IN THE SUPREME COURT OF THE STATE OF NEVADA

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. 65562 District Court Case No.: CV 19,460

Reply in Support of Petition for Writ of Mandamus

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Memorandum of Points and Authorities

I. Procedural status:

Petitioners requested a Writ of Mandamus 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. By Order dated May 13, 2014, this Court directed the Real Party in Interest ("Plaintiff") to file and serve, within thirty days, an answer to the Petition. Plaintiff served her "Answer in Opposition to Petition for Writ of Mandamus" on June 12, 2014.[1] Her Answer did not and does not present any cogent countervailing argument to defeat the issues raised in the Petition.

II. Reply Argument

A. Plaintiff fails to provide any direct challenge to any of the issues raised in the Petition.

Petitioners articulated three issues for the Court to address: (1) Whether, having found that the facts alleged in support of Plaintiff's negligence claim sounded in medical malpractice, the district court mistakenly ruled that Plaintiff's battery claim, based on those same facts, was a claim for common-law battery

[1] Petitioners assume, without conceding, that Respondent actually filed her Opposition (by mail). As of 3:00 p.m. on June 16, 2014, the Supreme Court filing system did not reflect receipt or filing of the Answer. In fact, the Opposition was not filed until June 17, 2014, five days late.

falling outside the realm of medical malpractice; (2) whether the district court misapplied the law by failing to apply the medical malpractice expert affidavit requirement to Plaintiff's battery claim; and (3) whether Defendants were therefore left without any just, speedy and adequate remedy at law.

Plaintiff's answer to the first issue is, apparently, that "Petitioners *actually concede* ... that [Plaintiff's] claim is a battery claim," [Opp. p. 6], as though doing so is dispositive of the issue. Petitioners are happy to "concede" that Plaintiff purported to assert a ***medical*** battery claim arising out of the same facts and occurrences that formed the basis for her ***medical malpractice*** claim.[2] Plaintiff, however, persists in the fiction that a "medical battery" claim is the same legal animal as an ordinary, i.e., non-medical, "battery" claim. It was precisely the "use and implanting" of a Mirena IUD, not its labeling, that Plaintiff claims caused her injury. Plaintiff nowhere argues that the implanting of an IUD is a completely non-medical procedure. Accordingly, if a medical-surgical procedure, or its non-consent, caused a "battery," then it would have been, as a matter of law, a medical battery.

Plaintiff consented in writing to the use and implanting of an IUD, which cannot be accomplished in any woman without her consent, regardless of labeling.

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[2] Petitioners do not, of course, concede that any battery occurred, medical or otherwise.

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If Plaintiff argues that her consent was not informed, then, assuming the truth of that allegation, her claim necessarily sounds in medical malpractice.

Plaintiff also argues that the Court should ignore its own precedent because the facts differ. In *Bronneke v. Rutherford*, 120 Nev. 230, 238 89 P.3d 40 (2004) This Court held that a "failure to obtain a patient's informed consent ***is a malpractice issue***" for which expert testimony is required. Plaintiff appears to be persuaded that because *Bronneke* involved chiropractic treatment instead of Ob-Gyn treatment, any principles of law in *Bronneke* must be inapposite to this matter. However, when legal principles are forced to ride the trolley of factual relativism, no one can rely on either. *Bronneke* is controlling law that Plaintiff cannot avoid.

Plaintiff's own argument derails her trolley. She consented, in writing, to a medical-surgical procedure, which was performed. If she argues that her consent was not "informed," then she must concede that her claim sounded in medical malpractice. Otherwise, her lack of informed consent would be a mere tautology. If on the other hand, she argues common-law battery, she alleges no facts in any pleading that she experienced an unconsented touching, apart from a surgical procedure. Thus, when the district court determined that Plaintiff's negligence claim sounded in medical malpractice, it was obligated to find that the "battery" claim also sounded in medical malpractice. Doing otherwise resulted in error.

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III. Conclusion

The district court erroneously found Plaintiff's battery claim not to sound in medical malpractice, when it did so as a matter of law. The insertion of an IUD by definition cannot be a battery (an unconsented to touching) as consent was given. In order to insert any IUD, the patient has to consent. If implied or informed consent is the issue then an affidavit is required. Plaintiff consented in writing to a medical-surgical procedure. To the extent Plaintiff claims a "battery" occurred, the claim falls under the medical malpractice statutes. Absent a writ of mandamus, Petitioners are without a plain, speedy and adequate remedy at law.

WHEREFORE, Petitioners respectfully request relief as set forth in the Petition, and such other and further relief as the Court deems appropriate in the circumstances.

IV. Certificate of Compliance

I hereby 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), 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 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 Rule 32(a)(4) – (6) and the type-volume limitations of Rule 32(a)(7)(A)(ii), in that it contains 1,236 words.

Dated this 23rd day of June, 2014.

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By: _____

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of PISCEVICH & FENNER 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: **REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS**

Person(s) Served:

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Hon. Michael R. Montero
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Department II
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DATED this 23rd day of June, 2014.

Beverly Chambers