

1 PET
2 MUELLER, HINDS & ASSOCIATES, CHTD.
3 Craig A. Mueller, Esq.
4 Nevada Bar No. 4703
5 Kelsey Bernstein
6 Nevada Bar No. 13825
7 600 South Eighth Street
8 Las Vegas, NV 89101
9 (702) 940-1234
10 Attorney for Petitioners
11 Dwight Solander
12 Janet Solander

Electronically Filed
Apr 22 2016 02:24 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

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

11 Dwight Solander,) Supreme Court Case No.: 67710; 67711
12 Petitioner)
13 vs.)
14 The State of Nevada,) **PETITION FOR REHEARING**
15 Respondents,)
16)
17 And)
18)
19 Janet Solander,)
20 Petitioner)
21 vs.)
22 The State of Nevada,)
23 Respondents,)
24)

21
22 MUELLER, HINDS & ASSOCIATES, CHTD.
23 Craig Mueller, Esq.
24 Nevada Bar No. 4703
25 cmueller@muellerhinds.com
26 600 South 8th Street
27 Las Vegas, Nevada 89101
28 (702) 382-1200
Attorney for Dwight Solander
Attorney for Janet Solander

MEMORANDUM OF POINTS AND AUTHORITIES

Statement of the Case

The instant issue on appeal is whether use of a catheter as medically intended constitutes sexual assault under Nevada Revised Statute 200.366. Respondent Dwight Solander was charged on or about March 25, 2014 with 46 felony counts by way of information before the Honorable Judge Valerie Adair in Clark County District Court, Department 21. Ten of those counts are Sexual Assault with a Minor Under Fourteen Years of Age. These counts revolve around allegations that Mrs. Solander used urinary catheters as medically intended by the manufacturer.

On September 16, 2014, Mr. Solander filed a pretrial Petition for Writ of Habeas Corpus in District Court challenging, among other things, the inclusion of these ten counts. After oral arguments, the presiding Judge requested the State provide a bench memorandum with legal support for how medically correct use of a catheter may constitute sexual assault, which the State filed on October 15, 2014; after duly considering the State's position, on January 28, 2015, the Judge granted Mr. Solander's Petition in part, holding that medical use of a catheter does not constitute sexual assault under Nevada law.

1 On September 24, 2015, the State submitted their Opening Brief to this
2 Court; an Answering Brief was filed on December 2, 2015. A Reply was filed
3 December 17, 2015. On April 19, 2016, this Court filed an Order of Reversal
4 and Remand which is both internally inconsistent and ignores fundamental
5 aspects of statutory construction that have manifested several times in
6 Nevada case law.
7
8

9 10 **ARGUMENT** 11

12 Pursuant to NRAP 40(5)(c), this Court may consider rehearings when
13 the court has “overlooked, misapplied or failed to consider a statute,
14 procedural rule, regulation or decision directly controlling a dispositive issue
15 in the case.” Statutory construction is the dispositive issue in this case, and the
16 Court failed to consider voluminous case law firmly admonishing a statutory
17 interpretation which produces an absurd result.
18
19

20 This Court’s order is internally inconsistent regarding the significance of
21 any intent, i.e. purpose, that is required to constitute sexual assault under NRS
22 200.364. First, the Order holds that “sexual assault requires a showing of
23 general intent... [n]either the definition of ‘sexual assault’ nor the definition of
24 ‘sexual penetration’ includes an element of sexual motivation or gratification”
25
26
27
28

1 (Order, page 3). These statements imply that statutory sexual assault will lie
2 so long as the prohibited actions are alleged to have objectively occurred,
3 irrelevant of the intent with which they were performed. However, the Order
4 later holds that “[w]e thus agree that, if the Solanders undertook the
5 catheterization for a bona fide medical purpose, they may avoid criminal
6 liability under NRS 200.366” (Order, page 8). This statement implies that the
7 purpose or intent by which the action occurs is highly determinative of
8 liability – if the catheterization was undertaken for a medical or non-sexual
9 purpose, there can be no liability for sexual assault.
10
11
12
13

14 The positions taken by this Court regarding intent are internally
15 inconsistent and mutually exclusive. First, the Court holds that catheterization
16 exposes the actor to sexual assault allegations because the statute does not
17 require any sexual intent; the purpose behind the catheterization is irrelevant
18 under the “general intent” statute. Second, the Court holds that catheterization
19 may or may not fall under the statute based on the intent with which it is
20 performed, as a medical purpose absolves the actor of any liability. If a
21 medical purpose removes the actions from the statute’s scope, then intent
22 does in fact matter. Essentially, the Court is saying that sexual intent is
23 irrelevant, except when the intent is non-sexual (i.e. medical).
24
25
26
27
28

1 In addition to this inconsistency, the Court's Order also fails to take into
2 consideration well-recognized rules of statutory construction that have been
3 embodied and emblazoned numerous times into Nevada law. As correctly
4 stated in the Order, "[t]he Soldanders argue that a literal reading of NRS
5 200.364(5) and NRS 200.366 produces an absurd result, for it 'criminalize[s]
6 every doctor, nurse, or parnt who must, for example, insert a finger into a
7 child's rectum to dislodge a stoppage caused by constipation or to clean areas
8 soiled by dirty diapers or insertion of a suppository" (Order, page 5).
9 However, the Court followed that this claim of literal absurdity is the
10 equivalent to a request to apply the rule of lenity. This was not the case.

11 The Answering Brief does not ask for the rule of lenity to be applied to
12 this statute, as the plain language of the statute is not ambiguous (nor was it
13 alleged as such before this Court). However, ambiguity and absurdity are
14 patently different legal concepts, each requiring a separate analysis.

15 As the language of the statute is not facially ambiguous, the rule of lenity
16 does not apply. However, as alleged in the Answering Brief, the pure absurdity
17 of the State's requested construction *must* be taken into consideration when
18 interpreting the statute. Absurdity is not contingent upon the clarity of the
19 statutory language. This Court has held on many occasions that resulting

1 absurdity may require a specific statutory interpretation even if the
2 unambiguous plain language is to the contrary.
3

4 “[W]e construe unambiguous statutory language according to its plain
5 meaning *unless doing so would provide an absurd result.*” *Cal. Commercial*
6 *Enters. v. Amedeo Vegas I, Inc.*, 119 Nev. 143, 145, 67 P.3d 328, 330 (2003);
7 *Simmons Self-Storage Partners, LLC v. Rib Roof, Inc.*, 331 P.3d 850, 854 (Nev.
8 2014). The Court interprets statutes “to avoid unreasonable or absurd results
9 and give effect to the Legislature’s intent.” *S. Nev. Homebuilders Ass’n v. Clark*
10 *Cnty.*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005). “The entire subject matter
11 and the policy of the law may also be involved to aid in its interpretation, and
12 it should always be construed so as to avoid absurd results.” *Moody v.*
13 *Manny’s Auto Repair*, 110 Nev. 320, 325, 871 P.2d 935, 938 (1994).
14
15
16
17

18 While the statute’s language may not be ambiguous, the literalist
19 interpretation proffered by the State would lead to patently absurd results,
20 and so that interpretation must be avoided. If intent and purpose has no
21 bearing on whether actions may constitute sexual assault under the statute,
22 the scenarios described above where doctors, parents and caretakers may be
23 exposed to criminal liability (scenarios intentionally made hyperbolic in an
24 attempt to convey the absurdity of application) will become reality.
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **VERIFICATION OF KELSEY BERNSTEIN, ESQ.**

- 2
- 3
- 4 1. I am an attorney at law, admitted to practice in the State of Nevada.
- 5 2. I am the attorney handling this matter on behalf of Petitioner.
- 6
- 7 3. The factual contentions contained within the Petition for Rehearing are
- 8 true and correct to the best of my knowledge.
- 9

10

11 Dated this 21 day of April, 2016.

12

13

14 MUELLER, HINDS & ASSOCIATES.

15 Respectfully Submitted By:

16  13825

17 KELSEY BERNSTEIN, ESQ.

18 Attorney for Petitioner

19

20

21

22

23

24

25

26

27

28

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28


- 3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

1 I understand that I may be subject to sanction in the event that the
2 accompanying brief is not in conformity with the requirements of the Nevada
3 Rules of Appellate Procedure.
4

5
6 Dated this 21 day of April, 2016.
7
8

9
10 MUELLER, HINDS & ASSOCIATES.

11 Respectfully Submitted By:

12 

13 KELSEY BERNSTEIN, ESQ.

14 Attorney for Petitioners
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

Pursuant to NRAP 25(d), I hereby certify that on the 22 day of

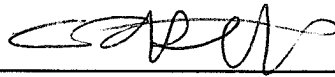
APRIL, 2016, I served a true and correct copy of the Petition for

Writ of Mandamus to the last known address set forth below:

The Honorable Judge Valerie Adair
Eighth Judicial District
Department 21
200 Lewis Avenue
Las Vegas, Nevada 89101

Chris Burton
Deputy District Attorney
Office of the Clark County District Attorney
200 Lewis Avenue
Las Vegas, Nevada 89101

Steve Wolfson
Office of Clark County District Attorney
200 Lewis Avenue
Las Vegas, Nevada 89101



Employee of Mueller, Hinds & Associates