 23:16*.

3 On April 8, 2014, the District Court denied Petitioners' Motion to Dismiss  
4 Barrett's claim for battery, as Real Party alleged that she did not consent to  
5 Petitioner's use of a non-FDA approved device. *App. p. 5:6-10; p. 6: 1-7:2*.

### 6 **III. ARGUMENT**

#### 7 **A. Mandate, an extraordinary remedy, is unwarranted in this case**

8 The District Court correctly determined that Real Party Barrett did not  
9 consent to Petitioner's use of a non-FDA approved Mirenda IUD in Ms. Barrett's  
10 body and that this battery claim was not subject to a medical expert affidavit such  
11 as a medical negligence claim. *App. pp. 06:1-19*.

12 Petitioners, argue without any evidence in the record, that Real Party Barrett  
13 "consented" to implantation of a non-FDA approved device. Yet, Petitioners  
14 *actually concede* in their Petition that Real Party's claim is a battery claim:

15 "Accordingly, but for the use and implanting of the Mirenda IUD, [Real  
16 Party]'s 'battery' claim would be non-existent..." *Petition for Writ of  
Mandamus, Memorandum of Points and Authorities at p. 9:12-14*.

17 Clearly, extraordinary writ relief is within the sole discretion of this Court.  
18 *Walter v. Eight Judicial District Court, 127 Nev. Adv. Rep. 66, 263 P.3d 231, 233*  
19 *(2011)*.

20 However, Petitioner's argument that the District Court's decision that Real  
21 Party's battery claim did not require a medical affidavit is "arbitrary and  
22 capricious" is without merit.

23 *Mountainview Hospital v. Eight Judicial District Court, 128 Nev. Adv. Rep.*  
24 *17 (2012)* involved a medical malpractice claim that was dismissed for lack of  
25 compliance with *NRS 41A.071*. This Court determined that satisfaction of the  
26 affidavit requirement in *NRS 41A.071* for a medical malpractice cause of action  
27 warranted exercise of the Court's discretion in that case. *Mountainview Hospital,*  
28 *supra*.

1 Here, Petitioner also admits that “[o]f course, a battery claim may arise out  
2 of different facts and circumstances, even in a hospital setting.” *Petition, Memo. of*  
3 *Points and Authorities, FN 9*, p. 8:27-28. In conceding that battery claims exist  
4 outside the confines of the medical malpractice affidavit statute, Petitioners  
5 effectively admit that there is no basis for grant of this Petition.

6 **B. Ms. Barrett’s claim for battery is actionable.**

7 Petitioners admit that Real Party’s battery claim is based on use and implant  
8 of a non-FDA approved IUD. *Petition, Memo. of Points and Authorities at p.*  
9 *9:12-14.*

10 A claim for battery requires a showing the “actor (1) intended to cause  
11 harmful or offensive contact, and (2) such contact did occur.” *Burns v. Mayer* 175  
12 *F. Supp. 2d 1259; 2001 U.S. Dist. Lexis 20370 (2001)* .

13 Real Party’s reliance on *Bronneke v. Rutherford*, 120 Nev. 230, 89 P.3d. 40  
14 (2004) is misplaced. In *Bronneke*, a stroke victim sued a chiropractor for  
15 negligence after injury following a chiropractic adjustment. *Bronneke at 231*. The  
16 *Bronneke* Court determined that the physician’s professional standard (requiring  
17 adherence to NRS 41A 100(1) (1979) ) was required in a suit for negligence  
18 against a chiropractor. *Bronneke at p. 238*.

19 Here, Petitioners even admit that not every “medical battery claim” is  
20 subject to expert affidavit requirements of an associated medical negligence claim.  
21 *See Petition, Memo. of P& A at p. 8:8-12 and FN9 at p. 8:27-28 (“Of course, a*  
22 *battery claim may arise out of different facts and circumstances, even in a hospital*  
23 *setting.”)*

24 The District Court correctly point out that Real Parties *assumed, without*  
25 *support*, Real Party’s battery claim was subject to an expert affidavit requirement.  
26 *App. p. 6:5-8.*

27 Accordingly, the Petition should be denied in its entirety.  
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#### IV. CONCLUSION

The District Court properly concluded that based on the actual allegations of the Complaint, Real Party Barrett's battery claim presented a viable claim for damages. Petitioners have not presented any legitimate legal basis for grant of the extraordinary relief of writ of mandamus.

Accordingly, Real Party respectfully requests that the Court enter its Order denying Petitioner's Petition for Writ of Mandamus in its entirety.

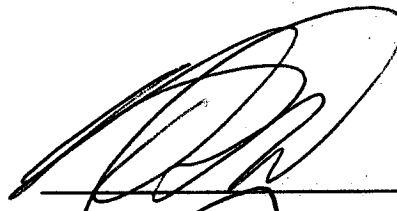
#### IV. CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this Answer and Opposition to writ for mandamus, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this Answer and opposition to writ complies with all applicable Nevada Rules of Appellate Procedure, including *NRAP 28(e)* requiring every assertion in the brief regarding matters in the record be supported by a reference to the page of the Appendix where the matter to be 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.

I also certify, pursuant to *NRAP 28.2(a)(4)*, that the foregoing complies with the formatting requirements of *NRAP Rule 32(a)(4)-(6)* and the type-volume limitations of *Rule 32(a)(7)(A)(ii)*, in that it contains 1357 words.

Respectfully submitted,

Dated: June 12, 2014



DAVID ALLEN, Esq.  
DAVID ALLEN & ASSOCIATES  
Attorneys for Real Party in Interest  
KELLI BARRETT



**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I hereby certify that I am an employee of DAVID ALLEN & ASSOCIATES and that on this date I caused to be served a true and correct copy of the document described herein by the method indicated below, and addressed to the following:

**DOCUMENT SERVED:    ANSWER IN OPPOSITION TO WRIT OF  
MANDATE**

**Person(s) Served:**

Mark J. Lenz, Esq.  
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Hon. Michael R. Montero  
Sixth Judicial District Court  
Department II  
50 W. Fifth Street  
Winnemucca, NV 89445

☐ Hand Delivered  
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Dated: June 12, 2014

  
\_\_\_\_\_  
Anita Estioko