IN THE SUPREME COURT OF THE STATE OF NEVADA

RICHEY L. ANDREW,

Appellant(s),

v.

SHARON COSTER; NEVADA DEPARTMENT OF CORRECTIONS; AND THE STATE OF NEVADA,

Respondent(s).

Case No. 70836

District Court No. 16 TRT 0010 1B

On Appeal from an Order Granting Defendants' Motion to Dismiss

First Judicial District Court

RESPONDENTS' ANSWERING BRIEF

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE(S)**

STATUTES AND REGULATIONS

OTHER AUTHORITY

Respondents, Sharon Koster[1] and State of Nevada *ex rel.* Nevada Department of Corrections (NDOC Defendants), by and through counsel, Nevada Attorney General Adam Paul Laxalt, Chief Deputy Attorney General Clark G. Leslie, and Senior Deputy Attorney General D. Randall Gilmer, in conformity with NEV. R. APP. P. 28(b), and in response to Appellant Richey L. Andrew's (Andrew) Opening Brief, hereby provide their Answering Brief.

PREAMBLE

Andrew requests this Court exempt him from mandatory procedural requirements placed on all individuals seeking to bring a professional negligence/medical malpractice action in Nevada. In an effort to make his request more palatable to this Court, he frames his request as a constitutional requirement. Yet, there is no constitutional requirement that necessitates providing Andrew with special access and unprecedented ability to bring a medical malpractice action without providing the mandatory affidavit required by statute.

Accordingly, the District Court correctly dismissed this action.

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[1] Koster's name is misspelled by Appellant and in the caption of this case as "Coster."

JURISDICTIONAL STATEMENT

Under NEV. R. APP. P. 3A(b)(1) Andrew has the right to seek appellate review of the June 29, 2016[2] order of the District Court as it was a final decision in a civil case.[3] Under NEV. R. APP. P. 4(a)(1), Andrew timely filed his Notice of Appeal on July 14, 2016.[4]

ROUTING STATEMENT

This case involves a "principal issue . . . of statewide public importance" under NEV. R. APP. P. 17(a)(14). In addition, as of February 17, 2016, the fully briefed case of *Peck v. Valley Hospital et al.*,[5] was pending screening before this Court. Because *Peck* involves the same constitutional challenge to NRS 41A.071, Defendants respectfully request that the instant be clustered with *Peck* under Rule 2(c)(2) of this Court's Internal Operating Procedures. Clustering is warranted to ensure the cases are resolved in a consistent matter and to avoid the possibility of inconsistent published decisions.[6]

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[2] If a cited document has a different date between when it is signed and when it was stamped by the Clerk of the Court, the date stamp will be used unless otherwise noted.

[3] Record on Appeal (ROA) 81–83.

[4] ROA 84–85.

[5] Case No. 68664, District Court No. A–14–708447–C.

[6] *See* NEV. R. APP. P. 17(a)(14).

Andrew asserts that Court should retain jurisdiction under NEV. R. APP. P. 17(a)(13) as the case implicates an issue of "first impression involving the United States or Nevada Constitution." However, this Court did decide this precise issue in the unpublished 2010 case of *Morrow v. Skolnik*.[7] Thus, while it is true this Court has not provided any published authority on this issue, this Court has previously held that § 41A.071 applies to incarcerated individuals.

STATEMENT OF THE ISSUES PRESENTED

1. Did the District Court correctly rule that neither the United States nor Nevada Constitution requires indigent and incarcerated individuals be exempted from the mandatory statutory requirements NRS 41A.071?

2. Did the District Court correctly dismiss this case based on Andrew's inability to state a medical malpractice under the common law doctrine of res ipsa loquitur as codified at NRS 41A.100?

3. Did the District Court correctly dismiss this case in its entirety based on Andrew's failure to properly assert an Eighth Amendment deliberate indifference claim pursuant to 42 U.S.C. § 1983?

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[7] 126 Nev. 741, 367 P.3d 802 (2010).

STATEMENT OF THE CASE

I. Procedural History

Andrew initiated his medical malpractice lawsuit against the NDOC Defendants on March 9, 2016.[8] In lieu of filing an answer, the NDOC Defendants filed a timely Motion to Dismiss on May 20, 2016.[9] Andrew filed his opposition to the Motion to Dismiss on June 6, 2016.[10] The NDOC Defendants filed their reply on June 9, 2016.[11]

On June 29, 2016, the District Court granted the NDOC Defendants' Motion to Dismiss.[12] The case was dismissed due to Andrew's failure to provide the mandatory affidavit of merit required in all medical malpractice actions brought under NRS 41A.071.[13]

Andrew filed his timely Notice of Appeal on July 14, 2016.[14]

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[8] ROA 13–21.
[9] ROA 36–57.
[10] ROA 58–66.
[11] ROA 67–70.
[12] ROA 74–77.
[13] *Id.*
[14] ROA 84–85.

On September 28, 2016, this Court sought pro bono counsel for Andrew.[15] On November 17, 2016, Andrew's counsel filed his Notice of Appearance with this Court.[16]

Andrew filed his timely Opening Brief on March 13, 2017.[17]

The NDOC Defendants now bring their timely Answering Brief.

II. Statement of Relevant and Undisputed Facts[18]

A. The Alleged Malpractice and Complaint

On January 26, 2016, Dr. Cunningham, performed a standard prostate cancer procedure on Andrew.[19] At the conclusion of the surgery, a catheter was inserted in Andrew's penis.[20] Dr. Cunningham—whom Andrew did not sue—ordered the catheter to remain in place for approximately two (2) weeks, at which point NDOC was to return Andrew to Dr. Cunningham to have it removed.[21]

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[15] *See Order Regarding Pro Bono Counsel*, Docket 70836, Doc. 16–30262, issued Sept. 28, 2016.

[16] Notice of Appearance, Docket 70836, Doc. 16–35980, filed November 17, 2016.

[17] Opening Br., Doc. 17–08406, filed March 13, 2017.

[18] These facts are taken from Andrew's Complaint. Therefore, as below, for purposes of this appeal, the NDOC Defendants assume them to be true as required under Rule 12(b).

[19] ROA 15, 47 (¶ 6).

[20] ROA 15, 47 (¶ 7).

[21] *Id.*

Andrew asserts that instead of returning him to Dr. Cunningham, Koster 'removed the catheter, improperly [and] prematurely" on February 9, 2015.[22] As a result of this improper removal, Andrew claims he had to undergo additional medical procedures in an effort to correct damage to his penis.[23]

Based on these allegations, on March 9, 2016, Andrew filed a complaint entitled "Civil Action Medical Malpractice Negligence" (Malpractice Complaint).[24] Andrew asserted, among other things, that Koster acted "without proper training, without using accepted standards, [and] without using due diligence."[25] Andrew also alleged Koster's negligent and intentional actions "amount[ed] to "medical malpractice and/or deliberate indifference."[26]

Andrew was aware Nevada requires medical malpractice complaints to be accompanied by an affidavit of merit from a medical expert.[27] Specifically, § 41.071 of the Nevada Revised Statutes provides:

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[22] ROA 15, 47 (¶ 8).
[23] ROA 15–16; 47–48 ¶¶ 8–10.
[24] ROA 13, 45.
[25] ROA 16; 48 ¶ 11.
[26] ROA 17; 49 ¶ 49.
[27] ROA 56 ¶¶ 4–5.

> If an action for professional negligence is filed in the district court, the district court shall dismiss the action, without prejudice, if the action is filed without an affidavit that:
>
> 1. Supports the allegations contained in the action;
> 2. Is 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 professional negligence;
> 3. Identifies by name, or describes by conduct, each provider of health care who is alleged to be negligent; and
> 4. Sets forth factually a specific act or acts of alleged negligence separately as to each defendant in simple, concise and direct terms.[28]

Based on his awareness of this requirement, Andrew averred that he attempted to comply, but was not able to do so because of his financial and incarcerated status.[29]

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[28] NRS 41A.071. The NDOC Defendants (ROA 39) and the District Court (ROA 74) inadvertently referenced the previous version of the statute. However the version referenced herein is the version that has been in effect since June 9, 2015. Regardless, both versions of the statute required an affidavit of merit to be filed.

The amended language was apparently in reaction to *Egan v. Chambers*, 129 Nev. ___, 299 P.3d 364, 366–67 (Adv. Op. 25, April 25, 2013), where this Court concluded the previous language of NRS 41A.071 only required an affidavit of merit in "medical malpractice" but not "professional negligence" cases. *See also Zhang v. Barnes*, No. 67219, 2016 WL 4926325, at * 4–5 n. 2 (Nev. Sept. 12, 2016) (citing 2-15 Nev. Stat., ch. 439, §§ 6, 12, at 2527, 2529) (discussing *Egan* and noting the 2015 amendment to NRS 41A.071 "to substitute "professional negligence" for "medical malpractice").

While Andrew used the term "deliberate indifference" in the Malpractice Complaint, the title, the allegations, and Andrew's affidavit make clear this action is a state medical malpractice claim, not a civil rights complaint under 42 U.S.C. § 1983. Indeed, the Malpractice Complaint does not reference any particular amendment, § 1983, or any other civil rights language that would have placed the NDOC Defendants on notice of alleged constitutional violations.[30]

B. The Malpractice Complaint Dismissal

In lieu of filing an answer, the NDOC Defendants moved for dismissal of the Malpractice Complaint due to Andrew's failure to comply with the mandatory affidavit of merit requirement set forth in NRS 41A.071. The motion noted this Court's consistent and repeated holding that if a complaint does not comply with NRS 41A.071 it is void *ab initio*, does not legally exist,[31] and must be dismissed.[32]

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[29] ROA 56–57 (¶¶ 3–5, 7).

[30] ROA 13–20.

[31] ROA 39 (citing *Wheble v. Eighth Judicial Dist. Court*, 128 Nev. ___, 272 P.3d 134, 137 (Adv. Op. 11, Mar. 1, 2012) (citing *Washoe Washoe Med. Ctr. v. Second Jud. Dist. Ct. of State of Nev.*, 122 Nev. 1298, 1304, 148 P.3d 790, 794 (2006)).

[32] *Washoe Med. Ctr.*, 122 Nev. at 1300–01; *Otak Nev., LLC v. Eighth Jud. Dist. Ct.*, 127 Nev. 593, 599, 260 P.3d 408, 412 (2011).

The NDOC Defendants also noted that this Court, in the unpublished *Morrow* decision concluded the affidavit requirement contained in NRS 41A.071 applied even in situations where the plaintiff is an incarcerated individual.[33]

Andrew claimed in opposition that requiring him to comply with the affidavit requirement precludes him from accessing the courts and therefore denies him the opportunity "to bring fourth medical negligent claims."[34] Andrew's opposition did not assert any claim based on res ipsa loquitur as codified under NRS 41A.100 nor did it address any potential § 1983 civil rights claim.[35] In reply, the NDOC Defendants noted Andrew's inability to provide the District Court with any authority for his assertion that NRS 41A.071 was unconstitutional.[36]

On June 29, 2016, the District Court dismissed Andrew's Malpractice Complaint in its entirety.[37] The District Court concluded Andrew's failure to comply with the plain, unambiguous, mandatory

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[33] ROA 41 (citing *Morrow*, 126 Nev. 741). Andrew provided a copy of the *Morrow* to the District Court. *See* ROA 66.

[34] ROA 62 (citing *Lewis v. Casey*, 518 U.S. 343 (1996)).

[35] ROA 58–63.

[36] ROA 67–69.

[37] ROA 74–76.

affidavit requirement contained in NRS 41A.071 resulted in the Malpractice Complaint being void *ab initio*, requiring dismissal.[38]

STANDARDS OF REVIEW

I. Motion to Dismiss Standard of Review

This Court reviews motions to dismiss de novo.[39] Dismissal orders will be affirmed whenever "'it appears beyond a doubt that the plaintiff could prove no set of facts . . . [that] would entitle him to relief.'"[40]

II. Statutory Construction Standard of Review

Issues of statutory construction and interpretation are questions of law, subject to de novo review.[41] Unambiguous statutes require this Court to apply the words as written without looking "beyond the

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[38] ROA 76.

[39] *Zohar v. Zbiegien*, 130 Nev. ___, 334 P.3d 402, 404–05 (Adv. Op. 74, Sept. 18, 2014) (citing *Munda v. Summerlin Life & Health Ins. Co.*, 127 Nev. 918, 923, 267 P.3d 771, 774 (2011)).

[40] *Zohar*, 334 P.3d at 405 (citing *Munda*, 127 Nev. at 923 (quoting *Vacation Vill., Inc. v. Hitachi Am., Ltd.*, 110 Nev. 481, 484, 874 P.2d 744, 746 (1994))).

[41] *Washoe Med. Ctr.* 122 Nev. at 1302; *Pub. Agency Comp. Trust v. Blake*, 127 Nev. 863, 866, 265 P.3d 694, 696 (2011).

statute's plain language."[42] Legislative history should only be used for guidance in situations where the statute is ambiguous.[43] If required to look beyond the words of the statute, this Court "must resolve [ambiguities] by looking to the statute's legislative history" in order to "'construe[] the statute in a manner that conforms to reason and public policy.'"[44]

III. Constitutionality of Statute Standard of Review

While this Court also reviews constitutional challenges to statutes de novo,[45] statutes are presumed constitutional.[46] Andrew, as the challenger of the statute's constitutionality, bears the burden of establishing its unconstitutionality.[47] This Court has a duty to provide

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[42] *Washoe Med. Ctr.*, 122 Nev. at 1302 (citing *Beazer Homes Nev., Inc. v. Eighth Jud. Dist. Ct.*, 120 Nev. 575, 579–80, 97 P.3d 1132, 1134 (2004)); *Wheble* 272 P.3d at 136.

[43] *Washoe Med. Ctr.*, 122 Nev. at 1302 (citing *Potter v. Potter*, 121 Nev. 613, 616, 119 P.3d 1246, 1248 (2005)).

[44] *Zohar*, 334 P.3d at 405 (quoting *Great Basin Water Network v. Taylor*, 126 Nev. 187, 196, 234 P.3d 912, 918 (2010)).

[45] *Awada v. Shuffle Master, Inc.*, 123 Nev. 613, 618, 173 P.3d 707, 711 (2007).

[46] *Nevadans for Nev. v. Beers*, 122 Nev. 930, 939, 142 P.3d 339, 345 (2006); *see also Tam v. Eighth Jud. Dist. Ct.*, 131 Nev. ___, 358 P.3d 234, 237–38 (2015) (Adv. Op. 80, Oct. 1, 2015).

[47] *Shapiro v. Welt*, 133 Nev. ___, 389 P.3d 262, 267 (Adv. Op. 6, Feb. 2, 2017) (quoting *Silvar v. Eighth Jud. Dist. Ct.*, 122 Nev. 289, 292, 129 P.3d 682, 684 (2006)).

"every reasonable construction" possible "in order to save a statute from unconstitutionality."[48] Thus, when "a statute is susceptible to both a constitutional and unconstitutional interpretation, this [C]ourt is obliged to construe the statute so that it does not violate the constitution."[49]

SUMMARY OF ARGUMENT

Nevada has a legitimate governmental interest to reduce health care costs so patients have access to affordable health care. Consistent with this legitimate governmental interest, Nevada promulgated NRS 41A.071 in an effort to reduce frivolously filed medical malpractice actions. As of 2012, at least twenty four (24) other states have similar affidavit requirements.[50]

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[48] *Shapiro*, 389 P.3d at 267 (quoting *State v. Castaneda*, 126 Nev. 478, 481, 248 P.3d 550, 552 (2010)).

[49] *Scenic Nev., Inc. v. City of Reno*, 132 Nev. ___, 373 P.3d 873, 876 (Adv. Op. 48, Sept. 16, 2016) (quoting *Whitehead v. Nev. Comm'n on Judicial Discipline*, 110 Nev. 874, 883, 878 P.2d 913, 919 (1994)).

[50] *See Jones v. Corr. Med. Servs., Inc.*, 845 F. Supp.2d 824, 853–54 (W.D. Mich. 2012) (citing Benjamin Grossberg, *Comment: Uniformity, Federalism and Tort Reform: The Erie Implications of Medical Malpractice Certificate of Merit Statutes*, 159 U. PA. L. REV. 217, 222–25 (2010) (surveying 25 states requiring some sort of affidavit of merit for medical malpractice actions)).

Exempting indigent or incarcerated individuals from this requirement would go against the plain language and intent of this legitimate governmental purpose. Nothing in either the Nevada or United States Constitution requires such an exemption.

In addition, Andrew's malpractice allegations do not fall under res ipsa loquitur as codified by NRS 41A.100. Those exceptions apply to only four, narrowly tailored situations. Andrew's allegations of malpractice do not implicate any of those four exceptions.

Finally, to the extent Andrew argues on appeal that his case should have proceeded as a civil rights case under the Eighth Amendment, the Malpractice Complaint makes clear Andrew neither brought nor intended to bring a federal civil rights lawsuit. The allegations sound in malpractice, and he attempted to be exempted from the affidavit requirement that applies to state malpractice claims. Medical malpractice claims do not become constitutional violations simply because the person alleging medical malpractice is incarcerated.

Accordingly, the District Court appropriately dismissed Andrew's Malpractice Complaint in its entirety.

ARGUMENT

I. NRS 41A.071 is Constitutional As Applied to Andrew

Andrew first argues the District Court erred by not providing him with an exemption to the affidavit of merit requirement. Specifically, Andrew asserts that because he is incarcerated, requiring him to comply with a general procedure statute like all other individuals bringing a medical malpractice action, violates his equal protection rights[51] under both the Fourteenth Amendment of the United States Constitution and the Nevada Constitution.[52]

The District Court correctly disagreed with Andrew's constitutional argument.

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[51] Andrew made a passing reference to his due process rights being violated. *See* Opening Br., pp. 5–6, 12. However, this reference to due process is never repeated, is not contained in the Table of Contents or Statement of the Issues, and Andrew has not provided any argument as to how NRS 41A.071 violated his due process rights. As such, the NDOC Defendants have addressed the constitutionality of § 41.071 generally and whether it violates Andrew's equal protection rights specifically, as opposed to whether Andrew's due process rights have been violated. Should this Court wish to have the due process issue briefed, despite Andrew's failure to include it in his Statement of the Issues or Argument, the NDOC Defendants respectfully request an opportunity to provide supplemental briefing.

[52] Opening Br., pp. 5–15; *see also* NEV. CONST. art 1, § 8.

This Court has made clear that "[t]he right of malpractice plaintiffs to sue for damages caused by medical professionals does not involve a fundamental constitutional right."[53] Because this is not a fundamental right, NRS 41A.071 is constitutional so long as it is "rationally related to a legitimate governmental purpose."[54] This Court concluded over a decade ago that "the underlying purpose of [§ 41A.071] is to ensure that such actions be brought in good faith based upon competent expert opinion."[55] In addition, this Court concluded that § 41A.071 is rationally related to the legitimate government purpose of attempting to "lower costs [and to] reduce frivolous lawsuits."[56]

Governor Guinn, in calling the special legislative session that resulted in the codification of § 41A.071, also confirmed the purpose of the affidavit of merit was to "balance[] the needs of injured parties, patients who seek the best medical care available and the doctors who

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[53] *Tam*, 358 P.3d at 239 (quoting *Barrett v. Baird*, 111 Nev. 1496, 1507, 908 P.2d 689, 697 (1995), *overruled on other grounds*, *Lioce v. Cohen*, 124 Nev. 1, 174 P.3d 970 (2008))).

[54] *Tam*, 358 P.3d at 239 (citing *Flamingo Paradise Gaming, LLC v. Chanos*, 125 Nev. 502, 520, 217 P.3d 546, 559 (2009)).

[55] *Borger v. Eighth Jud. Dist. Ct.*, 120 Nev. 1021, 1029, 102 P.3d 600, 606 (2004).

[56] *Szydel v. Markman*, 121 Nev. 453, 459, 117 P.3d 200, 204 (2005) (citing *Borger*, 120 Nev. at 1029); *see also Zohar*, 334 P.3d at 405 (quoting *Washoe Med. Ctr.*, 122 Nev. at 1304).

must purchase and carry insurance to protect themselves and their patients."[57]

A. There is No Equal Protection Violation[58]

"Article 4, § 21 of the Nevada Constitution requires that all laws be 'general and of uniform operation throughout the State."[59] Nevada interprets the equal protection clause of its constitution to be consistent with the equal protection clause contained in the United States Constitution.[60] "A statute that treats similarly situated people differently implicates equal protection."[61] However, different classifications are permissible in situations where a suspect class or

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[57] *Zohar*, 334 P.3d at 405 (quoting Hearing on S.B. 2 Before the Senate Comm. of the Whole, 18th Special Sess. (Nev., July 29, 2002) (statement of Governor Guinn)).

[58] To the extent Andrew has attempted to raise a due process challenge, *see supra* at n. 51, just as with equal protection challenges, to withstand a due process challenge, the statute need only be rationally related to a legitimate government purpose. *Tam*, 358 P.3d at 239.

[59] *In re Candelaria*, 126 Nev. 408, 416, 245 P.3d 518, 523 (2010) (quoting *Barrett*, 111 Nev. at 1509).

[60] *In re Candelaria*, 126 Nev. at 416 (quoting *Barrett*, 111 Nev. at 1509).

[61] *In re Candelaria*, 126 Nev. at 417 (citing *Rico v. Rodriguez*, 121 Nev. 695, 703, 120 P.3d 812, 817 (2005).

fundamental right is not involved, so long as the different classifications are reasonable.[62]

As noted above, the right for a plaintiff to bring a malpractice action is not a fundamental right.[63] Likewise, both this Court and the Court of Appeals have held, albeit in unpublished cases, consistent with Ninth Circuit precedent, that prisoners are not a suspect class.[64]

In 2006, this Court held that the filing of a malpractice action without the mandatory affidavit of merit requires dismissal.[65] This clear and unambiguous conclusion has been reiterated in numerous published cases since 2006.[66] These holdings are not a surprise given

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[62] *In re Candelaria*, 126 Nev. at 417 (citing *Flamingo Paradise Gaming*, 125 Nev. at 520).

[63] *Tam*, 358 P.3d at 239.

[64] *See*, *e.g.*, *Owens v. Cox*, No. 70805, 2017 WL 1215991, * 1 (Nev. Ct. App., Mar. 23, 2017); *Bayot v. Baca*, No. 71366, 2017 WL 1214965, * 1 (Nev. Ct. App., Mar. 23, 2017); *Kilie v. Cox*, No. 64480, 2014 WL 4670217, * 1 (Nev., Sept. 18, 2014); *Ngaue v. State*, No. 62967, 2013 WL 5376039, * 1 (Nev., Sept. 19, 2013); and *Ngaue v. Neven*, 128 Nev. 922, 381 P.3d 646 (2012) (all citing *Glauner v. Miller*, 184 F.3d 1053, 1054 (9th Cir. 1999).

[65] *Washoe Med. Ctr.*, 122 Nev. at 1306.

[66] *See*, *e.g.*, *Humboldt Gen. Hosp. v. Sixth Jud. Dist. Ct.*, 132 Nev. ___, 376 P.3d 167, 170 (Adv. Op. 53, July 28, 2016); *Baxter v. Dignity Health*, 131 Nev. ___, 357 P.3d 927, 929–30 (Adv. Op. 76, Sept. 24, 2015); *Pack v. LaTourette*, 128 Nev. ___, 277 P.3d 1246, 1250 (Adv. Op. 25, May 31, 2012); *MountainView Hosp. v. Eighth Jud. Dist. Ct.*, 128 Nev. ___, 273 P.3d 861, 866 (Adv. Op. 17, April 5, 2012); *Wheble*, 272

the use of the term "shall" in NRS 41A.071, as "shall" denotes mandatory language not susceptible to judicial discretion.[67]

Thus, based on the plain language of NRS 41A.071, as well as the conclusive and consistent rulings of this Court, the following is beyond debate:

- The right to bring a malpractice claim is not a fundamental constitutional right;
- The Nevada Constitution requires all statutes to have general and uniform application;
- NRS 41A.071 requires dismissal whenever an affidavit of merit has not been filed with the complaint;
- NRS 41A.071, as written, applies to all plaintiffs who wish to bring a malpractice claim; and
- Prisoners are not a suspect class.

Based on these indisputable legal principles, it is easy to extrapolate that applying NRS 41A.071 to Andrew is constitutional. In

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P.3d at 136; *Otak*, 127 Nev. at 599; *Fierle v. Perez*, 125 Nev. 728, 733, 219 P.3d 906, 910 (2009), *overruled on other grounds; Egan*, 299 P.3d 364.

[67] *Otak*, 127 Nev. at 598 (citing *Washoe Med. Ctr.*, 122 Nev. at 1303).

fact, exempting him from its mandatory requirements may be unconstitutional, as it would give Andrew and other prisoners special treatment with regard to bringing a medical malpractice claim. Such special treatment would run afoul of the constitutional requirement that "all laws be 'general and of uniform operation throughout the State.'"[68]

B. This Court Has Previously Held NRS 41A.071 Applies to Inmates Such as Andrew

Consistent with the indisputable legal principles noted above, this Court, in the unpublished opinion of *Morrow*, held that inmates must comply with NRS 41A.071. There, this Court unambiguously stated that the "appellant's status as an inmate or indigent person does not excuse his failure to attach the requisite affidavit to his complaint."[69]

In reaching that conclusion, this Court not only applied the plain language of § 41A.071, but also ruled consistently with the states of Texas, Florida, and Ohio.[70]

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[68] *In re Candelaria*, 126 Nev. at 416; *see also* NEV. CONST. art 4, § 21.

[69] *Morrow*, 2010 WL 5097872 at * 1; *see also* ROA 66.

[70] *Id.*

In *Perry v. Stanley*[71] and *Gill v. Russo*,[72] two different divisions of the Texas Court of Appeals concluded indigent inmate's constitutional rights are not violated by when they are required to obtain an expert report even when if "cannot afford to employ an expert."[73] The Texas Court of Appeals noted that is constitutional "[b]ecause a plaintiff raising a claim of medical negligence is required to prove his or her claim by competent expert testimony to avoid summary judgment and/or prevail at trial."[74] Thus, the requirement that the expert report be provided early in the process was "a reasonable restriction directly related to the statute's purpose of discouraging frivolous lawsuits."[75]

Morrow also relied on *O'Hanrahan v. Moore*[76] which was decided by a Florida District Court of Appeals.[77] There, an inmate challenged the constitutionality of the "presuit requirements for initiating a medical malpractice action," which, similar to Texas, including an expert report requirement, not simply an affidavit of merit as required

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[71] 83 S.W.3d 819 (Tex. App. 2002).
[72] 39 S.W.3d 717, 718–19 (Tex. App. 2001).
[73] 83 S.W.3d at 824–825.
[74] *Id.* at 825.
[75] *Id.*
[76] 731 So.2d 95 (Fl. Dist. Ct. App. 1999).
[77] *Id.*

in Nevada.[78] The Florida Court of Appeals declined to find the statute "unconstitutional as applied to an incarcerated, pro se claimant."[79]

Finally, *Morrow* cited the Ohio Court of Appeals case of *Ledger v. Ohio Dep't of Rehab. & Correction*,[80] where the court concluded an inmate was required to comply with the mandatory pleading requirement that a malpractice "claim [be] supported by" an affidavit of either the attorney or the plaintiff establishing that they "consulted with and reviewed the facts of the matter involved with a physician . . . who the affiant reasonably believes is knowledgeable regarding the issues involved in the particular claim."[81]

Of particular import in this case, Andrew asserted below that he should be excused from the affidavit of merit requirement because he can establish the malpractice at trial through the testimony of the treating physician, Dr. Cunningham.[82] The inmate in *Ledger* made the same argument – only to have it rightfully rejected:

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[78] 731 So.2d 95 at 96–97.
[79] *Id*. at 96.
[80] 80 Ohio App.3d 435, 609 N.E.2d 590 (Ohio Ct. App. 1992).
[81] *Id*. at 440, 609 N.E.2d at 593–94.
[82] ROA 61.

> On the one hand, appellant argue that he will not need any medical testimony to establish his claim, and yet, on the other hand, appellant indicates that he will required the testimony [the treating physician] to establish that the medical staff . . . was negligent and that they committed malpractice. Obviously, appellant is unable to establish his claim without expert testimony and, therefore, appellant must file an affidavit which meets the strict [statutory] requirements . . . in order for the Court of Claims to have jurisdiction over his case.[83]

Similarly, Nevada, save for the statutory exceptions set forth (and discussed *infra*) in NRS 41A.100, Nevada generally requires a plaintiff to prove medical malpractice by expert testimony.[84] Nothing in NRS 41A.071 changes this general rule. It simply accelerates a medical malpractice plaintiff's requirement to confer with the required experts.

In this regard, the Michigan Court of Appeals, in addressing Michigan's similar expert affidavit requirement stated:

> Deterring the filing of frivolous lawsuits against any party or group is a legitimate governmental interest. Moreover, a plaintiff intending to prevail on a medical malpractice claim will eventually be required to provide evidence that a

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[83] *Ledger*, 80 Ohio App. at 440; 609 N.E.2d at 593–94.

[84] *Jain v. McFarland*, 109 Nev. 465, 474, 851 P.2d 450, 456 (1993) (citing NRS 41A.100(1), *Beattie v. Thomas*, 99 Nev. 579, 584, 668 P.2d 268, 271 (1983), and *Stevens v. Duxbury*, 97 Nev. 517, 519, 634 P.2d 1212, 1214 (1981)).

> facility or professional deviated from professional norms. **Thus, requiring an affidavit of merit is rationally related to achieving the result of reduced frivolous medical malpractice claims**. Accordingly, we are not persuaded that § 2912d violates a medical malpractice plaintiff's equal protection rights.[85]

The same is true here.[86]

Andrew asserts this Court should not follow *Morrow* because it is unpublished, did not specifically address constitutional arguments, relied on law from other states, did not discuss *Barnes v. Eighth Jud. Dist. Ct.*,[87] and was decided before *Zohar v. Zbiegien*.[88] None of these reasons are persuasive.

As discussed above, the Texas, Florida, and Ohio courts discussed similar, and indeed more stringent presuit requirements. Yet, they all concluded that indigent, incarcerated individuals were not exempt from those requirements.

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[85] *Bartlett v. N. Ottawa Cmty. Hosp.*, 244 Mich. App. 685, 625 N.W.2d 470, 475–76 (2001) (emphasis added).

[86] *See Baxter*, 357 P.3d at 930 (NRS 41A.071 establishes public policy of requiring a plaintiff to "first review[] and validat[e] the [malpractice] claims" at the time of the filing of the lawsuit).

[87] 103 Nev. 679, 748 P.2d 483 (1987).

[88] 130 Nev. ___, 334 P.3d 402 (Adv. Op. 74, Sept. 18, 2014).

Andrew's reliance on *Barnes* is wholly misplaced. There, this Court held it was unconstitutional to treat indigent litigants differently than litigants represented by counsel.[89] Based on that difference, *Barnes* concluded indigent litigants equal protection rights were violated as the statute was not "general and of uniform operation" as the statute did not apply to individuals represented by counsel.[90] *Barnes* also determined the statute was not "rationally related to a legitimate state interest" because while it was designed:

> [T]o spare the state of the expense of financing frivolous lawsuits filed by indigent persons . . . the statute may also . . . screen out meritorious actions that would otherwise be filed by persons who cannot afford, or are otherwise precluded from obtaining, the required certificate of an attorney. . . . Because [the statute] may operate to preclude the filing of meritorious actions by indigent persons, we conclude that the classification scheme created by the statute is arbitrary and irrational. The statute is too broad in its sweep.[91]

Unlike *Barnes*, which only applied to indigent plaintiffs, NRS 41A.071 applies to all plaintiffs, regardless of whether they are indigent or rich, pro se or represented, incarcerated or free. In other words, as

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[89] 103 Nev. at 682.
[90] *Id*. at 682–684 n. 2.
[91] 103 Nev. at 684.

succinctly stated in *Washoe Med. Ctr. v. Second Jud. Dist. Ct.*, "although 'the [medical malpractice] statute may have harsh results in some cases, it cuts with a sharp but clean edge.'"[92]

In addition, while *Barnes* concluded the attorney affidavit requirement was not rationally related to a legitimate government interest,[93] this Court has repeatedly concluded NRS 41A.071 is rationally related to a legitimate governmental interest, e.g., reduction of health care costs.[94]

Further, to the extent Andrew attempts to undermine *Morrow* by referencing *Zohar*, Andrew's arguments are again unavailing.

Zohar held the affidavit of merit provided by the plaintiff was sufficient to withstand dismissal because "it was attached to a medical malpractice complaint," and with the exception of not identifying the defendants by name, "complie[d] with the requirements of NRS 41A.071."[95] Because the affidavit substantially complied with

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[92] 122 Nev. at 1305 (citing *Lindberg v. Health Partners*, 599 N.W.2d 572, 578 (Minn. 1999)).

[93] 103 Nev. at 684.

[94] *Tam*, 358 P.3d at 239; *Szydel*, 121 Nev. at 459, 117 P.3d 200, 204 (2005) (citing *Borger*, 120 Nev. at 1029); *Zohar*, 334 P.3d at 405 (quoting *Washoe Med. Ctr.*, 122 Nev. at 1304).

[95] 334 P.3d at 403.

§41A.071, when reading § 41A.071 in conformity with "the notice-pleading standards for complaints," this Court concluded district courts "should read a medical malpractice complaint and affidavit together when determining whether the affidavit meets the requirements of NRS 41A.071."[96]

It is difficult to discern how *Zohar*, where the plaintiff undisputedly attached a substantially compliant affidavit of merit to the complaint, has any relevance to the situation presented in the instant case, where Andrew seeks to be exempted from a standard, mandatory, and well-accepted practice throughout the United States.[97]

Accordingly, while the NDOC Defendants concede this Court is not bound by *Morrow*, Andrew has failed to provide either binding or persuasive reasons as to why *Morrow* should not be followed. Conversely, the NDOC Defendants note that *Morrow* correctly acknowledged the plain language of § 41A.071, the public policy of this state, and the lack of any constitutional infirmity with requiring inmates to comply with this general medical malpractice requirement.

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[96] 334 P.3d at 403.

[97] *See Washoe Med. Ctr.*, 122 Nev. at 1305 n. 28 (noting similar affidavit of merit requirements exist in Georgia, Michigan, Minnesota, North Carolina and Texas); *see also Jones*, 845 F. Supp.2d at 853–54.

C. This Court's Previous Holding Complies with the Majority of Other States Constitutional Findings with Regard to Similar Affidavit of Merit Requirements

The *Morrow* decision is not only consistent with the decisions in Texas, Florida and Ohio, but also numerous other decisions of from various state and federal courts throughout the United States. To illustrate this point, the NDOC Defendants will briefly discuss cases applying New Jersey, Delaware, and Georgia affidavit of merit requirements to inmates.

1. New Jersey

In *Horne v. United States*,[98] the United States Court of Appeals for the Third Circuit held determination that a prisoner is required to comply with state affidavit of merit requirements should the prisoner wish to bring a medical malpractice claim against the United States under the Federal Tort Claims Act. Specifically, the Third Circuit agreed with the United States District Court for the District of New Jersey's conclusion that because the inmate "complained of the medical care he received" he was required to submit an affidavit of merit in . . .

[98] 223 Fed. App'x 154, 156 (3d Cir. 2007).

conformity with New Jersey's statutory requirements.[99] Because the inmate plaintiff "failed to provide the requisite affidavit of merit . . . summary judgment was properly entered in favor of the United States."[100]

Similarly, here, Andrew failed to comply with the mandatory requirement of NRS 41A.071. This failure requires dismissal.[101]

2. Delaware

In *Steedley v. Surdo–Galef*,[102] the Delaware Supreme Court held it was constitutional to require inmates to comply with Delaware's affidavit of merit requirements. There, the inmate plaintiff appealed the trial court's dismissal of his malpractice action based on his failure to file an affidavit of merit.[103]

In rejecting the inmate's as applied constitutional challenge, the Delaware Supreme Court stated:

> Section 6853 of Title 18 of the Delaware Code unequivocally requires that "[n]o healthcare negligence lawsuit shall be filed in this State unless the complaint is accompanied by . . . [a]n

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[99] 223 Fed. App'x 154, 156 (3d Cir. 2007).
[100] *Id.* (citing N.J. STAT. ANN. 2A:53A–29).
[101] *Washoe Med. Ctr.*, 122 Nev. at 1300–01.
[102] No. 499, 2012, 2013 WL 1228019 (Del., March 26, 2013).
[103] *Id.* at * 1.

> affidavit of merit as to each defendant signed by an expert witness . . . stating that there are reasonable grounds to believe that there has been healthcare medical negligence committed by each defendant. . . .
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> It is undisputed that [the inmate] failed to file an affidavit of merit as to either defendant. Moreover, his allegations of medical negligence did not fall within one of the exceptions to the affidavit requirement. . . .His contention that the affidavit of merit is not necessary when a plaintiff requests review of the complaint . . . by a medical malpractice review panel has no basis in law and is contradicted by the clear terms of 18 DEL. C. § 6853. **Furthermore, we find no merit to [the inmate's] contention that the affidavit requirement is unconstitutional as applied to him, an indigent prisoner, because it restricts his access to the court systems. While [the inmate's] incarceration may make obtaining the affidavit of merit more challenging, he is not prevented from doing so and is not in a unique position vis-à-vis other indigent plaintiffs simply because of his incarceration**.[104]

Likewise, here, while complying with NRS 41A.071 may be challenging for Andrew and other indigent or incarcerated individuals, that challenge does not create a constitutional barrier requiring this . . .

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[104] *Steedley*, 2013 WL 1228019 at * 1, ¶¶ 3–4 (emphasis added).

court to provide inmates with special court access in medical malpractice actions.

3. Georgia

The United States Court of Appeals for the Eleventh Circuit opined that Georgia's affidavit of merit requirement applies to inmates.

> But, even if a Georgia court construed [the inmate's] complaint as stating an action for medical malpractice, **the affidavit requirement does not render the state tort remedy inadequate** for the purpose of *Bivens*[105] liability. **[The inmate] stands in the same shoes as anyone else in Georgia filing a professional malpractice claim and is subject to no stricter rules than the rest of Georgia's residents**. **Even a free citizen, especially one with limited funds, will have difficulty in obtaining an affidavit from an "expert competent to testify ... set[ting] forth specifically at least one negligent act or omission claimed to exist and the factual basis for each such claim." Furthermore, a prisoner faces inherent challenges in filing any type of lawsuit, especially one that involves complicated claims. That state procedural rules complicate the filing of a lawsuit does not mean that a plaintiff lacks**
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[105] *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

> **"*any alternative remedy* for harms caused by an individual officer's unconstitutional conduct."**[106]

Andrew, without addressing this case, notes that in *Pollard v. GEO Grp., Inc.*, the Ninth Circuit, in dicta, criticized the Eleventh Circuit's reference to inmates standing in "the same shoes as anyone else."[107]

However, the Supreme Court called into question any persuasive nature of this dicta when, in reversing *Pollard*, it refused to find state law tort remedies inadequate as applied to inmates even when those statutory schemes "impos[e] procedural obstacles [by] initially requiring [by way of example] the use of expert administrative panels in medical malpractice cases."[108] The public policy behind NRS 41A.071 further erodes any persuasive value *Pollard* may have.

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[106] *Alba v. Montford*, 517 F.3d 1249, 1255 (11th Cir. 2008) (quoting in part *Corr. Servs. Corp. v. Malesko,* 534 U.S. 61, 70 (2001)).

[107] 607 F.3d 583, 602 (9th Cir. 2010), *rev'd Minneci v. Pollard*, 565 U.S. 118 (2016).

[108] *Minneci*, 565 U.S. at 129. Indeed, Nevada had a similar administrative screening panel requirement before enactment of NRS 41A.071. *See Jain v. McFarland*, 109 Nev. 465, 471–72, 851 P.2d 450, 455 (1993); *Barrett v. Baird*, 111 Nev. 1496, 1511, 908 P.2d 689, 699 (1995).

D. Andrew's Reliance on the Oklahoma Constitution is of No Assistance

Andrew relies most heavily on two Oklahoma cases where the Oklahoma Supreme Court found an affidavit of merit requirement to be unconstitutional.[109] Neither case provides assistance to Andrew.

First, the Oklahoma Supreme Court found the entire affidavit of merit scheme to be unconstitutional; it did not hold it was unconstitutional as applied to inmates or indigent individuals.[110] This conclusion was based on the particular language of the Oklahoma Constitution prohibiting the legislature from enacting "any local or special law . . . [r]egulating the practice or jurisdiction of, or changing the rules of evidence in judicial proceedings or inquire before the courts."[111]

Second, the language contained in that constitutional provision is, as recognized in *Wall v. Marouk*,[112] "unlike those in the constitutions of any other state, and . . . more detailed and restrictive than those of . . .

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[109] Opening Br., p. 9 (citing *Zeier v. Zimmer, Inc.*, 152 P.3d 861 (Ok. 2006) and *Wall v. Marouk*, 302 P.3d 775 (Ok. 2013)).

[110] *Zeier*, 152 P.3d at 868–69.

[111] *Id.* at 865 (citing OKLA. CONST. art 5, § 46).

[112] 302 P.3d 775 (Ok. 2012).

other states."[113] In short, the Oklahoma statute violated Oklahoma's separate of power provisions.

Unlike Oklahoma, *Washoe Med. Ctr.* categorically held that because "NRS 41A.071 does not conflict with NRCP 15(a) . . . there is no separation of powers violation."[114] This Court also noted "[t]he requirement to file an expert affidavit does not infringe on or interfere with the judiciary's inherent authority to procedurally manage litigation."[115]

Accordingly, Andrew's reliance on *Wall* and *Zeier*, both of which relied on specific language in the Oklahoma Constitution, is misplaced.

E. Andrew's Claims are not Saved by NRS 41A.100

Andrew next asserts the District Court erred in concluding that his case could not proceed under res ipsa loquitur principles as codified at NRS 41A.100.[116] Andrew is incorrect.

This Court addressed the interaction between NRS 41A.071 and NRS 41A.100 in *Szydel v. Markman*.[117] There, this Court resolved the

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[113] 302 P.3d at 779.
[114] 122 Nev. at 1305 n. 29.
[115] *Id.* (citing *Borger*, 120 Nev. at 1029).
[116] Opening Br., pp. 15–21.
[117] 121 Nev. 453, 117 P.3d 200 (2005).

conflict between the statutes by concluding that when a plaintiff is relying solely on the res ipsa loquitur exceptions codified in NRS 41A.100(1), the affidavit requirement does not apply.[118] *Szydel* made clear that in order for a case to proceed without an affidavit of merit, "the plaintiff must present fats and evidence that show the existence of one or more of the situations enumerated in NRS 41A.100(1)(a)–(e).[119]

The five exceptions set forth § 41A.100(1) are situations where (1) "a foreign substance . . . was unintentionally left within the body of a patient following surgery;" (2) when an explosion or fire occurs due to a substance being used in treatment; (3) "unintended burn[s] caused by heat, radiation or chemicals;" (4) "an injury . . . to a part of the body not directly involved in the treatment;" or (5) when surgery is performed on the wrong patient or body part.

The Malpractice Complaint establishes Andrew did not allege any of these five exceptions to the affidavit of merit requirement.[120] Rather, Andrew's malpractice action was based on allegations that Koster did . . .

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[118] 121 Nev. at 459–61.
[119] *Id*. at 460.
[120] ROA 13–20.

not follow Dr. Cunningham's order to let him remove the catheter and that she improperly and prematurely[121] removed the catheter.[122]

NRS 41A.100(3) provides that the exceptions of subsection (1)(a)–(e) do "not apply in an action in which a plaintiff submits an affidavit pursuant to NRS 41A.071 or otherwise designates an expert witness that the specific provider of health care deviated from the accepted practice of care."[123] Case law is clear that these are the only exceptions to the affidavit of merit requirement.[124] Because of this narrow exception, *Szydel* instructed malpractice plaintiffs that "'the wise course of action in all malpractice cases would be . . . to provide affidavits even when they do not intend to rely on expert testimony at trial.'"[125]

Of course here, Andrew admitted that he planned on relying on the testimony of his treating physician, Dr. Cunningham.[126] In addition, Andrew admitted that he knew of the affidavit of merit

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[121] Despite the fact that the catheter was removed two weeks after the surgery as Andrew alleges Dr. Cunningham ordered the catheter to remain "for approximately two (2) weeks." ROA 15 (¶ 7).

[122] ROA at 15–16.

[123] NRS 41A.100(3).

[124] *Szydel*, 121 Nev. at 461.

[125] *Id.* (quoting *Palanque v. Lambert–Woolley*, 168 N.J. 398, 774 A.2d 501, 507 (2001).

[126] ROA 61.

requirement, but was unable to find an expert to provide him with an affidavit of merit.[127] The fact that Andrew designated Dr. Cunningham as an expert in opposing the motion to dismiss,[128] and also conceded that he was aware of the affidavit of merit requirement,[129] is evidence Andrew did not intend to rely on the five res ipsa loquitur exceptions contained in NRS 41A.100(1).

Accordingly, the District Court did not err when it failed to permit Andrew to proceed under a res ipsa loquitur theory of liability.

F. Andrew did not Allege an Eighth Amendment Deliberate Indifference Claim

Andrew also argues the District Court should have construed the Malpractice Complaint, despite its clear title and content, as an Eighth Amendment deliberate indifference claim.[130] This argument also fails.

The law of the land for over forty (40) years is that a "[m]edical malpractice [claim] does not become a constitutional violation merely because the victim is a prisoner."[131] Rather, "[i]n order to state a

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[127] ROA 56–57.
[128] ROA 61.
[129] ROA 56–57.
[130] Opening Br., pp. 21–25.
[131] *Estelle v. Gamble*, 429 U.S. 97, 106 (1976); *see also Kinford v. Bannister*, 913 F. Supp.2d 1010, 1018 (D. Nev. 2012).

cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is only such indifference that can offend 'evolving standards of decency' in violation of the Eighth Amendment."[132]

In *Segler v. Clark Cty.*,[133] the United States District Court for the District of Nevada stated that "neither accidents, negligence by the medical staff nor medical malpractice are enough [to constitute an Eighth Amendment deliberate indifference claim] without a showing of 'acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs.'"[134] Similarly, "inadvertence . . . is insufficient to establish a cause of action under § 1983."[135] Further, "[a] difference of opinion between . . . medical professionals . . . concerning what medical care is appropriate does not amount to deliberate indifference."[136] The failure of a medical professional to

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[132] *Estelle*, 429 at 106.

[133] 142 F. Supp. 2d 1264 (D. Nev. 2001).

[134] *Id.* at 1270 (*citing Estelle*, 429 at 106).

[135] *Proctor v. Horn*, 95 F. Supp. 3d 1242, 1250 (D. Nev. 2015).

[136] *Horn*, 95 F. Supp. 3d at 1250 (citing *Snow v. McDaniel*, 681 F.3d 978, 987 (9th Cir. 2012).

"treat[] a medical condition [also] does not state a valid claim of medical mistreatment under the Eighth Amendment.[137]

Here, the Malpractice Complaint alleges Koster did not have "proper training" and did not use "accepted standards" or "due diligence" when she "improperly remov[ed] [the] catheter from [Andrew's] penis in a negligent . . . manner."[138] The Malpractice Complaint also specifically used the term "medical malpractice."[139]

Simply put, Andrew alleges only that Koster did not follow the instructions of Dr. Cunningham and that she acted negligently. However, even in making this assertion, Andrew admits Dr. Cunningham ordered the catheter to be removed in approximately two weeks—which is precisely what occurred.

As a medical professional, it is entirely possible Koster disagreed with Dr. Cunningham's alleged order to return Andrew purposes of removing the catheter. Even assuming the catheter was improperly or negligently removed by Koster, as alleged in the Malpractice Complaint, Andrew has simply failed to assert any intentional

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[137] *Antonetti v. Skolnik*, 748 F. Supp. 2d 1201, 1209 (D. Nev. 2010) (citing *Estelle*, 429 U.S. at 106).

[138] ROA 16–17.

[139] ROA 18.

wrongdoing on the part of Koster with the intention to purposely or recklessly cause Andrew harm. As such, the Malpractice Complaint simply does not allege sufficient facts to establish a deliberate indifference claim.

As noted in *Evans v. Wright*,[140] "[t]he removal of [a] catheter, even done in a painful manner . . . [does] not amount to deliberate indifference to a serious medical need."[141] Similarly, in *Martinez v. Garza*, the United States District Court for the Eastern District of California held that a plaintiff's assertion "that a nurse 'yanked a catheter from his penis' in anger when he complained that the equipment was contaminated . . . did not violate the Eighth Amendment."[142]

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[140] No. 6:14–cv–566, 2015 WL 11831265, * 1 (E.D. Tx., Dec. 23, 2015).

[141] *Id*. at *1; see also *See Benscooter v. Southall*, Case No. 5:14–cv–144–OC–29–PRL, 2016 WL 1110424, * 6 (M.D. Fl., March 22, 2016) (removal of catheter did not rise to the level of deliberate indifference); *Williams v. Fed. Bureau of Prisons*, No. 15–6971 (RBK) (AMD), 2015 WL 7871164, * 3, (D. N.J., Dec. 4, 2015) (disagreements regarding catheter insertion and removal of left testicle did not constitute deliberate indifference).

[142] *Evans v. Wright*, No. 6:14–cv–566, 2015 WL 5766862, * 6 (E.D. Tx., Sept. 29, 2015), *citing Martinez v. Garza*, No. 1:09–cv–899, 2011 WL 23670, * 14 (E.D. Cal., Jan. 4, 2011); *see also Duckett v. Scamehom*, 564 Fed. App'x 290 (9th Cir. 2014) ("The district court properly

In short, Andrew failed to state a claim of deliberate indifference. Accordingly, the District Court appropriately dismissed the entirety of the Malpractice Complaint.

CONCLUSION

Andrew was required to comply with the affidavit of merit requirement of NRS 41A.071. Andrew knew of this requirement which is why he sought an exception from the District Court.

The Malpractice Complaint does not assert any res ipsa loquitur theory of medical negligence as codified under NRS 41A.100.

A plain reading of the Malpractice Complaint makes it evident Andrew did not state a claim of deliberate indifference to a serious medical need. Rather, the Malpractice Complaint only sought recovery under a state theory of medical malpractice.

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dismissed Duckett's action because Duckett failed to allege facts showing that defendants acted with deliberate indifference to a serious medical need in connections with the removal of his catheter").

Consequently, the District Court appropriately dismissed Andrew's case in its entirety. As such, this Court should affirm the District Court's order dismissing this case.

Respectfully submitted this 12th day of April, 2017.

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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:

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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. 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 12th day of April, 2017.

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CERTIFICATE OF SERVICE

Pursuant to NEV. R. APP. P. 25(5)(c), I hereby certify that, on the 12th day of April, 2017, I electronically served the foregoing **RESPONDENTS' ANSWERING BRIEF** by electronic means to all parties who are registered users of the court's electronic filing system as follows:

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