

IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANK MILFORD PECK,

Appellant,

vs.

VALLEY HOSPITAL MEDICAL
CENTER; DAVID R. ZIPF, M.D.;
AND MICHAEL D. BARNUM,
M.D.,

Respondents.

Case No.: 68664

District Court No.: A-14-708447-C
Dept. No. III

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APPEAL

From the Eighth Judicial District Court
The Honorable Douglas W. Herndon

**RESPONDENT MICHAEL D. BARNUM, M.D.'S
AMENDED ANSWERING BRIEF**

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TABLE OF CONTENTS

TABLE OF CONTENTS.....	i-ii
TABLE OF AUTHORITIES.....	iii-vi
NRAP 26.1 DISCLOSURE STATEMENT.....	1
STATEMENT OF FACTS.....	2-5
STANDARD OF REVIEW.....	5-6
SUMMARY OF THE ARGUMENT.....	6-7
LEGAL ARGUMENT.....	7-29
I. NRS 41A.071 DOES NOT VIOLATE THE EQUAL PROTECTION OR DUE PROCESS CLAUSES OF THE UNITED STATES AND NEVADA CONSTITUTIONS.....	7-19
A. Nevada Has A Legitimate Government Interest In Providing Access To Affordable Medical Care For Its Citizens.....	8-12
1. NRS 41A.071’s Legislative History Reflects Its Rational Purpose Of Stabilizing Nevada’s Health Care Crisis.....	8-9
2. This Court Has Previously Recognized The Rational And Legitimate Governmental Interest In Enacting A Medical Malpractice Statutory Scheme Aimed At Stabilizing The Health Care Crisis.....	10-11
3. Since The Enactment Of NRS 41A.071 Health Care Costs Have Actually Decreased.....	12
B. NRS 41A.071 Does Not Impose An Unconstitutional Burden On Medical Malpractice Plaintiffs’ Access To Court.....	13-19
1. NRS 41A.071 Does Not Prejudice Medical Malpractice Plaintiffs By Requiring Them To Obtain Expert Review Prior To Filing Suit.....	13-15

2.	NRS 41A.071 Does Not Violate Mr. Peck's Right To A Jury Trial.....	15-16
3.	Mr. Peck's Reliance On <i>Zeier</i> Is Misguided.....	17-19
II.	NRS 41A.071 DOES NOT UNCONSTITUTIONALLY DISCRIMINATE AGAINST INDIGENT PLAINTIFFS.....	19-21
III.	NRS 41A.071 DOES NOT UNCONSTITUTIONALLY DISCRIMINATE AGAINST INCARCERATED PLAINTIFFS.....	21-24
IV.	NRS 41A.100(1)(A) DOES NOT APPLY TO PECK'S CLAIM BECAUSE THE FACTS PRESENTED BY PECK IN HIS COMPLAINT DO NOT MEET THE NARROW RES IPSA REQUIREMENTS.....	24-29
A.	Retention Of A Needle Guide Is Not Unintentional.....	26
B.	Mr. Peck Did Not Undergo Surgery At Any Time During The Course Of His Subject Care And Treatment.....	27-28
C.	The Facts And Evidence Presented To The Trial Court Reflect That Nothing Was Left In Mr. Peck's Hand.....	28-29
	CONCLUSION.....	30
	CERTIFICATE OF COMPLIANCE.....	31-32
	CERTIFICATE OF SERVICE.....	33-34

TABLE OF AUTHORITIES

Cases	Pages
<i>Barnes v. Eighth Judicial Dist. Court of State of Nev., In & For Clark County</i>	
103 Nev. 679, 682, 748 P.2d 483, 486 (1987)	19, 20, 22
<i>Barrett v. Baird</i>	
111 Nev. 1496, 1507, 908 P.2d 689, 697 (1995).....	7, 10, 11, 16
<i>Boddie v. Connecticut</i>	
401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971).....	20, 21
<i>Bonicamp v. Vazquez</i>	
120 Nev. 377, 379, 91 P.3d 584, 585 (2004).....	5
<i>Borger v. Dist. Court</i>	
120 Nev. 1021, 1028, 102 P.3d 600 (2004).....	16
<i>Breliaut v. Preferred Equities Corp.</i>	
109 Nev. 842, 858 P.2d 1258 (1993).....	14
<i>Buzz Stew, LLC v. City of N. Las Vegas</i>	
124 Nev. 224, 228, 181 P.3d 670 (2008).....	5
<i>Contrevo v. Mercury Finance Co. of Nev.</i>	
123 Nev. 1496, 153 P.3d 652 (2007).....	27
<i>DeLuna v. St. Elizabeth's Hosp.</i>	
147 Ill.2d 57, 588 N.E.2d 1139 (Ill. 1992).....	14-15
<i>Etkind v. Suarez</i>	
271 Ga. 352, 356(4), 519 S.E.2d 210 (1999).....	20
<i>Fernandez v. Admirand</i>	
108 Nev. 963, 843 P.2d 354 (1992).....	13, 14
<i>Flamingo Paradise Gaming, LLC v. Chanos</i>	
125 Nev. 502, 520, 217 P.3d 546, 559 (2009).....	7, 8
<i>Gill v. Russo</i>	
39 S.W.3d 717 (Tex. App. 2001).....	22
<i>Goldberg v. Kelly</i>	
397 U.S. 254, 267, 90 S.Ct. 1011, 1020, 25 L.Ed.2d 287 (1970).....	13
<i>Hodge v. Cheek</i>	
581 N.E.2d 581, 584–85 (1989), <i>dismissed</i> , 48 Ohio St. 3d 708 (1990).....	15
<i>Horne v. United States</i>	
223 Fed. Appx. 154, 156 (3d Cir. 2007).....	21

<i>Jain v. McFarland</i>	13, 16
109 Nev. 465, 851 P.2d 450 (1993)	
<i>Lawrence v. Clark Cnty.</i>	
127 Nev. —, —, 254 P.3d 606, 608 (2011).....	5
<i>Ledger v. Ohio Dept. of Rehab. Corr.</i>	
80 Ohio App.3d 435, 609 N.E.2d 590, 593-95 (Ohio Ct. App. 1992).....	23
<i>Levingston v. Washoe Cty.</i>	
112 Nev. 479, 482, 916 P.2d 163, 166 (1996).....	5, 6
<i>Morrow v. Skolnik</i>	
126 Nev. 741, 367 P.3d 802 (2010).....	21, 22
<i>O’Hanrahan v. Moore</i>	
731 So.2d 95 (Fla. Dist. Ct. App. 1999).....	24
<i>Orcutt v. Miller</i>	
95 Nev. 408, 595 P.2d 1191 (1979).....	13
<i>Ortwein v. Schwab</i>	
410 U.S. 656, 93 S.Ct. 1172, 35 L.Ed.2d 572 (1973).....	7
<i>Perry v. Stanley</i>	
83 S.W.3d 819 (Tex. App. 2002).....	22
<i>Peterson v. Columbus Med. Ctr. Found., Inc.</i>	
533 S.E.2d 749, 755 (Ga. App. Ct. 2000).....	20
<i>Prabhu v. Levine</i>	
112 Nev. 1538, 930 P.2d 103 (1996).....	13
<i>Scott v. Rayhrer</i>	
185 Cal.App.4th 1535 (2010).....	26
<i>Seoane v. Ortho Pharmaceuticals, Inc.</i>	
660 F.2d 146, 151 (5th Cir. 1981).....	7
<i>Silvar v. Eighth Judicial Dist. Court</i>	
122 Nev. 289, 292, 129 P.3d 682, 684 (2006).....	6
<i>Spencer v. McCarley Moving &c. Co.</i>	
174 Ga.App. 525, 330 S.E.2d 753 (1985).....	20
<i>State v. Javier C.</i>	
128 Nev. Adv. Op 50, 289 P.3d 1194, 1197 (2012).....	27
<i>State v. Lucero</i>	
127 Nev. 92, 249 P.3d 1226, 1228 (2011).....	27
<i>Szydel v. Markman</i>	
121 Nev. 453, 460–61, 117 P.3d 200, 205 (2005).....	24, 25, 28, 29
<i>Tam v. Eighth Jud. Dist. Ct.</i>	
131 Nev. Adv. Op. 80, 358 P.3d 234, 237–38 (2015).....	<i>passim</i>

<i>United States v. Kras</i>	7
409 U.S. 434, 93 S.Ct. 631, 34 L.Ed.2d 626 (1973)	
<i>Wall v. Marouk</i>	
302 P.3d 775, 779 (OK. 2012).....	17
<i>Washoe Medical Center v. Second Judicial District Court</i>	
122 Nev. Adv. Rep. 110, 148 P.3d 790, 793-94 (2006).....	25, 29
<i>Wright v. Cradlebaugh</i>	
3 Nev. 349 (1867).....	13
<i>Zeier v. Zimmer, Inc.</i>	
2006 OK 98, ¶¶ 14-18, 152 P.3d 861, 867-869 (2006).....	17, 18, 19
<i>Zohar v. Zbiegien</i>	
130 Nev. Adv. Op. 74, 334 P.3d 402 (2014).....	14

Statutes	Pages
-----------------	--------------

NRS 41A.035.....	11
NRS 41A.071.....	<i>passim</i>
NRS 41A.100.....	<i>passim</i>
63 O.S. Supp.2003 § 1–1708.1E.....	17

Other Authorities	Pages
--------------------------	--------------

Excerpts from the Senate Journal Remarks and Testimony, July 30, 2002.....	9
http://emedicine.medscape.com/article/1998177-overview (last visited August 30, 2016).....	26
Journal of the Senate of the State of Nevada, Eighteenth Special Session, The First Day of July 29, 2002.....	8-9
Minutes of the Senate Committee on Judiciary Seventy-Eighth Session, of March 26, 2015.....	12
NEV. CONST. art 1, §8.....	13
<i>Nevada Ballot Questions 2004</i> , Question No. 3, Argument in Support of Question No. 3 at 16, <i>available at</i> https://www.leg.state.nv.us/Division/Research/VoteNV/BallotQuestions/2004.pdf 2004.....	8
NRAP 25.....	33
NRAP 26.1.....	1
NRAP 28(e)(1).....	31
NRAP 32(a)(4)-(6).....	31

NRAP 32(a)(7).....	31
NRAP 36(c)(3).....	21
NRCP 12(c).....	4, 5
NRCP 8(a).....	14
Oklahoma Constitution art. 5, § 46.....	17
U.S. CONST. amend. XIV, §1.....	13

NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made so that the Justices of the Court may evaluate possible disqualification or recusal.

1. Respondent Michael D. Barnum, M.D. is an individual nongovernmental party.

2. The law firm of Alverson, Taylor, Mortensen & Sanders has appeared on behalf of Dr. Barnum before this Court, as well as the District Court.

Dated this 1st day of September, 2016.

**ALVERSON, TAYLOR, MORTENSEN
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/s/ Brigitte E. Foley

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STATEMENT OF FACTS

Mr. Peck has been at all relevant times, and remains currently incarcerated, at High Desert State Prison in Indian Springs. AA0002. On December 31, 2013, Mr. Peck was transferred to Valley Hospital Medical Center for a high temperature and symptoms consistent with viral meningitis, where he was under the care of the attending physician, Dr. Zipf. AA0036. Mr. Peck also named Dr. Barnum as a Defendant in his medical malpractice Complaint filed on October 13, 2014, though it is unclear from the record as to what role, if any, Dr. Barnum assumed in Mr. Peck's subject care and treatment. AA0001-5. On February 18, 2014, Mr. Peck requested medical assistance based in part on his alleged suspicion that there was a foreign object under the skin in his left hand. AA0020. On March 26, 2014, Dr. Suwee of the Nevada Department of Corrections ordered an X-ray of Mr. Peck's left hand to rule out the potential presence of a foreign body. AA0022. The X-ray taken on March 8, 2014, was unremarkable and did not identify any foreign object in Appellant's hand. AA0024.

On October 13, 2014, Mr. Peck in pro per filed the Complaint for medical malpractice against Valley Hospital Medical Center, David R. Zipf, M.D., and Michael D. Barnum, M.D. alleging medical malpractice and *res ipsa loquitur* under NRS 41A.100(1)(a). AA0001-5. However, Mr. Peck did not allege that a foreign object was *unintentionally* left in his body *following surgery*. AA0001-5

(emphasis added). Mr. Peck did not attach an affidavit by a medical expert as required by NRS 41A.071. AA0001-5

On June 17, 2015, Dr. Zipf filed a Motion for Judgment on the Pleadings, arguing that Mr. Peck's Complaint must be dismissed for failure to attach the requisite NRS 41A.071 affidavit of merit, and Mr. Peck's claim did not fall under the NRS 41A100(1)(a) *res ipsa loquitor* exception. AA0006-0018. Dr. Zipf also attached selected medical records as exhibits in support of his Motion, including the March 8, 2014 radiology report that failed to identify a retained object in Mr. Peck's left hand. AA0020-27. On June 26, 2015, Mr. Peck filed his Opposition to Dr. Zipf's Motion, wherein he claimed that Dr. Suwee ordered the X-ray "based on his 'observation' of an object just under the skin," and that a Nurse Brenda, who was allegedly in charge of blood draws, "knew exactly what the object was when she felt Mr. Peck's hand and said, "of it's probably a needle guide." AA0029. Mr. Peck also argued in his Opposition that he was unable to obtain an affidavit from a health care provider due to his incarcerated status. AA0030. Finally, Mr. Peck expanded upon his claim that *res ipsa* applies to the instant matter by claiming that the common law *res ipsa* doctrine should be applied in this case because Defendants had "exclusive control" over Mr. Peck. AA0030-32.

On July 2, 2015, Respondent Barnum filed a Joinder to the Motion for Judgment on the Pleadings, which included arguments analogous to those contained in Dr. Zipf's Motion. AA0040-46.

Dr. Zipf filed his Reply to Appellant's Opposition to Motion for Judgment on Pleadings on July 15, 2015, wherein he highlighted the fact that Mr. Peck listed facts in his Opposition that directly contradicted his Complaint. AA0052-57. For example, in his Opposition, Appellant alleged that the foreign object in his hand is a plastic needle guide that cannot be seen on X-ray; however, Appellant's Complaint alleged that the same x-ray "clearly showed an object in Mr. Peck's left hand." AA0055-56. Dr. Zipf further argued that a motion for judgment on the pleadings pursuant to NRCP 12(c) is based on the pleadings and only matters in the pleadings should be considered, and that Mr. Peck's attempt to add new facts in his Opposition should not be considered in deciding Dr. Zipf's Motion. AA0055-56. Dr. Barnum's July 17, 2015, Reply was also analogous to Dr. Zipf's. AA0058-65.

At the July 22, 2015, hearing on the Motion for Judgment on the Pleadings the District Court granted the Motion and Joinder on the basis that Mr. Peck alleged medical malpractice in his complaint but did not produce a medical expert affidavit. AA0066-69. The District Court found that the exception provided by NRS 41A.100(1)(a) did not apply to the instant case because the plain language of

the statute only allows for an exception when a foreign substance is unintentionally left in the body following surgery and there was no allegation by Mr. Peck that he had any surgery. AA0066-69.

The Order granting Dr. Zipf's Motion for Judgment on the Pleadings was entered on August 4, 2015. AA0072-0075. The Order granting Dr. Barnum's Joinder was entered on August 6, 2015. AA0076-81. Mr. Peck then filed his Notice of Appeal on August 17, 2015. AA0082.

STANDARD OF REVIEW

The district court may grant a motion for judgment on the pleadings when the material facts of the case "are not in dispute and the movant is entitled to judgment as a matter of law." NRCP 12(c); *Bonicamp v. Vazquez*, 120 Nev. 377, 379, 91 P.3d 584, 585 (2004). "Because an order granting a motion for judgment on the pleadings presents a question of law, [] review of such an order is de novo. *Lawrence v. Clark Cnty.*, 127 Nev. —, —, 254 P.3d 606, 608 (2011). In reviewing a judgment on the pleadings, the appellate court is to accept the factual allegations in the complaint as true and draw all inferences in favor of the nonmoving party. *Cf. Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008).

This court may consider constitutional issues even if they were not raised below, though it is not required to do so. *Levingston v. Washoe Cty.*, 112 Nev. 479,

482, 916 P.2d 163, 166 (1996) (“[I]ssues of a constitutional nature may be addressed when raised for the first time on appeal.”). “Statutes are presumed to be valid, and the challenger bears the burden of showing that a statute is unconstitutional. In order to meet that burden, the challenger must make a clear showing of invalidity.” *Tam v. Eighth Jud. Dist. Ct.*, 131 Nev. Adv. Op. 80, 358 P.3d 234, 237–38 (2015) (quoting *Silvar v. Eighth Judicial Dist. Court*, 122 Nev. 289, 292, 129 P.3d 682, 684 (2006) (citation omitted)).

SUMMARY OF THE ARGUMENT

1. NRS 41A.071 does not violate Mr. Peck’s equal protection and due process rights as an indigent, incarcerated medical malpractice litigant because NRS 41A.071 is rationally related to a legitimate governmental purpose of stabilizing Nevada’s health care crisis and providing protection for both doctors and patients.

2. NRS 41A.071 does not unconstitutionally infringe upon Mr. Peck’s right to access to the courts because NRS 41A.071’s mere acceleration of the time period in which a plaintiff must obtain such expert testimony does not create any additional burden on the plaintiff that is otherwise present in sustaining his claim.

3. Finally, Mr. Peck has failed to meet three conditions of NRS 41A.100(1)(a)’s narrow requirements that would entitle him to relief from NRS 41A.071’s affidavit of merit requirement: (1) Peck has failed to allege that a

foreign object was unintentionally left in his body; (2) he failed to allege that the object was left in his body following surgery; and (3) when challenged, he failed to present facts and evidence to show that his action actually meets the narrow *res ipsa* requirements. Therefore, Peck's *res ipsa* claim fails, and his complaint is void *ab initio* as a result of his failure to attach the requisite affidavit of merit.

LEGAL ARGUMENT

I. NRS 41A.071 DOES NOT VIOLATE THE EQUAL PROTECTION OR DUE PROCESS CLAUSES OF THE UNITED STATES AND NEVADA CONSTITUTIONS

“[T]he right of malpractice plaintiffs to sue for damages caused by medical professionals does not involve a fundamental constitutional right.” *Tam*, 358 P.3d at 239 (emphasis added) (quoting *Barrett v. Baird*, 111 Nev. 1496, 1507, 908 P.2d 689, 697 (1995)). “[W]hen a right is not fundamental, access to the courts may be restricted.” *Seoane v. Ortho Pharmaceuticals, Inc.*, 660 F.2d 146, 151 (5th Cir. 1981); see also, *Ortwein v. Schwab*, 410 U.S. 656, 93 S.Ct. 1172, 35 L.Ed.2d 572 (1973); *United States v. Kras*, 409 U.S. 434, 93 S.Ct. 631, 34 L.Ed.2d 626 (1973). To survive due process and equal protection challenges, NRS 41A.071 need only be rationally related to a legitimate governmental purpose. *Tam*, 358 P.3d at 239; see generally *Flamingo Paradise Gaming, LLC v. Chanos*, 125 Nev. 502, 520, 217 P.3d 546, 559 (2009). “While the legislative history is helpful to understanding the purpose of enacting the statute, the Court is not

limited to the reasons expressed by the Legislature; rather, **if any rational basis exists, or can be hypothesized, then the statute is constitutional.**” *Flamingo Paradise Gaming*, 125 Nev. at 520, 217 P.3d at 559 (emphasis added). Furthermore, “economics provides a rational basis for distinction in the statute.” *Id.* at 522, 217 P.3d at 560.

A. Nevada Has A Legitimate Government Interest In Providing Access To Affordable Medical Care For Its Citizens

Nevada’s medical malpractice statutory framework is rationally related to the legitimate government purpose of “stabiliz[ing] Nevada’s health care crisis and [] provid[ing] protection for both doctors and patients.” *Nevada Ballot Questions 2004*, Question No. 3, Argument in Support of Question No. 3 at 16, *available at* <https://www.leg.state.nv.us/Division/Research/VoteNV/BallotQuestions/2004.pdf> 2004; *Tam*, 358 P.3d at 239.

1. NRS 41A.071’s Legislative History Reflects Its Rational Purpose Of Stabilizing Nevada’s Health Care Crisis

When he opened the special session of the Nevada Legislature in 2002, Nevada Governor Kenny Guinn declared:

Nevada is in a health care crisis. The cost of medical liability insurance has risen to unacceptable levels. The inability of doctors to obtain their insurance at reasonable rates is endangering the health of our citizens. Therefore, ... immediate change in our laws is necessary to address this health care crisis.

Journal of the Senate of the State of Nevada, Eighteenth Special Session, The First Day of July 29, 2002. RA 00004.

Thereafter, the special session examined how other states dealt with medical malpractice claims in the face of similar health care crises due to increases in insurance premiums, and it found that a majority of these other jurisdictions, namely California, required affidavits of merit to be submitted with a complaint for malpractice. In discussing the affidavit requirement that it had introduced to replace the screening panel scheme, the Legislature noted that it “wanted to make certain that when there was a complaint filed that it is filed in good faith. The way to do that is with a summary affidavit from an expert in a substantially similar area indicating that the expert has reviewed the record.” Excerpts from the Senate Journal Remarks and Testimony, July 30, 2002, RA00008. The Legislature determined that by requiring a substantive affidavit, the attorney for the plaintiff could avoid any claim that the matter was frivolously brought. “[O]ur intent was to make certain we do not end up with this grab-bag of every doctor who happens to appear on a record end up in district court. Someone must do their homework before they file a lawsuit.” *Id.* RA00006-7.

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**2. This Court Has Previously Recognized The Rational
And Legitimate Governmental Interest In Enacting A
Medical Malpractice Statutory Scheme Aimed At
Stabilizing The Health Care Crisis**

In *Barrett v. Baird*, this Court upheld the constitutionality of Nevada's medical malpractice screening panel statutory scheme, which was the precursor to NRS 41A.071's expert affidavit requirement, after having determined that it would not disturb "carefully crafted legislation which fairly balances the interests involved in a medical malpractice suit and limits the judicial system's burdens and health care costs by discouraging frivolous litigation." 111 Nev. at 1511, 908 P.2d at 699. Barrett claimed "there is no rational reason that victims of medical negligence by physicians and hospitals be subjected to the burdens of the [screening] panel when injured patients of other health care providers are not." *Id.* at 698, 908 P.2d at 1509. The *Barrett* Court concluded "the fact that the screening panel statute does not apply to all health care providers, but only to physicians, hospitals and hospital employees, is a rational legislative choice." *Id.* The *Barrett* Court cited to the fact that "evidence before the legislature demonstrated that physicians and hospitals were experiencing enormous hikes in malpractice insurance premiums; there was no such evidence concerning the insurance rates of other health care providers," as evidence of the legislature's rationale in creating the distinction. *Id.* In addition, the *Barrett* Court noted that "Nevada's lawmakers could have concluded that physicians and hospitals were more affected by the

perceived malpractice crisis than other health care providers, i.e., that they had more difficulty obtaining insurance, that their premiums were higher, that they bore more of the brunt of frivolous litigation, etc.” *Id.*

Likewise, in *Tam v. Eighth Jud. Dist. Ct.*, this Court upheld the constitutionality of Nevada’s NRS 41A.035 non-economic damages cap in medical malpractice cases after the plaintiff in the underlying litigation matter argued that the cap violated the State and federal Equal Protection Clauses, claiming there was no rational basis for the statute. *Tam*, 358 P.3d at 238-39 (internal citations omitted). The *Tam* Court first reiterated its long-standing position that “the right of malpractice plaintiffs to sue for damages caused by medical professionals does not involve a fundamental constitutional right”, and therefore rational basis scrutiny applies. *Id.*, 358 P.3d at 239 (internal citations omitted). After applying this rational basis scrutiny to the non-economic damages cap statute (NRS 41A.035), including reviewing the relevant legislative history and ballot proposal, the *Tam* Court concluded that “NRS 41A.035 does not violate equal protection because the imposition of an aggregate cap on noneconomic damages in medical malpractice actions is rationally related to the legitimate governmental interests of ensuring that adequate and affordable health care is available to Nevada’s citizens.” *Id.*

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3. Since The Enactment Of NRS 41A.071, Health Care Costs Have Actually Decreased

On March 26, 2015, The Senate Judiciary Committee held hearings to discuss, among other things, the impact of NRS 41A.071, which revealed that since NRS 41A.071 went into effect the medical malpractice rates have significantly decreased. Minutes of the Senate Committee on Judiciary Seventy-Eighth Session, of March 26, 2015, RA00013-14. Rudy Manthei, D.O., who testified on behalf of Keep our Doctors in Nevada, produced documentation from Nevada Mutual Insurance Company showing that medical malpractice premiums have dropped almost 50% for physicians in Nevada since 2004. RA00014-16. This evidence and testimony unequivocally reflect that the tort reforms enacted in 2004, including NRS 41A.071 have, in fact, fulfilled the legislature's legitimate purpose for enacting them, which was to address the health care crisis in Nevada.

Like the rationales this Court previously reached in *Barrett* and *Tam*, the legislative history of NRS 41A.071 unequivocally reflects that NRS 41A.071 does not violate Mr. Peck's equal protection and due process rights because NRS 41A.071 is rationally related to the legitimate governmental interests of ensuring that adequate and affordable health care is available to Nevada's citizens. Accordingly, the District Court appropriately applied NRS 41A.071, and this Court should uphold the District Court's dismissal of Mr. Peck's Complaint for failing to attach the requisite expert affidavit.

**B. NRS 41A.071 Does Not Impose An Unconstitutional Burden
On Medical Malpractice Plaintiffs' Access To Court**

Article 1, Section 8 of the Nevada Constitution states, in pertinent part: “No person shall be ... deprived of life, liberty, or property, without due process of law....” The 14th Amendment to the U.S. Constitution contains a similar provision. Fundamental to due process of law is the opportunity to be heard in a meaningful manner and at a meaningful time. *Goldberg v. Kelly*, 397 U.S. 254, 267, 90 S.Ct. 1011, 1020, 25 L.Ed.2d 287 (1970); *see Wright v. Cradlebaugh*, 3 Nev. 341, 349 (1867) (due process “not only requires that a party shall be properly brought into court, but that he shall have the opportunity when in court to establish any fact which, according to the usages of common law or the provisions of the constitution would be a protection to himself or his property”).

**1. NRS 41A.071 Does Not Prejudice Medical
Malpractice Plaintiffs By Requiring Them To Obtain
Expert Review Prior To Filing Suit**

It is well established in Nevada that a medical malpractice plaintiff must generally use expert testimony to establish medical malpractice. NRS 41A.100; *Jain v. McFarland*, 109 Nev. 465, 474, 851 P.2d 450, 456 (1993); *Prabhu v. Levine*, 112 Nev. 1538, 1547, 930 P.2d 103, 107 (1996); *Orcutt v. Miller*, 95 Nev. 408, 412, 595 P.2d 1191, 1193 (1979); *Fernandez v. Admirand*, 108 Nev. 963, 843 P.2d 354 (1992) (finding that a plaintiff must first establish the accepted standard of medical care or practice, and that plaintiff must show that a doctor’s conduct

departed from that standard and legally caused the injuries suffered in order to prove medical malpractice). NRS 41A.071's affidavit requirement merely requires the Plaintiff to engage expert services sooner rather than later in order to provide the court with proof of having a valid claim.

NRCP 8(a) requires that a plaintiff's pleading shall contain "a short and plain statement of the claim showing that the pleader is entitled to relief contain notice of the claim."

The purpose of a complaint is to "give fair notice of the nature and basis of a legally sufficient claim and the relief requested," *Brelant v. Preferred Equities Corp.*, 109 Nev. 842, 846, 858 P.2d 1258, 1260 (1993), and the purpose of the expert affidavit is to further enable the trial court to determine whether the medical malpractice claims within the complaint have merit, both policy considerations are served when the sufficiency of the affidavit is determined by reading it in conjunction with the complaint.

Zohar v. Zbiegien, 130 Nev. Adv. Op. 74, 334 P.3d 402, 406 (2014).

Because a Plaintiff cannot proceed to trial without obtaining expert testimony to establish standard of care and breach thereof that resulted in injury, NRS 41A.071's mere acceleration of the time period in which a plaintiff must obtain such expert testimony does not create any additional burden on the plaintiff than what is otherwise required to his claim, a fact recognized by other jurisdictions that have previously addressed this issue: see e.g. *DeLuna v. St. Elizabeth's Hosp.*, 147 Ill.2d 57, 69-76, 588 N.E.2d 1139, 1144-47 (Ill. 1992)

(determining that Illinois’ affidavit of merit requirement does not unconstitutionally infringe on litigants’ right of access to courts because it merely “requires a litigant to obtain, before trial, a certificate from an appropriate health care professional stating that the alleged cause of action is meritorious. ... [T]he provision is essentially no different from the parallel requirement generally applicable in medical malpractice cases that the plaintiff ... present expert testimony to demonstrate the applicable standard of care and its breach); *Hodge v. Cheek*, 581 N.E.2d 581, 584–85 (1989), *dismissed*, 48 Ohio St. 3d 708 (1990) (Ohio’s affidavit of merit statute “requires only some evidence of a reasonable basis for plaintiff’s claim, it does not unfairly or unconstitutionally discriminate against plaintiffs who are of modest means. It must be borne in mind that testimony of an expert will be required at trial to support the claim. The statute requires only that such an expert be consulted before filing the complaint.”).

Likewise, NRS 41A.071’s requirement that Mr. Peck secure expert testimony prior to filing his Complaint does not create an unconstitutional burden upon him, because it merely accelerates the time in which Mr. Peck must secure expert testimony to pursue and eventually prove his case against Dr. Barnum.

2. NRS 41A.071 Does Not Violate Mr. Peck’s Right To A Jury Trial

Before NRS 41A.071 was enacted in 2004, plaintiffs seeking redress for medical malpractice claims first had to have their matters heard before a “medical

screening panel,” whose findings were admissible before a jury thereafter. The Nevada Supreme Court, in *Jain v. McFarland*, determined “the purposes of the screening panel are to minimize frivolous suits against doctors, to encourage settlement, and to lower the costs of malpractice premiums and health care.” 109 Nev. at 471–72, 851 P.2d at 455. In *Barrett*, the Nevada Supreme Court held that “the screening panel statute does not make a medical malpractice claimant’s right to a jury trial practically unavailable because it does not undermine the guarantee that a jury will find the facts.” *Barrett*, 111 Nev. at 1513-14, 908 P.2d at 701. The *Barrett* Court further determined that the screening panel’s finding “is only one piece of evidence to be weighed in light of all other evidence. There is no deprivation of a property interest as a result of the Panel’s findings nor [do] the Panel decisions bind or impair the interests of the parties.” *Id.* In *Borger v. Dist. Court*, 120 Nev. 1021, 1028, 102 P.3d 600 (2004), the Nevada Supreme Court confirmed the fact that NRS 41A.071 does not violate a medical malpractice litigant’s right to a jury trial: “NRS 41A.071 governs the *threshold* requirements for initial pleadings in medical malpractice cases, not the ultimate trial of such matters.” (Emphasis added). Accordingly, the *Barrett* Court determined that the screening panel statute withstood constitutional scrutiny. *Id.* NRS 41A.071, which imposes an even less restrictive burden on a medical malpractice plaintiff, likewise does not deprive medical malpractice litigants their right to a jury trial.

3. Mr. Peck's Reliance On *Zeier* Is Misguided

In *Zeier*, the Oklahoma Supreme Court determined that the affidavit of merit requirement violated the Oklahoma Constitution's "prohibition against regulating the practice or jurisdiction of, or changing the rules of evidence in judicial proceedings or inquiry before the courts." *Zeier v. Zimmer, Inc.*, 2006 OK 98, ¶¶ 14-18, 152 P.3d 861, 867-869 (2006). The *Zeier* Court concluded that "[b]ecause 63 O.S. Supp.2003 § 1-1708.1E impacts less than an entire class of similarly situated claimants—medical malpractice claimants are severed from all tort victims with the possibility of the creation of a third class if the doctrine of *res ipsa loquitor* applies, the statute is underinclusive and special." Therefore, the *Zeier* Court held that the statute violates the absolute and unequivocal prohibition of the Oklahoma Constitution art. 5, § 46 against the passing of special laws regulating the practice or jurisdiction of, or changing the rules of evidence in judicial proceedings or inquiry before the courts. *Id.* at ¶ 18, 152 P.3d at 868-69.

The Oklahoma Supreme Court decided *Zeier* based upon a unique provision contained in Oklahoma's Constitution that specifically prohibits the Legislature from enacting special laws dealing with twenty-eight subject areas. *Id.* at ¶ 18, 152 P.3d at 868-69. In fact, the Oklahoma Supreme Court has acknowledged is "unlike those in the constitutions of any other state, and ... more detailed and restrictive than those of other states." *Wall v. Marouk*, 302 P.3d 775, 779 (OK. 2012).

Because the *Zeier* Court's decision was based upon a specific provision contained in the Oklahoma Constitution that is not also contained in the Nevada or United States Constitutions, Mr. Peck's reliance upon the same is improper.

The *Zeier* Court also used a strict scrutiny standard when it determined that Oklahoma's affidavit of merit requirement created an unconstitutional monetary barrier to Oklahoma medical malpractice litigants' access to courts by requiring such litigants to pay for the cost of an expert opinion. *Zeier*, 2006 OK 98, ¶ 25, 152 P.3d at 872. This determination is inapplicable to the instant matter for two important reasons: (1) as previously discussed at length herein, it is well-established that the proper scrutiny standard for determination the constitutionality of NRS 41A.071 is *rational basis*, and not strict scrutiny; and (2) the cost of obtaining an expert affidavit is not a "liability" or "coercive collective device", but rather a *private* cost that is not imposed by the state, and it is one that a Nevada medical malpractice plaintiff must incur at some point in the litigation in order to succeed on his medical malpractice claims against a health care provider defendant. The *Zeier* Court not only applied a different standard of review than that which must be applied to the instant matter, and the *Zeier* Court's finding that Oklahoma's affidavit of merit requirement creates an unconstitutional monetary barrier to courts based upon the strict scrutiny standard applied cannot appropriately be applied to the instant matter because NRS 41A.071 does not

impose any additional financial burden on a medical malpractice litigant who is required to provide expert witness testimony at the time of trial anyway. Because the holdings and reasoning in *Zeier* cannot be applied to the instant matter for the reasons previously stated, Mr. Peck's reliance upon the same is improper.

II. NRS 41A.071 DOES NOT UNCONSTITUTIONALLY DISCRIMINATE AGAINST INDIGENT PLAINTIFFS

“[A]lthough an indigent has a right of reasonable access to the courts, the right of access is not unrestricted.” *Barnes v. Eighth Judicial Dist. Court of State of Nev., In & For Clark County*, 103 Nev. 679, 682, 748 P.2d 483, 486 (1987). For reasons previously discussed herein, it is undisputed that Mr. Peck's medical malpractice claim against Dr. Barnum does not implicate any fundamental right, therefore, NRS 41A.071 must be held constitutional if the classification scheme created by the statute is reasonably related to furthering a legitimate state interest. *Id.* at 683, 748 P.2d at 486. Mr. Peck improperly relies upon this Court's determination in *Barnes* that an affidavit of merit requirement *uniquely and narrowly* applied to litigants who were seeking to prosecute or defend civil actions *in forma pauperis* was arbitrary, irrational and “too broad in its sweep” and therefore violated indigent litigants' constitutional rights. *Id.* at 487. The significant distinction between the challenged statute in *Barnes* and NRS 41A.071 that Mr. Peck fails to recognize is that NRS 41A.071 does not arbitrarily separate indigent litigants from other civil litigants. Rather, NRS 41A.071 was enacted to

address the serious health care crisis in Nevada, along with the other provisions of NRS Chapter 41A, which this Court has repeatedly found to be rationally related to the legitimate government interest of reducing health care insurance costs in the state. *See e.g. Tam*, 131 Nev. Adv. Op. 80, 358 P.3d at 239. Accordingly, *Barnes* is not analogous to the case at bar, and Mr. Peck's reliance upon the same is improper.

Furthermore, Mr. Peck's constitutional attacks fail, as the economic deterrent of which he complains –having to retain an expert witness to prepare the affidavit of merit – is a cost charged by a private entity, in this case the expert witness. Indeed, nothing in NRS 41A.071 imposes a fee or cost associated with attaching an affidavit of merit to a medical malpractice complaint, and such cost if any, would be incurred regardless of the imposition of NRS 41A.071, as Mr. Peck would still be required to obtain an expert witness to substantiate his medical malpractice claims at trial. Therefore there is no state action that could be found to be an unconstitutional economic burden on Mr. Peck's ability to bring his claim. *See Peterson v. Columbus Med. Ctr. Found., Inc.*, 533 S.E.2d 749, 755 (Ga. App. Ct. 2000); *Etkind v. Suarez*, 271 Ga. 352, 356(4), 519 S.E.2d 210 (1999); *Spencer v. McCarley Moving &c. Co.*, 174 Ga.App. 525, 330 S.E.2d 753 (1985). Compare *Boddie v. Connecticut*, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971) (due

process denied to indigent plaintiffs who could not bring divorce action except upon payment of court fees and service of process costs).

Accordingly, Mr. Peck's constitutional attack on NRS 41A.071 based upon his status as an indigent litigant fails, and NRS 41A.071 must be upheld as constitutional and applied in the instant matter.

III. NRS 41A.071 DOES NOT UNCONSTITUTIONALLY DISCRIMINATE AGAINST INCARCERATED PLAINTIFFS

Just as with an indigent civil litigant, a prisoner's constitutional right of access to the courts to litigate non-fundamental civil matters can be subject to reasonable restrictions. *Morrow v. Skolnik*, 126 Nev. 741, 367 P.3d 802 (2010).¹ *See also, Horne v. United States*, 223 Fed. Appx. 154, 156 (3d Cir. 2007) (litigant's *pro se* prisoner status does not excuse his failure to comply with the affidavit of merit requirement). Although it is not a *published* decision, this Court's findings, rationales and determinations in *Morrow v. Skolnik*, as well as the cases cited therein upon which the *Morrow* Court based its decision, provide the necessary and proper foundational bases upon which to uphold NRS 41A.071 to Mr. Peck's constitutional challenges based upon his status as an inmate. Mr.

¹ This case has been cited for its strong persuasive value, as permitted under NRAP 36(c)(3). Although this decision was issued prior to January 1, 2016, Dr. Barnum respectfully requests that this Court consider the merits of this decision, as it addresses nearly identical issues to those presented in the instant matter.

Peck's arguments in attempting to distinguish each of three cases to which the *Morrow* Court cited are misguided and unpersuasive.

First, Mr. Peck attempts to improperly distinguish the Texas Court of Appeal's decisions in *Perry v. Stanley*, 83 S.W.3d 819 (Tex. App. 2002) and *Gill v. Russo*, 39 S.W.3d 717 (Tex. App. 2001) from *Barnes*. Both *Perry* and *Gill* determined that the requirement to file a medical expert affidavit with a complaint can be applied to inmates because they bear the burden of proof at trial including providing expert testimony. *Id.* As previously discussed extensively herein, the *Barnes* Court's decision was very narrow in scope and cannot be properly applied to the instant action because (1) NRS 41A.071 does not arbitrarily separate incarcerated litigants from other civil litigants as it is rationally related to the legitimate government interest of reducing health care insurance costs in the state; (2) NRS 41A.071 does not create any additional burden on Mr. Peck, given the fact that he cannot proceed to trial without obtaining expert testimony to establish standard of care and breach thereof that resulted in injury; and (3) the economic deterrent of which Mr. Peck complains – having to retain an expert witness to prepare the affidavit of merit – is not a state action, but rather a cost charged by a private entity, and not a fee or cost associated with attaching an affidavit of merit to a medical malpractice complaint, and such cost if any, would be incurred

regardless of the imposition of NRS 41A.071 as Mr. Peck would still be required to obtain an expert witness to substantiate his medical malpractice claims at trial.

Mr. Peck also improperly argues that *Ledger v. Ohio Dept. of Rehab. Corr.*, 80 Ohio App.3d 435, 609 N.E.2d 590, 593-95 (Ohio Ct. App. 1992) is distinguishable from the instant matter because the statute at issue in *Ledger* provides for an exception to the expert affidavit requirement if the plaintiff brings his claim upon *res ipsa loquitor*, which Mr. Peck claims is not present in Nevada. Appellant's Br. 24. Obviously, that assertion is untrue. In fact, Mr. Peck claims as an alternative to his constitutionality arguments that his case falls under a *res ipsa loquitor* exception provided by NRS 41A.100(1)(a).

Mr. Peck also claims that *Ledger* weighs in his favor "because it provides an alternative means for incarcerated plaintiffs to substantiate their medical malpractice claims by their own sworn statements so that they can have a full and fair opportunity to redress their personal injuries." Appellant's Br. 24-25. This argument fails for several reasons: (1) This "alternative means" still requires incarcerated medical malpractice plaintiffs such as Peck to retain and consult with an expert witness in order to commence a malpractice claim, which is no less financially or logistically burdensome than NRS 41A.071's requirements. (2) Peck's "less burdensome" argument does not properly articulate the rational basis standard that must be applied to his constitutional attack on NRS 41A.071. All

that is required to uphold NRS 41A.071 as constitutional is that the statute must be rationally related to a legitimate governmental purpose, which as discussed throughout this brief is to reduce health care insurance costs in the state. (3) Finally, Peck appears to be improperly requesting that this Court “legislate from the bench” by purportedly granting Peck an *advantage* over other medical malpractice litigants by excusing NRS 41A.071 requirements in favor of permitting Peck to adhere to a different, and less regulated requirement.

Finally, *O’Hanrahan v. Moore*, 731 So.2d 95 (Fla. Dist. Ct. App. 1999) represents another jurisdiction that has refused to find an affidavit of merit requirement in medical malpractice cases unconstitutional as applied to an incarcerated, pro se claimant, as a denial of access to courts.

Because NRS 41A.071 does not arbitrarily differentiate incarcerated litigants from non-incarcerated litigants, nor does it impose any additional barriers on an incarcerated litigant’s access to courts, Mr. Peck’s constitutionality challenge on this basis fails, and NRS 41A.071 must be upheld and applied.

IV. NRS 41A.100(1)(A) DOES NOT APPLY TO PECK’S CLAIM BECAUSE THE FACTS PRESENTED BY PECK IN HIS COMPLAINT DO NOT MEET THE NARROW RES IPSA REQUIREMENTS

NRS 41A.100(1)(a) enumerates one of five *res ipsa loquitor* exceptions to NRS 41A.071’s general requirement that a medical malpractice plaintiff attach an affidavit of merit to a complaint for malpractice where “a foreign substance other

than medication or prosthetic device was unintentionally left within the body of a patient following surgery.” *See Szydel v. Markman*, 121 Nev. 453, 460–61, 117 P.3d 200, 205 (2005) (“the expert affidavit requirement in NRS 41A.071 does not apply to a res ipsa loquitur case under NRS 41A.100(1)”). However, “medical malpractice claims that do not rely on the res ipsa loquitur doctrine ... are subject to the requirements of NRS 41A.071 and must be supported by an appropriate affidavit from a medical expert.” *Id.* “In addition, when challenged by the defendant in a pretrial or trial motion, [plaintiff must] meet the prima facie requirements for a res ipsa loquitur case” by presenting facts and evidence to show that “his or her action actually meets the narrow res ipsa requirements.” *Id.*

Mr. Peck has failed to meet three conditions of 41A.100(1)(a)’s narrow requirements that would entitle him to relief from NRS 41A.071’s affidavit of merit requirement: (1) Peck has failed to allege that a foreign object was unintentionally left in his body; (2) he failed to allege that the object was left in his body following surgery; and (3) when challenged, he failed to present facts and evidence to show that his action actually meets the narrow res ipsa requirements. Therefore, Peck’s *res ipsa* claim fails, and his complaint is void *ab initio* as a result of his failure to attach the requisite affidavit of merit. *Washoe Medical Center v. Second Judicial District Court*, 122 Nev. Adv. Rep. 110, 148 P.3d 790, 793-94 (2006).

A. Retention Of A Needle Guide Is Not Unintentional

In *Scott v. Rayhrer*, 185 Cal.App.4th 1535 (2010), the plaintiff underwent surgery and had postoperative complications requiring Penrose drains in the wound. *Id.* at 1539. Months later, a fistulogram showed a drain or a portion of a drain had remained inside the plaintiff. *Id.* The court noted the similarity of this to the instance of a retained sponge, but made the distinction that it was not *inadvertently* left in the body. *Id.* at 1547 (emphasis added). The court found that the drain was intentionally inserted and meant to be retained temporarily, and determined that expert testimony was required to prove the physician who inserted the drains was negligent. *Id.* at 1548. Similar to the case in *Scott*, Nevada's modified *res ipsa* framework is inapplicable to the instant matter because the needle guide that was allegedly inserted and retained in Mr. Peck's arm would have been intentionally retained.² Therefore, the facts of this case do not meet the narrow NRS 41A.100(1)(a) exception, and expert testimony is required to prove negligence.

² Intravenous (IV) cannulation is a technique in which a cannula is placed inside a vein to provide venous access. Venous access allows sampling of blood as well as administration of fluids, medications, parenteral nutrition, chemotherapy, and blood products. Venous valves encourage unidirectional flow of blood and prevent pooling of blood in the dependent portions of the extremities; they also can impede the passage of a catheter through and into a vein. <http://emedicine.medscape.com/article/1998177-overview> (last visited August 30, 2016).

B. Mr. Peck Did Not Undergo Surgery At Any Time During The Course Of His Subject Care And Treatment

Surgery is not defined by NRS 41A.100. Therefore, in determining the meaning of a statute, the legislative intent is the focus of the inquiry. *State v. Lucero*, 127 Nev. 92, 249 P.3d 1226, 1228 (2011). The starting point is the statute's plain meaning. *Id.* “[T]he court should ascribe plain meaning to its words, unless the plain meaning was clearly not intended.” *Contrevo v. Mercury Finance Co. of Nev.*, 123 Nev. 1496, 153 P.3d 652, 653 (2007). This Court also follows the statutory interpretation maxim “*expression unius est exclusion alterius*,” meaning, the expression of one thing is the exclusion of another. *State v. Javier C.*, 128 Nev. Adv. Op 50, 289 P.3d 1194, 1197 (2012).

Mr. Peck attempts to show ambiguity in the term “surgery” by pointing to sections within the Nevada Revised Statutes that define different types of surgery. This argument fails because there is no dispute that there are certainly different types of surgery, however, the term “surgery” still carries with it the weight of an operative procedure with more risks than, for example, a flu shot. Furthermore, each of the definitions that Mr. Peck provides as examples of surgery describes procedures that *must* be performed by a licensed physician (triple bypass surgery, LASIK vision surgery), and *not* by a nurse who would be more likely to start an IV line using a plastic needle guide. Even by his own examples, Mr. Peck’s factual allegations do not fall within the narrow scope of medical procedures that would

appropriately be defined as surgery. Indeed, Mr. Peck’s claim that there is ambiguity present as to whether his factual allegations satisfy the narrow requirements of NRS 41A.100(1)(a) only confirms the need for expert testimony in this case to educate the jury about the purpose and procedures that would have resulted in a plastic needle guide being left in his hand. Therefore, Mr. Peck’s claim was properly dismissed because for failure to comply with NRS 41A.071. *See Szydel*, 121 Nev. at 459–60, 117 P.3d at 204.

C. The Facts And Evidence Presented To The Trial Court Reflect That Nothing Was Left In Mr. Peck’s Hand

“[W]hen challenged by the defendant in a pretrial or trial motion, [plaintiff must] meet the prima facie requirements for a res ipsa loquitur case” by presenting **facts and evidence** to show that “his or her action actually meets the narrow res ipsa requirements.” *Szydel*, 121 Nev. at 460–61, 117 P.3d at 205 (emphasis added). The objective facts and evidence presented to the trial court show that nothing was retained in Mr. Peck’s hand following the subject care and treatment. Mr. Peck references an X-ray taken on March 8, 2014, as confirming the presence of a foreign object in his hand. However, the radiology report does not show evidence of anything in Mr. Peck’s hand. AA 0024. Furthermore, Mr. Peck did not attach any affidavits to his Complaint or Opposition, nor did he attach any medical records – progress notes, history and physicals, etc. – reflecting any health care provider’s acknowledgement that a plastic needle guide was left in his hand. Mr.

Peck’s only explanation or reasoning for this fatal flaw is that “needle guides are plastic and do not show up on an X-Ray,” and “unless specifically instructed, what appeared to be clear plastic would be easily missed.” AA 0029. Again, these claims actually cut against Mr. Peck’s arguments and only reaffirm that if there was a plastic needle guide left in Mr. Peck’s arm he would have to present expert testimony to a jury to explain or “instruct” as to how to properly interpret the radiology films, thereby also invoking the NRS 41A.071 expert affidavit requirement. *Szydel*, 121 Nev. at 460–61, 117 P.3d at 205. Indeed, because Mr. Peck has failed to present any facts and evidence to show that his action actually meets the narrow res ipsa requirements, and his failure to attach the NRS 41A.071 affidavit of merit to his complaint renders his claim void *ab initio*. *Washoe*, 122 Nev. Adv. Rep. 110, 148 P.3d at 793-94.

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CONCLUSION

NRS 41A.071 is not unconstitutional and does not violate Mr. Peck's right to reasonable access to the courts. Mr. Peck failed to provide an expert affidavit and failed to allege any facts that would satisfy an exception under NRS 41A.100. Accordingly, the District Court properly dismissed Mr. Peck's claims against Dr. Barnum, which this Court must uphold. For the foregoing reasons, Respondents respectfully request that this Court affirm the District Court's Dismissal Order Granting Judgment on the Pleadings.

Dated this 1st day of September, 2016.

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CERTIFICATE OF COMPLIANCE

1. I hereby 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 this brief has been prepared in a proportionally-spaced typeface using Microsoft Word in 14-point Times New Roman font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding parts of the brief exempted by NRAP 32(a)(7)(c), it does not exceed 30 pages.

3. Finally, 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)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

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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.

Dated this 1st day of September, 2016.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of the law firm of Alverson, Taylor, Mortensen & Sanders, and that on this 1st day of September, 2016, I served the above and foregoing **RESPONDENT MICHAEL D. BARNUM, M.D.'S AMENDED ANSWERING BRIEF** in accordance with NRAP 25 via the Court's electronic filing system, as well as by placing a true and correct copy of the same in a sealed envelope, with postage fully prepaid thereon, and sending in the U.S.

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