IN THE SUPREME COURT OF THE STATE OF NEVADA

MELISSA CUMMINGS Appellant, vs. ANNABEL BARBER, M.D. AND UNIVERSITY MEDICAL CENTER Respondents.	Case No. 76972 Dist. Court Case No. : A729065

RESPONDENT ANNABEL BARBER, M.D.'S APPENDIX

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ALPHABETICAL INDEX

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of April, 2019 I served the foregoing **RESPONDENT ANNABEL BARBER, M.D.'S APPENDIX** upon the following parties by:

__X__ VIA ELECTRONIC SERVICE: by mandatory electronic service (e-service), proof of e-service attached to any copy filed with the Court; or

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June 7, 2018

VIA Hand-Delivery
Honorable Kenneth Cory
Eighth Judicial District Court
200 Lewis Avenue, Courtroom 16A
Department 1
Las Vegas, NV 89155

Re: Cummings v. Barber, M.D., et al.
Case No. A-15-729065-C

Dear Judge Cory:

In follow-up to the June 5, 2018 hearing on Defendant Annabel Barber, M.D.'s Motion for Summary Judgment, I am enclosing copies of the most pertinent Nevada cases on res ipsa claims, with copies to all counsel.

Should you have any questions or concerns, please do not hesitate to contact our office.

Very truly yours,

CARROLL, KELLY, TROTTER,
FRANZEN, McBRIDE & PEABODY

Heather S. Hall

Heather S. Hall, Esq.

HSH/mvh
Enclosures
cc via e-service: Kirk Kennedy, Esq. and Jeff Pitegoff, Esq.

Lowe v. Ahn

Court of Appeals of Nevada

May 28, 2015, Filed

No. 64464

Reporter
2015 Nev. App. Unpub. LEXIS 236 *; 2015 WL 3540894

DUANE LEE LOWE, INDIVIDUALLY; AND THERESE LOWE, INDIVIDUALLY AND AS THE WIFE OF DUANE LEE LOWE, Appellants, vs. CHRISTOPHER MICHAEL AHN, M.D., INDIVIDUALLY, Respondent.

Prior History: *Lowe v. Ahn, 2014 Nev. Unpub. LEXIS 1045 (2014)*

Core Terms

district court, personal injury, res ipsa loquitur instruction, surgery, appellants', arm, part of the body, malpractice, monitoring, padding, preponderance of the evidence, rebuttable presumption, course of treatment, jury instructions, res ipsa loquitur, causation, proximate

Judges: **[*1]** Gibbons, C.J., Tao, J., Silver, J.

Opinion

ORDER OF AFFIRMANCE

This is an appeal from a district court judgment, pursuant to a jury verdict, in a medical malpractice case. Eighth Judicial District Court, Clark County; Joanna Kishner, Judge.

Appellant Duane Lowe underwent an 11-hour spine surgery. Sometime during either the surgery or the 15-hour recovery period following the surgery, Lowe suffered a brachial plexus injury to his arm. As relevant to this appeal, appellants Lowe and his wife Therese Lowe sued the anesthesiologist, Dr. Ahn, for failing to properly pad, position, and monitor Lowe's arm.

At trial, both sides presented extensive expert testimony on the issue of negligence. Appellants' experts testified Ahn was negligent in padding, positioning, and monitoring the arm during the unusually lengthy surgery. Ahn's experts testified Ahn's actions met the applicable standard of care. Experts from both sides testified Ahn was responsible for positioning, padding, and monitoring Lowe's arms, and nerve injuries were a known risk. All experts agreed Lowe's comorbidities contributed to the risk of injury.

Appellants argued because Lowe had suffered an injury to his arm during surgery on his back, **[*2]** the doctrine of res ipsa loquitur created a presumption Ahn was negligent. Appellants proposed a jury instruction compelling the jury to apply this negligence presumption to Ahn.[1] Ahn countered that the res ipsa presumption did not apply to him because *NRS 41A.100(1)(d)*, the relevant statute, applies only when the injury is not within the scope of the physician's treatment; here Ahn's

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[1] Appellants' proposed instruction read:

> The law provides for a rebuttable presumption that a personal injury was caused by medical malpractice where the personal injury occurred under the following circumstance:
>
> An injury was suffered during the course of treatment to a part of the body not directly involved in such treatment or proximate thereto.
>
> In this action, it has been established that an injury was suffered during the course of treatment to a part of the body not directly involved in such treatment or proximate thereto. The effect of this rebuttable presumption is that it places upon the defendants the [burden] of proving, by a preponderance of the evidence, that the personal injury was not caused by negligence.

treatment included padding, positioning, and monitoring of Lowe's arm.

The district court, citing Banks v. Sunrise Hospital, 120 Nev. 822, 102 P.3d 52 (2004), found a **[*3]** res ipsa loquitur instruction appropriate. The district court reasoned there remained a question of fact regarding whether appellants established the predicate facts under NRS 41A.100(1)(d). Accordingly, the district court instructed the jury on the form res ipsa loquitur instruction[2] substantially similar to instructions given in Carver v. El-Sabawi, 121 Nev. 11, 107 P.3d 1283 (2005) and Johnson v. Egtedar, 112 Nev. 428, 915 P.2d 271 (1996). This instruction allowed the jury to determine whether, under the facts of the case, the res ipsa loquitur presumption of negligence applied to Ahn.

The jury found Ahn was not negligent, and did not address damages.

On appeal, appellants argue the district court erred in giving the form res ipsa loquitur instruction instead of the instruction appellants proposed. Appellants further argue the district court erred in allowing defense experts to voice speculative opinions on causation, and offering cumulative inappropriate opinions prejudicing appellants' case. Appellants also assert the district court erred in prohibiting appellants from presenting evidence of Lowe's future medical expenses and lost earning capacity.

The primary issue before this court is whether the district court instructed the jury correctly on the law of res ipsa loquitur. We review a district court's determination regarding jury instructions for abuse of discretion. Banks, 120 Nev. at 832, 102 P.3d at 59. We will not reverse a judgment for an erroneous jury instruction unless, from the totality of the evidence, it appears the "error has resulted in a miscarriage of justice." **[*5]** Carver, 121 Nev. at 14, 107 P.3d at 1285.

NRS 41A.100(1) replaces the common law doctrine of res ipsa loquitur in medical malpractice cases. Banks, 120 Nev. at 832, 102 P.3d at 59. NRS 41A.100(1)(d) reads, in pertinent part,

> Liability for personal injury or death is not imposed upon any provider of medical care based on alleged negligence in the performance of that care unless evidence consisting of expert medical testimony . . . is presented to demonstrate the alleged deviation from the accepted standard of care in the specific circumstance of the case and to prove causation of the alleged personal injury or death, except that such evidence is not required and a rebuttable presumption that the personal injury or death was caused by negligence arises where evidence is presented that the personal injury or death occurred in any one or more of the following circumstances:
>
> ...
>
> (d) An injury was suffered during the course of treatment to a part of the body not directly involved in the treatment or proximate thereto[.]

If a plaintiff presents evidence suggesting the situation falls within one of the factual predicates set forth in NRS 41A.100(1), but there remains a genuine dispute regarding whether the factual predicate is met, the trial court should give a res ipsa loquitur instruction tasking the jury with determining **[*6]** whether a factual predicate exists. *See* Johnson, 112 Nev. at 434, 915 P.2d at 274; *see also* Born v. Eisenman, 114 Nev. 854, 859, 962 P.2d 1227, 1230 (1998).

We cannot say here the district court abused its discretion in giving the form res ipsa loquitur instruction and allowing the jury to determine whether the negligence presumption applied to Ahn. The res ipsa loquitur instruction was the same instruction our Supreme Court approved in *Johnson*, where the patient suffered tears to her spinal dura, psoas major muscle, colon, and ureter during a spine surgery. Johnson, 112 Nev. at 431, 915 P.2d at 273. There, the Supreme Court held because the plaintiff presented some evidence the case fell under NRS 41A.100(1), the district court should have allowed the jury to determine whether the res ipsa

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[2] That instruction read:

> The law provides for a rebuttable presumption that a personal injury was caused by medical malpractice where the personal injury occurred under the following circumstance:
>
> If you find by a preponderance of the evidence that an injury was suffered during the course of treatment to a part of the body not directly involved in such treatment or proximate thereto, then a rebuttable presumption operates to shift to the defendants the burden of proving, by a preponderance of the evidence, that the personal injury was not caused by negligence.
>
> If, on the other hand, you do not find by a preponderance of the evidence that an injury was suffered during the course of treatment to a part of the body not directly **[*4]** involved in such treatment or proximate thereto, then the burden of proving by a preponderance of the evidence consisting of expert medical testimony that the personal injury was caused by negligence remains with the plaintiff.

loquitur presumption applied. *Id. at 434, 915 P.2d at 274-75*. Here, appellants sued for negligence on the grounds Ahn failed to properly position, pad, and monitor Lowe's arm during surgery. Experts from both sides testified positioning, padding, and monitoring the arm was one of Ahn's specific duties during the surgery. Experts also testified nerve injury to a limb is a known risk of this procedure. Under these facts, we cannot say that the presumption must apply as a matter of law.

We likewise do not agree *Banks* mandates application of the presumption. Critically, *Banks* did not discuss **[*7]** the differences between the two res ipsa instructions. *Banks* only required *a* res ipsa loquitur instruction be given under the particular facts of that case. And, like many medical malpractice actions, the *Banks* decision is highly fact-based with regards to the application of *NRS 41A.100(1)*. To hold *Banks* necessitates application of plaintiff's proposed res ipsa loquitur instruction to all anesthesiologist malpractice cases when the patient suffers an injury to any part of the body outside the immediate area of surgery, without regard to the anesthesiologist's duties or treatment, would both overextend *Banks'* holding and supersede the requirements of *NRS 41A.100(1)*.

Accordingly, we do not reverse the district court for refusing to give appellants' preferred res ipsa loquitur instruction to the jury.

Regarding the standard for medical expert testimony on alternate theories of causation, we are not persuaded under these facts the district court violated the rules set forth in *Williams v. Eighth Judicial District Court, 127 Nev. 518, 262 P.3d 360 (2011)*. *Williams* made clear where an expert's testimony is offered to "either contradict the plaintiffs expert or furnish reasonable alternative causes to that offered by the plaintiff," it need not be stated to a reasonable degree of medical certainty. **[*8]** *Williams, 127 Nev. at 529-31, 262 P.3d at 368*. *See also Leavitt v. Siems, 130 Nev. , , 330 P.3d 1, 5-6 (2014)*. Here, Ahn's experts' opinions regarding alternate causation were offered to directly rebut appellants' theory of causation. Furthermore, Nevada law is clear speculative opinion testimony is not prohibited under circumstances like those in this case because the jury determines the expert's credibility and assesses the weight of the testimony. *Leavitt, 130 Nev. at , 330 P.3d at 6*. Accordingly, the district court did not violate the *Williams* rule. Moreover, we note the record reflects that Ahn's experts testified to a reasonable degree of medical certainty.

Finally, we determine appellants' arguments involving cumulative inappropriate expert opinions are without merit. Appellants point to only four instances Lowe's counsel objected to statements of two defense experts. But, in all four instances objected to, the jury was admonished not to consider the testimony. Under such circumstances, the Nevada Supreme Court has set a high bar for reversing a jury verdict and, given the evidence supporting Ahn's defense here, appellants have not shown why these four instances mandate reversal of the verdict. *See Gunderson v. D.R. Horton, Inc., 130 Nev. , , 319 P.3d 606, 612 (2014)*; *Lioce v. Cohen, 124 Nev. 1, 17-18, 174 P.3d 970, 981 (2008)*.

Our holding regarding the res ipsa loquitur instruction moots appellants' additional arguments regarding their **[*9]** inability to submit evidence of damages to the jury; thus, we do not discuss those issues.

Having considered appellants' contentions and concluded they are without merit, we

ORDER the judgment of the district court AFFIRMED.

/s/ Gibbons, C.J.

Gibbons

/s/ Tao, J.

Tao

/s/ Silver, J.

Silver

End of Document

Szydel v. Markman

Supreme Court of Nevada

August 11, 2005, Decided

No. 42663

Reporter
121 Nev. 453 *; 117 P.3d 200 **; 2005 Nev. LEXIS 62 ***; 121 Nev. Adv. Rep. 47

ANNETTE SZYDEL AND KEVIN SZYDEL, INDIVIDUALLY, AND AS HUSBAND AND WIFE, Appellants, vs. BARRY MARKMAN, M.D., Respondent.

Subsequent History: Rehearing denied by *Szydel v. Markman, 2005 Nev. LEXIS 95 (Nev., Sept. 9, 2005)*

Prior History: **[***1]** Appeal from a district court order dismissing a medical malpractice action. Eighth Judicial District Court, Clark County; Valorie Vega, Judge.

Disposition: Reversed and remanded.

Core Terms

district court, ipsa, affidavit requirement, expert testimony, needle, res ipsa loquitur, requirements, expert opinion, loquitur, statutes, breast, foreign object, medical-legal, screening, provides, cases, medical malpractice, malpractice case, malpractice, medical malpractice action, medical malpractice claim, legislative intent, frivolous lawsuit, medical expert, frivolous, surgical, surgery

Case Summary

Procedural Posture

Appellant patient brought a medical malpractice action under *Nev. Rev. Stat. § 41A.100*, Nevada's res ipsa loquitur statute, because a surgical needle had been left in her body during an operation. The Eighth Judicial District Court, Clark County (Nevada) dismissed the complaint for failure to comply with *Nev. Rev. Stat. § 41A.071*, which required malpractice actions to be accompanied by a medical expert's affidavit. The patient appealed.

Overview

The issue was whether a medical malpractice action filed under Nevada's res ipsa loquitur statute, *Nev. Rev. Stat. § 41A.100*, which did not require expert testimony at trial, had to include a medical expert affidavit, as mandated by *Nev. Rev. Stat. § 41A.071*. The Supreme Court of Nevada held that the expert affidavit requirement did not apply when the malpractice action was based solely on res ipsa loquitur. The plain language of *§ 41A.071* provided a threshold requirement for medical malpractice pleadings and did not pertain to evidentiary matters at trial, as did *Nev. Rev. Stat. § 41A.100(1)*. When read together, the statutes were in conflict because *Nev. Rev. Stat. § 41A.100(1)* permitted a jury to infer negligence without expert testimony at trial, whereas *Nev. Rev. Stat. § 41A.071* required dismissal whenever there was no expert affidavit. Requiring an affidavit at the start of a malpractice action, while permitting the patient to proceed at trial without the need to produce expert testimony under the res ipsa loquitur doctrine, lead to an absurd result. But, when a res ipsa claim was filed with other non res ipsa claims, the other claims had to be supported by an affidavit.

Outcome

The judgment of the trial court was reversed and the case was remanded.

LexisNexis® Headnotes

Governments > Legislation > Effect & Operation > Amendments

Healthcare Law > Healthcare Litigation > Actions Against Healthcare Workers > General Overview

Torts > Malpractice & Professional Liability > Healthcare Providers

Torts > Malpractice & Professional Liability > General Overview

HN1 **Effect & Operation, Amendments**

During the special session, the legislature enacted various measures intended to reform the way medical malpractice claims are handled, including completely eliminating the requirement for prescreening of medical malpractice cases by the medical-legal screening panel and requiring medical malpractice actions to be accompanied by an expert's affidavit. However, the changes passed during the special session were not effective until October 1, 2002. As a result, claimants who filed a case with the panel before the effective date could elect to opt out of the new statutory scheme and continue under the prior prescreening statutes.

Evidence > ... > Testimony > Expert Witnesses > General Overview

Torts > Malpractice & Professional Liability > Healthcare Providers

HN2 **Testimony, Expert Witnesses**

Nev. Rev. Stat. § 41A.071 requires the dismissal of any medical malpractice action filed in district court without a medical expert's supporting affidavit.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Governments > Legislation > Interpretation

HN3 **Standards of Review, De Novo Review**

Appellate review of statutory provisions is de novo. When construing a statute, the legislative intent is controlling. Under the plain meaning rule, the Supreme Court of Nevada will not look beyond the plain language of the statute, unless it is clear that this meaning was not intended. When the language of a statute is clear on its face, the supreme court will deduce the legislative intent from the words used.

Governments > Legislation > Interpretation

HN4 **Legislation, Interpretation**

When two statutes are clear and unambiguous but conflict with each other when applied to a specific factual situation, an ambiguity is created and the Supreme Court of Nevada will attempt to reconcile the statutes. In doing so, it will attempt to read the statutory provisions in harmony, provided that this interpretation does not violate legislative intent.

Evidence > ... > Testimony > Expert Witnesses > General Overview

Torts > ... > Proof > Res Ipsa Loquitur > Evidentiary Effect

Torts > Malpractice & Professional Liability > General Overview

Torts > Malpractice & Professional Liability > Healthcare Providers

Torts > ... > Proof > Res Ipsa Loquitur > General Overview

HN5 **Testimony, Expert Witnesses**

Nev. Rev. Stat. § 41A.100(1) provides an exception to the basic requirement that expert testimony or evidence from a recognized medical text or treatise is required to prove negligence and causation in a medical malpractice lawsuit. *Section 41A.100(1)* requires that a res ipsa loquitur instruction must be given when the circumstances and evidence so warrant. All a plaintiff need do to warrant an instruction under the statutory medical malpractice res ipsa loquitur rule is present some evidence of the existence of one or more of the factual predicates enumerated in the statute. If the trier of fact then finds that one or more of the factual predicates exist, then the presumption must be applied.

Evidence > ... > Testimony > Expert Witnesses > General Overview

Torts > ... > Proof > Res Ipsa Loquitur > General Overview

Torts > Malpractice & Professional Liability > Healthcare Providers

HN6[] Testimony, Expert Witnesses

Nev. Rev. Stat. § 41A.100(1)(a) states that expert testimony is not required in instances where a foreign object is unintentionally left in the patient's body following surgery.

Evidence > ... > Testimony > Expert Witnesses > General Overview

Torts > ... > Proof > Evidence > Expert Testimony

Torts > Malpractice & Professional Liability > Healthcare Providers

Torts > ... > Proof > Res Ipsa Loquitur > General Overview

HN7[] Testimony, Expert Witnesses

See Nev. Rev. Stat. § 41A.100(1)(a).

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Defects of Form

Torts > ... > Proof > Res Ipsa Loquitur > General Overview

Civil Procedure > Dismissal > Involuntary Dismissals > General Overview

Evidence > ... > Testimony > Expert Witnesses > General Overview

Torts > Malpractice & Professional Liability > General Overview

Torts > Malpractice & Professional Liability > Healthcare Providers

HN8[] Defenses, Demurrers & Objections, Defects of Form

Nev. Rev. Stat. § 41A.071 requires the dismissal of a medical malpractice action filed without an affidavit from a medical professional practicing in a substantially similar field. The plain language of § 41A.071 provides a threshold requirement for medical malpractice pleadings and does not pertain to evidentiary matters at trial, as does Nev. Rev. Stat. § 41A.100(1), the res ipsa statute. However, there is an apparent conflict between Nev. Rev. Stat. §§ 41A.071 and 41A.100(1).

Evidence > ... > Testimony > Expert Witnesses > General Overview

Torts > Malpractice & Professional Liability > Healthcare Providers

HN9[] Testimony, Expert Witnesses

See Nev. Rev. Stat. § 41A.071.

Evidence > ... > Testimony > Expert Witnesses > General Overview

Torts > ... > Proof > Res Ipsa Loquitur > Evidentiary Effect

Torts > Malpractice & Professional Liability > General Overview

Torts > Malpractice & Professional Liability > Healthcare Providers

Torts > ... > Proof > Res Ipsa Loquitur > General Overview

HN10[] Testimony, Expert Witnesses

The language of Nev. Rev. Stat. §§ 41A.071 and 41A.100(1) is unambiguous. However, when read together, the statutes are in conflict because § 41A.100(1), the res ipsa statute, permits a jury to infer medical negligence without expert testimony at trial, whereas Nev. Rev. Stat. § 41A.071 requires dismissal whenever the expert affidavit requirement is not met. Accordingly, requiring an expert affidavit at the start of a malpractice action, while permitting the plaintiff to proceed at trial without the need to produce expert testimony under the res ipsa loquitur doctrine, leads to an absurd result. Enforcing this requirement in a res ipsa case would do little to advance the primary goal of the expert affidavit requirement, which is to deter frivolous litigation and identify meritless malpractice lawsuits at an early stage.

Environmental Law > Hazardous Wastes & Toxic Substances > Toxic Torts

Torts > ... > Proof > Res Ipsa Loquitur > General Overview

Evidence > ... > Testimony > Expert Witnesses > General Overview

Torts > Malpractice & Professional Liability > General Overview

Torts > Malpractice & Professional Liability > Healthcare Providers

HN11 **Hazardous Wastes & Toxic Substances, Toxic Torts**

Requiring an expert affidavit in a res ipsa case under *Nev. Rev. Stat. § 41A.100(1)* is unnecessary. The purpose of the expert affidavit requirement is to lower costs, reduce frivolous lawsuits, and ensure that medical malpractice actions are filed in good faith based upon competent expert medical opinion. *Nev. Rev. Stat. § 41A.071* was intended to substitute the medical-legal screening panel with a less expensive process that continues to deter frivolous lawsuits. Undeniably, the res ipsa loquitur doctrine codified in *Nev. Rev. Stat. § 41A.100* permits medical malpractice claims to go forward without expert testimony when the plaintiff is able to present some evidence that one or more of the factual situations enumerated in *§§ 41A.100(1)(a)-(e)* exist. These are factual situations where the negligence can be shown without expert medical testimony.

Evidence > ... > Testimony > Expert Witnesses > General Overview

Torts > ... > Proof > Res Ipsa Loquitur > General Overview

Torts > Malpractice & Professional Liability > Healthcare Providers

HN12 **Testimony, Expert Witnesses**

At the same time the legislature added *Nev. Rev. Stat. § 41A.071*, it amended the expert testimony requirement contained in *Nev. Rev. Stat. § 41A.100(2)* to add the "substantially similar" medical field language contained in *Nev. Rev. Stat. § 41A.071*. This requirement that the testimony of a medical care provider be from someone in a substantially similar field relates back to the statement of what medical testimony is admissible under *Nev. Rev. Stat. § 41A.100(1)*. The res ipsa loquitur exception is contained at the end of *§ 41A.100(1)*. If the legislature had wanted *NRS 41A.100* to fall within the ambit of *Nev. Rev. Stat. § 41A.071*, it had the opportunity to accomplish that goal while making the noted change. The fact that it declined to do so indicates to us that the legislature did not want to extend the affidavit requirement to res ipsa loquitur cases.

Evidence > ... > Testimony > Expert Witnesses > General Overview

Torts > ... > Proof > Res Ipsa Loquitur > General Overview

Torts > Malpractice & Professional Liability > Healthcare Providers

HN13 **Testimony, Expert Witnesses**

When a plaintiff files a res ipsa loquitur claim in conjunction with other medical malpractice claims that do not rely on the res ipsa loquitur doctrine, those other claims are subject to the requirements of *Nev. Rev. Stat. § 41A.071* and must be supported by an appropriate affidavit from a medical expert. In addition, any res ipsa claim filed without an expert affidavit must, when challenged by the defendant in a pretrial or trial motion, meet the prima facie requirements for a res ipsa loquitur case. Consequently, the plaintiff must present facts and evidence that show the existence of one or more of the situations enumerated in *Nev. Rev. Stat. § 41A.100(1)(a)-(e)*.

Evidence > ... > Testimony > Expert Witnesses > General Overview

Torts > ... > Proof > Res Ipsa Loquitur > General Overview

Torts > Malpractice & Professional Liability > Healthcare Providers

HN14 **Testimony, Expert Witnesses**

The wise course of action in all malpractice cases would be for plaintiffs to provide affidavits even when they do

not intend to rely on expert testimony at trial.

Counsel: Murdock & Associates, Chtd., and Robert E. Murdock, Las Vegas, for Appellants.

John H. Cotton & Associates, Ltd., and Anthony J. D'Olio and Mara E. Fortin, Las Vegas, for Respondent.

Judges: BEFORE ROSE, GIBBONS and HARDESTY, JJ. GIBBONS, J., concurs. HARDESTY, J., dissenting.

Opinion by: ROSE

Opinion

[*454] [201]** *OPINION*

By the Court, ROSE, J.:

In this appeal, we consider whether a medical malpractice action filed under Nevada's res ipsa loquitur statute, NRS 41A.100, which does not require expert testimony at trial, must include a medical expert affidavit, as mandated by NRS 41A.071. We conclude that the expert affidavit requirement does not apply when the malpractice action is based solely on the res ipsa loquitur doctrine.

FACTS

On June 22, 2001, respondent Dr. Barry Markman performed a bilateral mastopexy, or breast lift, operation on appellant Annette Szydel. After Dr. Markman completed the procedure on the right breast, the nursing staff conducted an equipment count **[***2]** and informed **[*455]** Dr. Markman that all sponges, needles, and other equipment used during the surgery were accounted for. Dr. Markman closed Szydel's right breast and continued the operation on her left breast. After Dr. Markman completed the procedure on her left breast, the nursing staff informed Dr. Markman that one of the surgical needles was unaccounted for.

Dr. Markman conducted a thorough search of Szydel's left breast but was unable to locate the missing needle. Following an initial search of the operating field and operating room, an x-ray was taken to see if the missing needle was located within the wound or had adhered to Szydel's body. Following the hospital's standard procedure in such situations, the hospital staff relocated Szydel to the recovery room to facilitate a thorough search of the operative suite and the surgical drapes. Dr. Markman informed Szydel of the missing needle and explained that, if necessary, she would be taken back into the operating room to remove the needle.

The standard x-ray did not indicate the presence of a foreign object. The search of the operative suite and Szydel's surgical drapes also failed to locate the missing needle. Dr. Markman then took **[***3]** Szydel to the fluoroscopy [1] suite to rule out any possibility that the needle was left inside Szydel's body. The results of the fluoroscopy showed that the needle was located in the middle of Szydel's right breast, indicating that the initial equipment count performed after the procedure on her right breast was incorrect. Szydel was taken back to the operative suite, and the needle was removed.

At the time of Szydel's surgery, a Nevada statute required that medical malpractice claims be submitted to a medical-legal screening panel before proceeding in district court. In June 2002, the Governor called a special session of Nevada's Legislature to "address a perceived medical malpractice insurance **[**202]** crisis" in Nevada. [2] ***HN1***[↑] During the special session, the Legislature enacted various measures intended to reform the way medical malpractice claims are handled, including completely eliminating the requirement for prescreening of medical malpractice cases **[***4]** by the medical-legal screening panel and requiring medical malpractice actions to be accompanied by an expert's affidavit. [3] However, the changes passed during the special session were not effective until October 1, 2002. As a result, claimants who filed a case with the panel before the effective date could elect to opt out of the new statutory scheme and continue under the prior prescreening statutes. [4]

[*456] Szydel filed a complaint with the medical-legal screening panel on September 27, 2002. Szydel elected to continue with the panel. The panel then informed Szydel by letter that her complaint was procedurally

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[1] *Steadman's Medical Dictionary* 543 (5th unabridged ed. 1982).

[2] *Borger v. Dist. Ct.*, 120 Nev. ___, ___, 120 Nev. 1021, 102 P.3d 600, 602 (2004).

[3] *Id.*; *see also* NRS 41A.016, *repealed by* 2002 Nev. Stat. Spec. Sess., ch. 3, § 69, at 25.

[4] *Borger*, 120 Nev. at ___, 102 P.3d at 602-03; 2002 Nev. Stat. Spec. Sess., ch. 3, § 72, at 25-26.

deficient and advised her that unless she corrected the deficiencies **[***5]** before December 4, 2002, her complaint would not be filed or submitted to the panel and any subsequent filing would be considered a new complaint. [5]

Szydel never corrected the procedural problems with her complaint, and the panel dismissed her claim without prejudice on January 9, 2003. Six months later, on June 6, 2003, Szydel and her husband filed a malpractice complaint in district court. Szydel's complaint alleged that in performing the mastopexy operation, Dr. Markman left a surgical needle inside Szydel's breast and, under Nevada's res ipsa loquitur statute, there is a rebuttable presumption of negligence. **[***6]** Dr. Markman moved to dismiss for failure to comply with NRS 41A.071, the new statutory provision requiring malpractice actions to be accompanied by a medical expert's affidavit.

HN2[↑] NRS 41A.071 requires the dismissal of any medical malpractice action filed in district court without a medical expert's supporting affidavit. Szydel opposed Dr. Markman's motion and argued that because this was a retained foreign object case under NRS 41A.100, Nevada's res ipsa loquitur statute, which does not require expert testimony at trial, the affidavit requirement of NRS 41A.071 was inapplicable to her complaint.

After giving Szydel additional time to obtain an expert's affidavit, the district court dismissed Szydel's complaint without prejudice for her failure to comply with NRS 41A.071. Szydel appeals.

DISCUSSION

Standard of review and applicable law

Szydel argues that the expert witness affidavit requirement of NRS 41A.071 does not apply in a retained foreign object case under NRS 41A.100(1)(a), the res **[***7]** ipsa loquitur statute. Our ***HN3***[↑] review of statutory provisions is de novo. [6] When construing a statute, the legislative intent is controlling. [7] Under the plain meaning rule, **[*457]** "this court will not look beyond the plain language of the statute, unless it is clear that this meaning was not intended." [8] When the language of a statute is clear on its face, this court will deduce the legislative intent from the words used. [9]

HN4[↑] When two statutes are clear and unambiguous but conflict with each other when applied to a specific factual situation, an ambiguity is created and we will attempt to **[**203]** reconcile the statutes. [10] In doing so, we will attempt to read the statutory provisions in harmony, provided that this interpretation does not violate **[***8]** legislative intent. [11]

Resolution of the conflict between NRS 41A.100 and NRS 41A.071

We begin with the plain meaning rule and look to the meaning of language employed in each of the statutes. [12] ***HN5***[↑] NRS 41A.100(1) provides an exception to the basic requirement that expert testimony or evidence from a recognized medical text or treatise is required to prove negligence and causation in a medical malpractice lawsuit. [13] As this court has noted, NRS 41A.100(1) requires that a res ipsa loquitur instruction must be given when the circumstances and evidence so

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[5] The exact wording of the panel's letter read:

> If the deficiencies are corrected to the satisfaction of the Division on or before *December 4, 2002*, the above date of receipt will be deemed the date of filing.
>
> If the deficiencies are not corrected on or before *December 4, 2002*, the complaint will not be filed or submitted to the panel and any subsequent submission is a new complaint.

[6] *Clark County v. Upchurch, 114 Nev. 749, 753, 961 P.2d 754, 757 (1998)*.

[7] *Id.*

[8] *State v. Quinn, 117 Nev. 709, 713, 30 P.3d 1117, 1120 (2001)*.

[9] *Cleghorn v. Hess, 109 Nev. 544, 548, 853 P.2d 1260, 1262 (1993)*.

[10] *See Bowyer v. Taack, 107 Nev. 625, 627, 817 P.2d 1176, 1177 (1991)*.

[11] *City Council of Reno v. Reno Newspapers, 105 Nev. 886, 892, 784 P.2d 974, 978 (1989)*.

[12] *Quinn, 117 Nev. at 713, 30 P.3d at 1120*; *Cleghorn, 109 Nev. at 548, 853 P.2d at 1262*.

[13] *Banks v. Sunrise Hospital, 120 Nev. ___, ___, 120 Nev. 822, 102 P.3d 52, 71 (2004)* (Maupin, J., concurring in part and dissenting in part).

warrant. [14] In *Born v. Eisenman*, this court noted that:

> "All a plaintiff need do to warrant an instruction under the statutory medical malpractice res **[***9]** ipsa loquitur rule is present *some* evidence of the existence of one or more of the factual predicates enumerated in the statute. *If the trier of fact then finds* that one or more of the factual predicates exist, then the presumption must be applied. This is the approach taken in Nev. J.I. 6.17."

[15]

HN6[↑] NRS 41A.100(1)(a) sets forth the specific exception involved in this case and states that expert testimony is not required in instances **[*458]** where a foreign object is unintentionally left in the patient's body following surgery. [16]

[*10]** In contrast, ***HN8***[↑] NRS 41A.071 requires the dismissal of a medical malpractice action filed without an affidavit from a medical professional practicing in a substantially similar field. [17] **[***11]** As this court recently noted in *Borger v. District Court*, the plain language of NRS 41A.071 provides a threshold requirement for medical malpractice pleadings and does not pertain to evidentiary matters at trial, as does NRS 41A.100(1). [18] However, in a footnote, this court in *Borger* noted the apparent conflict between NRS 41A.071 and NRS 41A.100(1) but left the issue unresolved because NRS 41A.100(1) was not at play in that case. [19]

HN10[↑] The language of these two statutes is unambiguous. However, when read together, the statutes are in conflict because NRS 41A.100(1) permits a jury to infer negligence without expert testimony at trial, [20] **[***12]** whereas ***[**204]*** NRS 41A.071 requires dismissal whenever the expert affidavit requirement is not met. [21] Accordingly, we agree with Szydel that requiring an expert affidavit at the start of a malpractice action, while permitting the plaintiff to proceed at trial without the need to produce expert testimony under the res ipsa loquitur doctrine, leads to an absurd result. Enforcing this requirement in a res ipsa case would do little to advance the primary goal **[*459]** of the expert affidavit requirement, which is to deter frivolous litigation and identify meritless malpractice lawsuits at an early stage. [22]

In *Palanque v. Lambert-Woolley*, [23] the New Jersey Supreme Court held that New Jersey's statutory affidavit

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[14] *Born v. Eisenman, 114 Nev. 854, 859, 962 P.2d 1227, 1230 (1998).*

[15] *Id.* (quoting *Johnson v. Egtedar, 112 Nev. 428, 434, 915 P.2d 271, 274 (1996)).*

[16] NRS 41A.100(1)(a) provides:

> 1. ***HN7***[↑] Liability for personal injury or death is not imposed upon any provider of medical care based on alleged negligence in the performance of that care unless evidence consisting of expert medical testimony, material from recognized medical texts or treatises or the regulations of the licensed medical facility wherein the alleged negligence occurred is presented to demonstrate the alleged deviation from the accepted standard of care in the specific circumstances of the case and to prove causation of the alleged personal injury or death, except that such evidence is not required and a rebuttable presumption that the personal injury or death was caused by negligence arises where evidence is presented that the personal injury or death occurred in any one or more of the following circumstances:
>
> (a) A foreign substance other than medication or a prosthetic device was unintentionally left within the body of a patient following surgery.

[17] NRS 41A.071 provides:

> ***HN9***[↑] If an action for medical malpractice or dental malpractice is filed in the district court, the district court shall dismiss the action, without prejudice, if the action is filed without an affidavit, supporting the allegations contained in the action, 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 malpractice.

[18] *120 Nev. at ___, 102 P.3d at 605.*

[19] *Id. at ___ n.25, 102 P.3d at 604 n.25.*

[20] *Born, 114 Nev. at 859, 962 P.2d at 1230.*

[21] *Borger, 120 Nev. at ___, 102 P.3d at 606.*

[22] *See id.* ("The underlying purpose of [NRS 41A.071] . . . is to ensure that such actions be brought in good faith based upon competent expert opinion. In this, the statute clearly works against frivolous lawsuits filed with some vague hope that a favorable expert opinion might eventually surface.").

[23] *168 N.J. 398, 774 A.2d 501 (N.J. 2001).*T

requirement does not apply to "common knowledge" malpractice cases where ""'jurors' common knowledge as lay persons is sufficient to enable them, using ordinary understanding and experience, to determine a defendant's negligence without the benefit of the specialized knowledge of experts."'" [24] The New Jersey court noted that in such a case "whether a plaintiff's claim meets the [required] threshold of merit can be determined on the face of the complaint." [25] The court reasoned that

> requiring an affidavit of merit in such a case is not necessary to achieve the primary goal **[***13]** of the statute, that is, to weed out meritless malpractice lawsuits at an early stage and to prevent frivolous litigation. Indeed, recognition of the common knowledge exception allows meritorious claims to move forward without the added, and in those cases unnecessary, cost of hiring an expert to execute an affidavit when that expert will not testify at trial.

[26]

For the same reasons, we conclude that ***HN11***[↑] requiring an expert affidavit in a res ipsa case under NRS 41A.100(1) is unnecessary. As this court has noted, the purpose of the expert affidavit requirement is to lower costs, reduce frivolous lawsuits, and ensure that medical malpractice actions are filed **[***14]** in good faith based upon competent expert medical opinion. [27] **[***15]** NRS 41A.071 was intended to substitute the medical-legal screening panel with a less expensive process that continues to deter frivolous lawsuits. [28] Undeniably, the res ipsa loquitur doctrine codified in NRS 41A.100 permits medical malpractice claims to go forward without expert testimony when the plaintiff is able to present some evidence that one or more of the factual situations enumerated in NRS 41A.100(1)(a)-(e) exist. [29] **[*460]** These are factual situations where the negligence can be shown without expert medical testimony, as when a foreign substance is found in the patient's body following surgery, NRS 41A.100(1)(a), or when a surgical procedure is performed on the wrong limb of the patient's body, NRS 41A.100(1)(e). It would be unreasonable to require a plaintiff to expend unnecessary effort and expense to obtain an affidavit from a medical expert when expert testimony is not necessary for the plaintiff to succeed at trial. [30]

HN12[↑] At the same time the Legislature added NRS 41A.071, it amended the expert testimony requirement contained in NRS 41A.100(2) to add the "substantially similar" medical field language contained in NRS 41A.071. [31] This requirement that the testimony of a medical care provider be from someone in a **[**205]** substantially similar field relates back to the statement of what medical testimony is admissible under NRS 41A.100(1). The res ipsa loquitur exception is contained at the end of NRS 41A.100(1). If the Legislature had wanted NRS 41A.100 to fall within the ambit of NRS 41A.071, it had the opportunity to accomplish that goal while making the noted change. The fact that it declined to do so indicates to us that the Legislature did not want to extend the affidavit **[***16]** requirement to res ipsa loquitur cases.

HN13[↑] When, however, a plaintiff files a res ipsa loquitur claim in conjunction with other medical malpractice claims that do not rely on the res ipsa loquitur doctrine, those other claims are subject to the requirements of NRS 41A.071 and must be supported by an appropriate affidavit from a medical expert. [32] In addition, any res ipsa claim filed without an expert

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[24] Id. at 506 (quoting Hubbard ex rel. Hubbard v. Reed, 168 N.J. 387, 774 A.2d 495, 499 (N.J. 2001) (quoting Chin v. St. Barnabas Medical Center, 160 N.J. 454, 734 A.2d 778, 785 (N.J. 1999))).

[25] Id.

[26] Id.

[27] Borger, 120 Nev. at ___, 102 P.3d at 606.

[28] Id. at ___, 102 P.3d at 604.

[29] Born, 114 Nev. at 859, 962 P.2d at 1230.

[30] Palanque, 774 A.2d at 506.

[31] See 2002 Nev. Stat. Spec. Sess., ch. 3, § 12, at 9-10.

[32] Although Dr. Markman disputes the fact that his actions, as a matter of law, meet the requirements of res ipsa loquitur under NRS 41A.100(1)(a), the district court did not rule on the issue but dismissed Szydel's claim due to her failure to submit an affidavit as required by NRS 41A.071. The application of Nevada's res ipsa statute to the factual circumstances of Szydel's claim should be addressed by the district court if raised on remand. Consequently, we do not consider Dr. Markman's contention.

affidavit must, when challenged by the defendant in a pretrial or trial motion, meet the prima facie requirements for a res ipsa loquitur case. Consequently, the plaintiff must present facts and evidence that show the existence of one or more of the situations enumerated in NRS 41A.100(1)(a)-(e). While the dissent disapproves this procedure because it is not specifically set forth in the statute, we believe it is only fair that a plaintiff filing a res ipsa loquitur case be required to show early in **[***17]** the litigation process that his or her action actually meets the narrow **[*461]** res ipsa requirements. Of course, as recognized by the *Palanque* court, ***HN14***[↑] "'the wise course of action in all malpractice cases would be for plaintiffs to provide affidavits even when they do not intend to rely on expert testimony at trial.'" [33]

Because we conclude that the expert affidavit requirement **[***18]** in NRS 41A.071 does not apply to a res ipsa loquitur case under NRS 41A.100(1), we reverse the district court's order dismissing the complaint and remand this case to the district court for proceedings consistent with this opinion. In light of our disposition, we do not reach appellant's other arguments.

GIBBONS, J., concurs.

Dissent by: HARDESTY

Dissent

HARDESTY, J., dissenting:

The majority improperly compares two independent legal concepts within NRS Chapter 41A, one a jurisdictional requirement and the other a rule of evidence, to circumvent the clear and unambiguous filing requirements that provide a district court with jurisdiction over a medical malpractice case. The affidavit requirement of NRS 41A.071 is jurisdictional in nature, intended to prevent frivolous lawsuits and ensure that medical malpractice cases are filed in good faith based on competent expert opinion. [1] NRS 41A.100, Nevada's limited codification of res ipsa loquitor, is a rule of evidence creating the rebuttable presumption that a defendant is negligent in medical malpractice cases.

[*19]** Szydel's malpractice action focuses on the retained foreign object provisions of NRS 41A.100. Although retained foreign object cases frequently demonstrate clear examples of medical malpractice, that is not always the case. Szydel initially filed a complaint with the medical-legal screening panel, claiming that medical malpractice occurred based on the temporary retention of a needle during a bilateral mastopexy. The retained needle was removed before post-operative recuperation. The panel dismissed her claim without prejudice because she failed to procure an expert opinion stating that negligence occurred. After Szydel's case was dismissed by the medical-legal screening panel, Szydel filed a complaint in district court under NRS 41A.100. Again, however, Szydel failed to provide an expert opinion after the district court gave her several extensions of time to do so. Without an expert opinion, the district **[**206]** court dismissed the case. Szydel conceded that she was never able to procure an expert opinion to meet the requirements of the medical-legal screening panel or NRS 41A.071. In spite of Szydel's futile **[***20]** efforts to **[*462]** procure an expert opinion, the majority breathes new life into a case that lacks merit and was properly dismissed under NRS 41A.071.

General rules of statutory construction apply in this instance. It is well-established that the language of a statute should be given its plain meaning unless, in so doing, the spirit of the act is violated. [2] "Thus, when 'a statute is clear on its face, a court may not go beyond the language of the statute in determining the legislature's intent.'" [3] An ambiguous statute, however, which "'is capable of being understood in two or more senses by reasonably informed persons,'" or one that otherwise does not speak to the issue before the court, may be examined through reason and consideration of public policy to determine the legislature's intent. [4] "'The meaning of the words used may be determined by examining the context and the spirit of the law or the

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[33] 774 A.2d at 507 (quoting Hubbard, 774 A.2d at 501).

[1] See Borger v. Dist. Ct., 120 Nev. ___, ___, 120 Nev. 1021, 102 P.3d 600, 606 (2004).

[2] University Sys. v. Nevadans for Sound Gov't, 120 Nev. ___, ___, 120 Nev. 712, 100 P.3d 179, 193 (2004).

[3] Id. (quoting McKay v. Bd. of Supervisors, 102 Nev. 644, 648, 730 P.2d 438, 441 (1986)).

[4] Id. (quoting McKay, 102 Nev. at 649, 730 P.2d at 442); Clark County v. Sun State Properties, 119 Nev. 329, 334, 119 Nev. 329, 72 P.3d 954, 957 (2003).

causes which induced the legislature to enact it.'" [5] In addition, "when the legislature enacts a statute, this court presumes that it does so 'with full knowledge of existing statutes relating to the same subject.'" [6] Further, "when separate statutes are potentially **[***21]** conflicting, [this court] attempts to construe both statutes in a manner to avoid conflict and promote harmony." [7]

NRS 41A.071 **[***22]** is clear and unambiguous, providing that "the district court shall dismiss the action, without prejudice, if the action is filed without an affidavit." The plain meaning of the statute clearly intends to prevent fraudulent claims from being filed. Generally, in res ipsa loquitor cases involving retained foreign objects, the affidavit requirement of NRS 41A.071 should be relatively easy to satisfy; however, if the affidavit requirement is not met, the case must be dismissed under NRS 41A.071.

My colleagues reach a conclusion that NRS 41A.071 and NRS 41A.100, when read together, conflict because NRS 41A.100(1) permits a jury to infer negligence without any expert testimony at trial, whereas NRS 41A.071 requires dismissal whenever the expert affidavit requirement is not met.

[*463] The affidavit requirement is not susceptible to two meanings, and it cannot be read to say that the need for an affidavit in a res ipsa case has been excused or not addressed by our Legislature. An affidavit is required in all cases.

The plain meaning of both **[***23]** statutes is not in conflict and can be harmonized. NRS 41A.071 is a procedural rule that requires a sworn affidavit from a medical professional before the district court may entertain a medical malpractice claim. Once a party has met that initial requirement, the district court must later determine during trial whether, as a matter of law, the res ipsa loquitor rule in NRS 41A.100 applies, which allows the plaintiff to proceed to the jury without producing expert testimony regarding negligence and causation on the part of the defendant.

Without applying the affidavit requirement of NRS 41A.071 to res ipsa loquitor cases, even the most frivolous of res ipsa claims could be brought to district court. Further, the purpose behind NRS 41A.071, to reduce frivolous lawsuits that have "some vague hope that a favorable expert opinion might eventually surface," [8] would be thwarted. It **[**207]** is unlikely that the Legislature intended cases to be excluded from a review for frivolity under NRS 41A.071. Instead, the Legislature more likely intended that a party bringing a **[***24]** res ipsa case would establish, through a medical expert opinion, that the party's case is not frivolous, regardless of whether the party would produce expert opinion evidence later in trial. The approach taken by the majority runs contrary to the goals of NRS 41A.071 because, by the time a decision is made on whether a party is entitled to the res ipsa instruction, a substantial amount of time, energy, and money in discovery and trial is expended.

The majority suggests a remedy if an expert opinion is not required with the complaint filing and the res ipsa loquitor instruction is later denied. They conclude that the case must be dismissed. Nothing in the statutory structure of NRS Chapter 41A provides for such a procedure or dismissal. The better approach is to require the medical affidavit initially, even if a party does not intend to rely later on expert testimony at trial.

For these reasons, I would affirm the dismissal **[***25]** by the district court.

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[5] *University Sys., 120 Nev. at ___, 100 P.3d at 193* (quoting *McKay, 102 Nev. at 650-51, 730 P.2d at 443*).

[6] *State, Div. of Insurance v. State Farm, 116 Nev. 290, 295, 995 P.2d 482, 486 (2000)* (quoting *City of Boulder v. General Sales Drivers, 101 Nev. 117, 118-19, 694 P.2d 498, 500 (1985)*).

[7] *Beazer Homes Nevada, Inc. v. Dist. Ct., 120 Nev. 575, 587, 120 Nev. 575, 97 P.3d 1132, 1140 (2004)*.

[8] *Borger, 120 Nev. at ___, 102 P.3d at 606*.

Kinford v. Bannister

United States District Court for the District of Nevada

December 18, 2012, Decided; December 18, 2012, Filed

3:11-cv-00701-RCJ-WGC

Reporter
913 F. Supp. 2d 1010 *; 2012 U.S. Dist. LEXIS 179416 **; 2012 WL 6627995

STEVEN KINFORD, Plaintiff, vs. ROBERT BANNISTER, et al., Defendants.

Prior History: *Kinford v. Bannister, 2012 U.S. Dist. LEXIS 176066 (D. Nev., July 27, 2012)*

Core Terms

ipsa, ***medical malpractice***, surgery, proposed amended complaint, Recommendation, allegations, deliberate indifference, implants, affidavit requirement, ***medical malpractice*** action, screws, motion to dismiss, motion to amend, viable, statute of limitations, futile, inmate, prison, doctrine of ***res ipsa*** loquitur, serious medical needs, ***res ipsa*** loquitur, viability, issues, amend, avers, color, ***medical malpractice*** claim, professional negligence, proposing amendment, asserting

Counsel: **[**1]** Steven Kinford, Plaintiff, Pro se, Carson City, NV.

For Robert Bannister, Dr. Marsha Johns, David Marr, Defendants: Jeffrey Paul Hoppe, LEAD ATTORNEY, Nevada Office of the Attorney General, Carson City, NV; Nathan L Hastings, Nevada Attorney General's Office, Carson City, NV; Troy C Jordan, Reno, NV.

For Dr. Philip Schlager, terminated 11/27/2012 per #77 Order on Stipulation, Defendant: Edward J. Lemons, Alice C Mercado, Lemons, Grundy & Eisenberg, Reno, NV.

Judges: WILLIAM G. COBB, UNITED STATES MAGISTRATE JUDGE.

Opinion by: WILLIAM G. COBB

Opinion

[*1012] ORDER

Before the court is Plaintiff's "Motion for Leave to File An Amended Civil Rights Complaint" (Doc. # 76). Defendants Bannister, Johns and Mar have filed a "limited opposition" to the motion, mainly on the grounds that Plaintiff "fails to attach his amended complaint so that it is full and complete in and of itself . . . ." (Doc. # 78 at 2.) However, it appears that Defendants' counsel overlooks document 76-1 which, although not labeled as such, is Plaintiff's proposed amended complaint (Doc. # 76-1, Exh. 5, pp. 2-16). Thus, Plaintiff has complied **[*1013]** with both LR 15-1(a) and this court's minute order of 10/19/12 (Doc. # 73).

The essence of the motion to amend is that Plaintiff **[**2]** states he was mistakenly operating under the assumption that Dr. Philip Schlager performed the surgery of which he originally complained. [1] When he discovered that Dr. James Pincock, and not Dr. Schlager, was the surgeon involved with his treatment, Plaintiff agreed to dismiss Dr. Schlager from this action (Doc. ## 73, 74); Dr. Schlager was dismissed on 11/27/12 (Doc. # 77). The proposed amended complaint asserts the same allegations which were averred against Dr. Schlager as against Dr. Pincock, i.e., common law negligence claims and an *Eighth Amendment* claim of deliberate indifference to Plaintiff's serious medical needs. (Doc. 76-1 at 10-11.)

I. Legal Standards

Amendment of complaints should not be granted where

[1] He alleged Dr. Schlager failed to remove surgical hardware previously implanted in Plaintiff's face following reconstructive surgery necessitated by a motorcycle accident.

the proposed amendment would be futile. Foman v. Davis, 371 U.S. 178, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962). A proposed amended complaint should be rejected where it could not survive a motion to dismiss. See, e.g., Rodriguez v. U.S., 286 F. 3d 972, 980 (7th Cir. 2002); Rose v. Hartford Underwriters Ins. Co., 203 F. 3d 417, 420 (6th Cir. 2000). **[**3]** Because Defendants were apparently unaware Plaintiff's motion (Doc. # 76) included a proposed amended complaint (Doc. # 76-1), Defendants did not substantively respond to Plaintiff's motion. As reflected herein, Defendants will be afforded another opportunity to do so. However, in the interim, the court will provide certain initial observations the court has regarding the viability of the proposed claims asserted against Dr. Pincock. [2]

II. Analysis of Proposed Amended Complaint

A. Common Law Claims of Professional Negligence (*Medical Malpractice*)

(1) Absence of *Medical Malpractice* Affidavit

Plaintiff's proposed common law claims against Dr. Pincock do not satisfy NRS 41A.071. In this court's Report and Recommendation of 7/27/12 (Doc. # 47) regarding Dr. Schlager's motion to dismiss (Doc. # 39), this court noted that under Nevada state law, a "malpractice action" is "void *ab initio*" if the complaint is not accompanied by an affidavit of a qualified health care professional attesting to the alleged professional **[**4]** negligence. Report and Recommendation, Doc. # 47 at 10, citing Nev. Rev. Stat. 41A.071 and Washoe Med. Ctr. v. Second Judicial Dist. Ct., 122 Nev. 1298, 148 P. 3d 790, 794 (2006).

Subsequent to the issuance of this court's Report and Recommendation on Dr. Schlager's motion to dismiss, the Hon. Robert C. Jones, District Judge, issued an order which dealt with, *inter alia*, the affidavit requirement of Nev. Rev. Stat. 41A.071. (Doc. # 79.) Although Judge Jones noted Dr. Schlager's motion to dismiss was moot by reason of the parties' stipulation and the court's order dismissing Defendant Schlager (Doc. # 77), Judge Jones further determined that a "pure issue of law" remained, i.e., the ***medical malpractice*** affidavit requirement, which was not mooted by reason of Plaintiff's **[*1014]** motion to amend. (Doc. # 79 at 1.) Judge Jones concluded the medical affidavit is a non-waivable condition precedent to the commencement of a ***medical malpractice*** lawsuit governed by Nevada law. (*Id.* at 2.) His decision has become the "law of the case" in this matter and would govern, as Judge Jones noted, Plaintiff's attempt to effect an amendment of his action to allege a standard ***medical malpractice*** claim against Dr. Pincock. (*Id.* at 1.) **[**5]** As such, Plaintiff's motion to amend to assert a ***medical malpractice*** action in the absence of the appropriate affidavit is futile and must be denied in accordance with Judge Jones' order herein.

Apparently anticipating this probable objection to his proposed amended complaint, Plaintiff seeks to be excused from Nevada's statutory affidavit requirement by contending in his motion he is a confined inmate and does not have access to medical personnel. (Doc. # 76 at 8.) He asserted a similar argument in his objection to the Report and Recommendation (Doc. # 75 at 2-3). [3] Whether the law affords Plaintiff relief from the affidavit requirements of Chapter 41A because of his prisoner status does not appear to have been specifically adjudicated, but the decision of Judge Jones herein, and the opinions of the Nevada Supreme Court, leave little doubt that ***medical malpractice*** actions filed without the statutorily-required affidavit do not state a claim for relief and that no exceptions to this obligation would seemingly be authorized. [4]

In *Borger v. Eighth Judicial Dist. Court*, the Nevada Supreme Court, albeit in *dicta*, concluded "NRS 41A.071 clearly mandates dismissal, *without leave to amend*, for complete failure to attach an affidavit to the complaint. This interpretation is consistent with the underlying purpose of the measure, which is to ensure that such actions be brought in good faith based upon competent expert opinion." 120 Nev. 1021, 1029, 102 P.3d 600, 606 (2004) (emphasis added); *accord* Collins v. MacArthur, No. 3:05-cv-237-PMP-VPC, 2006 U.S. Dist. LEXIS 101111, 2006 WL 1966728, at *2 (D. Nev. 2006); *cf.* Washoe Med. Ctr. v. Second Judicial Dist. Court of State of Nevada ex rel. County of Washoe, 122

[2] This order is not a Report and Recommendation on the matter of plaintiff's motion to amend. That will follow later after further briefing, if any, on the issues addressed herein.

[3] This contention was not addressed in Judge Jones' order (Doc. # 79).

[4] Discussed *infra* in § II A (2) is whether the affidavit requirement may be bypassed by the **[**6]** Nevada Legislature's codification of certain ***res ipsa*** *loquitur* exceptions in ***medical malpractice*** actions.

Nev. 1298, 1303-04, 148 P.3d 790 (2006) (holding "a ***medical malpractice*** complaint filed without a supporting medical expert affidavit is void ab initio . . ." and, as a consequence, "it does not legally exist and thus it cannot be amended [under Rule 15(a) of the Nevada Rules of Civil Procedure]"); Fierle v. Perez, 125 Nev. 728, 219 P.3d 906, 914 (Nev. 2009) (concluding "***medical malpractice*** and professional negligence claims made in a complaint **[**7]** that become void ab initio for lack of the attachment of an expert affidavit may not be cured by the amendment of that complaint . . . .").

Thus, plaintiff's attempts to amend his action to assert a standard ***medical malpractice*** action without the affidavit required by Nev. Rev. Stat. 41A.071 is futile and will be denied in due course. [5]

(2) Whether Plaintiff Articulates a Viable "*Res Ipsa*" Claim under *Nev. Rev. Stat. 41A.100*

Although not clearly articulated, Plaintiff's motion and proposed amended **[*1015]** complaint suggest another ground upon which Plaintiff might be relieved of the affidavit requirement that a medical negligence cause of action may be pursued without an affidavit, i.e., under the ***res ipsa*** *loquitur* doctrine. At page 7 of Plaintiff's motion, he makes reference to this doctrine, asserting that a ***medical malpractice*** action which is predicated **[**8]** upon the ***res ipsa*** *loquitur* doctrine is exempted from the affidavit requirements of Nev. Rev. Stat. 41A.071. (Doc. # 76 at 7.) The court will preliminarily examine the viability of such allegations, recognizing that *pro se* inmate civil rights cases are to be liberally interpreted. Karim-Panahi v. Los Angeles Police Department, 839 F.2d 621, 623 (9th Cir. 1988).

Nev. Rev. Stat. 41A.100 "codified" the common law ***res ipsa*** *loquitur* doctrine as it applies to certain ***medical malpractice*** events. Szydel v. Markman, 121 Nev. 453, 117 P.3d 200 (Nev. 2005); Fierle v. Perez, 125 Nev. 728, 219 P.3d 906 (Nev. 2009). Where a ***medical malpractice*** action is founded upon one of certain events enumerated in Nev. Rev. Stat. 41A.100, a plaintiff is not only exempted from having to present expert testimony at trial to present a viable case in chief, but the affidavit requirement is waived as well. An example of a ***res ipsa*** claim is where ". . . a foreign substance other than medication or a prosthetic device was unintentionally left with the body of a patient following surgery . . . ." (*Id.* at Section (1)(a).)

The apparent conflict between Nev. Rev. Stat. 41A.071 (which requires a complaint to be accompanied by an expert affidavit attesting **[**9]** to the professional negligence of which a plaintiff complains) and Nev. Rev. Stat. 41A.100 (which allows a ***medical malpractice*** action predicated on one of the statutory five ***res ipsa*** circumstances to proceed without the required affidavit or expert testimony) was resolved in Szydel, supra. In that case the Nevada Supreme Court ". . . concluded that the expert affidavit requirement does not apply when the malpractice action is based solely on the ***res ipsa*** *loquitur* doctrine." Fierle, supra, 219 P.3d at 913, citing Szydel, 121 Nev. at 454.

Herein, Plaintiff states "this claim is brought pursuant to the doctrine of ***res ipsa*** loquitur and Plaintiff is not required to provide an affidavit in support of his civil complaint," citing NRS 41A.071, NRS 41A.100 and Fierle v. Perez, 125 Nev. 728, 219 P3d 906 (Nev. 2009). (Doc. # 76 at 7-8.) In an apparent attempt to plead a ***medical malpractice/res ipsa*** *loquitur* claim, Plaintiff avers Dr. Pincock failed to remove broken screws, leaving "foreign material in Plaintiff's face." (*Id.* at 5.) He alleges Dr. Pincock failed to remove implants (*id.* at 10-11). The question becomes whether these averments constitute viable ***res ipsa*** allegations under the provisions of Nev. Rev Stat. 41A.100. **[**10]** For the reasons outlined herein, the court concludes they do not.

Nev. Rev. Stat. 41A.100 requires expert testimony or material from recognized medical texts or treatises to demonstrate the alleged deviation from the accepted standard of care. However, the Nevada legislature in that statute also codified the ***res ipsa*** *loquitur* doctrine in the ***medical malpractice*** arena by adopting five circumstances where professional testimony/learned treatises are not required to establish malpractice. More importantly and as applicable herein, a complaint which avers a prima facie case under any one of the five statutory exceptions is also relieved from the affidavit requirement of Nev. Rev. Stat. 41A.071. Fierle, supra, at 913.

The issue thus becomes when has a ***res ipsa*** plaintiff satisfactorily averred a viable ***medical malpractice***

[5] Although this court's decision on the waiver of the affidavit requirement is "dispositive" in nature, the conclusion reached herein is required in any event by Judge Jones ruling (Doc. # 79). Nevertheless, it will be again addressed in the eventual Report and Recommendation this court will be issuing with respect to Plaintiff's motion to amend.

action. The Nevada cases do not speak to the standards to be **[*1016]** employed with regard to *pleading* standards attendant to Nev. Rev. Stat. 41A.100, such as herein in the context of a motion to amend (which should not be granted if the proposed amendment is futile). In *Szydel*, the Nevada Supreme Court stated that a "***res ipsa*** claim filed without an expert affidavit must, when challenged **[**11]** by the defendant in a pretrial or trial motion, meet the prima facie requirements for a ***res ipsa*** *loquitur* case." Szydel, supra, at 205. When such a challenge is mounted, "the plaintiff must present facts and evidence that show the existence of one or more of the situations enumerated in NRS 41A.100(1)(a)-(e)." (*Id.*)

While the Nevada Supreme Court noted a medical defendant can challenge the viability of a ***medical malpractice/res ipsa*** action via a motion, the court did not give any guidance as to evaluating ***res ipsa*** exception allegations at initial stages, such as herein where Plaintiff seeks to amend his complaint to assert a ***medical malpractice*** action based upon ***res ipsa*** standards. However, as discussed above, an amendment which is obviously futile must not be allowed to proceed. Similarly, the Nevada Supreme Court held that the legislative purpose of enacting Chapter 41A was ". . . to ensure that parties *file* malpractice cases in *good faith*, *i.e.*, to prevent the *filing* of *frivolous* lawsuits." Borger, supra, at 604; footnote omitted; emphasis added. Accordingly, an amendment which asserts a frivolous action or is not lodged in good faith should not be allowed to be filed.

Thus, while **[**12]** post-screening processes allow a defendant to challenge the viability of a ***res ipsa medical malpractice*** claim (e.g., a motion to dismiss under Fed. R. Civ. P 12(b)), it would nonetheless appear that the court would be shirking its obligations of not prohibiting futile amendments if on the face of the complaint the allegations were not lodged in good faith, were "frivolous" or simply fail to state a claim under Nev. Rev. Stat. 41A.100. Presumably the court could allow such claims to proceed under the expectation that at some point in time the defendant doctor would lodge a challenge to the non-affidavit, ***res ipsa*** complaint. But to again quote the Nevada Supreme Court, the "legislative package" of Chapter 41A was intended ". . . to prevent the *filing* of frivolous lawsuits." Borger, supra; emphasis added. If the proposed amendment was invalid on its face, the court would be permitting a frivolous lawsuit to be *filed* in contravention to the intent of Nev. Rev. Stat. 41A.100 and also in contravention to the authorities cited in § I herein that a proposed amended complaint should be rejected where it could not survive a motion to dismiss.

Thus, the court must turn to the question of whether **[**13]** Plaintiff's proposed amended ***medical malpractice*** complaint, filed without an affidavit, may nonetheless proceed under one of the ***res ipsa*** *loquitur* provisions of Nev. Rev. Stat 41A.100. The only possible section of Nev. Rev. Stat. 41A.100 which might apply to plaintiff allegations would be 1(a) thereof, i.e., a "foreign substance other than medication or a prosthetic device . . . unintentionally left within the body of a patient following surgery."

Without specifically citing Nev. Rev. Stat. 41A.100(1)(a), Plaintiff's averments seem to possibly implicate this section by alleging Dr. Pincock failed to remove broken screws and implants, leaving "foreign materials in Plaintiff's face." (Doc. # 76 at 5, 10-11). However, these screws, implants or foreign materials were not alleged by plaintiff to have been placed within Plaintiff's body *during* Dr. Pincock's surgery. Instead, these materials were originally implanted by Washoe Medical Center physicians when Plaintiff "underwent extensive **[*1017]** reconstructive surgery to his face" following a motorcycle accident: "plates and screws were placed under the front facial skin areas of plaintiff" (*id*). He claims that his body started rejecting these implants **[**14]** and was referred to Dr Schlager who "recommended" corrective surgery, i.e., remove and/or repair of screws and plates in plaintiff's face." (*id*). Plaintiff thereafter underwent "corrective surgery" in January, 2009" (*id*) and now avers Dr. Pincock "failed to remove all foreign material from his face" and also "failed to remove a broken screw and/or metal plate." (*Id.* at 6-7; *see also* Doc. # 76-1 at 5 and 10.) [6]

It is the opinion and conclusion of this court, however, that failing to remove *previously implanted* hardware, which is the gravamen of Plaintiff's ***res ipsa*** claim for relief, differs markedly from the statutory ***res ipsa*** circumstance of *leaving behind and failing to remove* such a device following surgery. For example, in *Szydel*, an unaccounted for surgical needle was, post-surgery, discovered by fluoroscopy to have been left "in

[6] At page 5 of his proposed amended complaint (Doc. # 76-1), Plaintiff alleges Dr. Pincock "broke a metal retaining screw and failed to repair a metal plate in plaintiff's face." These averments are clearly the subject of the 41A.071 expert affidavit and would not qualify as one of the ***res ipsa*** exceptions of 41A.100. *See*, Fierle, supra, 219 P.3d at 913-914.

[15]** the middle of Szydel's right breast." In the subsequent litigation, this omission was found to satisfy the ***res ipsa*** exception of Nev. Rev. Stat. 41A.100(1)(a). However, errantly leaving behind a surgical device which the physician used *during* surgery, is markedly different from not removing previously implanted hardware. While the failure to do so might conceivably constitute professional negligence (which would have to be the subject of a medical affidavit), such circumstances do *not* state a viable ***res ipsa*** claim under Nev. Rev. Stat. 41A.100(1)(a).

For the foregoing reasons, the court concludes Plaintiff's averments fail to state a viable Nev. Rev. Stat. 41A.100 ***res ipsa*** *loquitur* cause of action. For any ***medical malpractice*** claim to proceed herein, an affidavit under Nev. Rev. Stat. 41A.071 is a prerequisite to proceeding with a ***medical malpractice*** claim. Accordingly, the attempted amendment is futile and should be denied.

Thus, as this court concluded in its Report and Recommendation with respect to Plaintiff's common law malpractice claims against Dr. Schlager, and as Judge Jones affirmed, Plaintiff would *not* be relieved from his obligation to file an affidavit of a qualified medical **[**16]** practitioner asserting Dr. Pincock allegedly violated the standard of care with respect to his treatment of Plaintiff. For the reasons stated above, Plaintiff's failure to submit a medically competent affidavit with his complaint voids his action at the outset. Nor does the ***res ipsa*** *loquitur* provision of Nev. Rev. Stat. 41A.100(1)(a) afford Plaintiff any relief. Plaintiff's proposed amendment to assert a negligence action against Dr. Pincock would be futile because it could simply not state an actionable claim for relief. [7]

B. Section 1983 Claims: Deliberate Indifference to a Serious Medical Need and Statute of Limitations Issues.

Count II of the proposed amended complaint basically re-states an "*Eighth Amendment*" claim against Dr. Pincock as it formerly did as against Dr. Schlager (Doc. # 76-1 at 10). It alleges that former **[*1018]** defendant Dr. Schlager initially evaluated Plaintiff for possible corrective surgery "to remove and/or repair facial implants." (*Id.*) Plaintiff now avers, however, that NDOC **[**17]** thereafter hired Dr. Pincock "to perform the recommended procedures" and that on January 5, 2009,

> Defendant Pincock performed a portion of the recommended procedures, performing surgery to the facial areas of Plaintiff. Defendant Pincock failed to remove screws and/or implants, broke a screw during surgery, and failed to remove or repair other devices, thus leving (sic) foreign objects in plaintiff's face necessitating another corrective procedure.

(Doc. # 76-1 at 10.)

Plaintiff alleges that prior to performing the surgery, Dr. Pincock "touched the surface areas of Plaintiff's face with his fingers and could easily feel and determine the implants were loose and/or otherwise being rejected by Plaintiff's body causing severe pain." (*Id.* at 11.) The failure to remove or repair the "facial implants" Plaintiff alleges "resulted in further damage to the implants (broken screw) . . . [and] resulted in further infliction of severe pain, cruel and unusual punishment . . . ." (*Id.*) From these allegations, Plaintiff concludes that "Defendant Pincock's actions were negligent and/or deliberately indifferent to Plaintiff's serious medical needs." (*Id.* at 10-11.)

The "negligence" (i.e., ***medical malpractice***) **[**18]** component of Count II was resolved above. The two remaining § 1983 issues which are presented by the proposed amendment are (1) whether these averments state a viable *Eighth Amendment* cause of action of deliberate indifference to serious medical needs, and (2) whether the *Eighth Amendment* claims, assuming they are otherwise viable, are barred by the statute of limitations. The court will discuss these concerns in that order.

(1) Deliberate Indifference[8]

It is well-settled that ***medical malpractice*** does not become a constitutional violation merely because the Plaintiff is a prisoner. Estelle v. Gamble, 429 U.S. 97, 106, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976). Even gross negligence has not been shown to satisfy the deliberate indifference standard. Toguchi v. Chung, 391 F.3d 1051, 1060 (9th Cir. 2004). This has been described as

[7] Again, this order should not be interpreted as a Report and Recommendation on the disposition of Plaintiff's motion to amend to assert a ***medical malpractice res ipsa*** claim; that will follow later.

[8] For the purposes of this discussion, the court assumes Plaintiff's medical needs may be characterized as "serious." The issue addressed at this juncture is the viability of the allegations from a "deliberate indifference" standpoint.

a "high legal standard." (*Id.*) [9]

A prison physician is not deliberately indifferent to an inmate's serious medical need when the physician prescribes a different method of treatment than that requested by the inmate. *See* McGuckin, 974 F.2d at 1059 (explaining negligence in diagnosing or treating a medical condition, without more, does not violate a prisoner's *Eighth Amendment* rights). A difference of opinion concerning appropriate medical care — either between a physician and the prisoner, or between medical professionals — does not amount to deliberate indifference. Snow v. McDaniel, 681 F.3d 978, 987 (9th Cir. 2012) (citing Sanchez v. Vild, 891 F.2d 240, 242 (9th Cir. 1989)); *see also* Franklin v. Oregon, 662 F.2d 1337, 1344 (9th Cir. 1981) (difference of opinion between **[*1019]** a prisoner-patient and medical staff regarding treatment is not cognizable under *section 1983*).

For a difference of opinion to amount to deliberate indifference, the inmate "must show that the course of treatment the doctors **[**20]** chose was medically unacceptable under the circumstances" and that the course of treatment was chosen "in conscious disregard of an excessive risk to [the prisoner's] health." Snow, 681 F.3d at 988 (internal quotations and citation omitted); *accord* Jackson v. McIntosh, 90 F.3d 330, 332 (9th Cir. 1996).

In West v. Atkins, 487 U.S. 42, 108 S. Ct. 2250, 101 L. Ed. 2d 40 (1988), the United States Supreme Court concluded that "a physician who is under contract with the State to provide medical services to inmates at a state-prison hospital on a part time basis acts 'under color of state law' within the meaning of *§ 1983* when he treats an inmate." (*Id.*) The court also confirmed "that deliberate indifference to a prisoner's serious medical needs, whether by a prison doctor or prison guard, is prohibited by the *Eighth Amendment*." (Id., at 48; citations omitted.) Justice Scalia, in a concurring opinion, stated that

> ". . . a physician who acts on behalf of the State to provide needed medical attention to a person involuntarily in state custody (in prison or elsewhere) and prevented from otherwise obtaining it, and who causes physical harm to such person by deliberate indifference, violates the *Fourteenth Amendment's* protection **[**21]** against the deprivation of liberty without due process."

(Id, at 57; citations omitted.)

The court is mindful that it previously found similar allegations, accepted as true and liberally interpreted at this stage of proceedings, stated a colorable claim as against Dr. Pincock's predecessor, i.e., Dr. Schlager. (Report and Recommendation, Doc. # 47 at 8-9.) Because of the court's previous findings with respect to Dr. Schlager, and because similar averments are now being asserted against Dr. Pincock, logic would suggest the same conclusions should be reached as to Dr. Pincock, i.e., that Plaintiff states a colorable claim of deliberate indifference as against Dr. Pincock. Nevertheless, for the reasons stated above, the court will afford Defendants an opportunity, if desired, to contest the viability of the "deliberate indifference" claims Plaintiff seeks to assert in his proposed amended complaint as against Dr. Pincock.

(2) Statute of Limitations

Section 1983 does not contain its own statute of limitations. Therefore, the federal courts borrow the statute of limitations for § 1983 claims applicable to personal injury claims. Wilson v. Garcia, 471 U.S. 261, 279-80, 105 S. Ct. 1938, 85 L. Ed. 2d 254 (1985); Johnson v. State of California, 207 F.3d 650, 653 (9th Cir. 2000)(citation **[**22]** omitted). In Nevada, the statute of limitations for § 1983 actions is two years. Nev. Rev. Stat. § 11.190(4)(e); Perez v. Seevers, 869 F.2d 425, 426 (9th Cir. 1989). Under federal law, a cause of action accrues when the plaintiff knows or has reason to know of the injury which is the basis of the action. Bagley v. CMC Real Estate Corp., 923 F.2d 758, 760 (9th Cir. 1991).

"A statute of limitation defense may be raised by a motion to dismiss if the running of the limitation period is apparent on the face of the complaint." Vaughan v. Grijalva, 927 F.2d 476, 479 (9th Cir. 1991); *see also* Estate of Blue v. County of Los Angeles, 120 F.3d 982, 984 (9th Cir. 1997). Generally, the issue of equitable tolling cannot be decided on a motion to dismiss. *See* Supermail Cargo, **[*1020]** Inc. v. United States, 68 F.3d 1204, 1206 (9th Cir. 1995); Cervantes v. City of San Diego, 5 F.3d 1273, 1276 (9th Cir. 1993).

[9] It should be clarified that this court's discussion of Plaintiff's ***medical malpractice*** claims expressed no opinion that Dr. Pincock **[**19]** was or was not "negligent" with respect to his treatment of Plaintiff. Instead, this court's findings are limited to Plaintiff's noncompliance with Nevada's statutory scheme for bringing common law ***medical malpractice*** actions.

It is not clear from the face of the complaint when Plaintiff knew or should have known of his injury. At a hearing on this case on October 19, 2012, the court advised Plaintiff that the proposed amended complaint he was contemplating filing posed a potential problem with respect to whether the civil rights **[**23]** action he wanted to assert against Dr. Pincock might be barred by the statute of limitations. The court instructed Plaintiff to set forth in his motion "the reasons why discovery of the incorrectly named Defendant was not known earlier." (Doc. # 73 at 2.)

In response to the court's instructions, Plaintiff's motion states he "failed to properly identify James L. Pincock as the party who performed the corrective surgery on Plaintiff's face on January 5, 2009, due to Plaintiff's inability to receive and/or review medical files possessed by NDOC officials." (Doc. 76 at 4.) Plaintiff's representations in his motion to amend, although somewhat confusing, assert he did not have access to his complete medical files (he infers there may have been more than one such file to which he did not have earlier access). (*Id.*). He contends that his medical files were "re-organized" by NDOC and that these files were "presented in this arrangement for the first time to Plaintiff on November 2, 2012" (*id.*).

Thus, while Plaintiff's proposed amended complaint presents potential issues of such claims being barred by the statute of limitations, he nonetheless has provided a colorably credible explanation, at **[**24]** least for pleading purposes (which, again, are liberally interpreted because of Plaintiff's pro se status), for the delay in pursuing his claim against Dr. Pincock. However, as with the "deliberate indifference" issue, Defendants have not addressed the statute of limitations issue either and will be afforded the opportunity, if desired, to do so. [10]

[10] Also not addressed herein is the "State action" requirement of § 1983 cases. In this court's Report and Recommendation of July 27, 2012 (Doc. # 47), this court found that plaintiff alleged sufficient averments which could reasonably be interpreted that Dr. Schlager was acting under color of state law. (*id.* at 6-8). While this court suggested that such averments might be better challenged under a Motion for Summary Judgment, in the context of defendant Schlager's Motion to Dismiss, the court found that Dr. Schlager's "concession" that he "was a private physician who provided medical consulting services to an inmate at NDOC's request" was sufficient to state a viable color of state law claim (Doc. 47 at 7-8). *See, West v. Atkins, 487 U.S. 42, 108 S. Ct. 2250, 101 L. Ed. 2d 40 (1988).*

III. Conclusion

Because Defendants filed only a "Limited Opposition" to Plaintiff's motion, **[**25]** it appears Defendants' counsel overlooked Plaintiff's proposed amended complaint (Doc. # 76-1). Accordingly, Defendants will be provided the opportunity to submit a further response to Plaintiff's motion which seeks to amend the action by the proposed addition of Dr. Pincock, but only as to the proposed *Eighth Amendment* claims (the court has already concluded the common law negligence claims are void due to the absence of the required medical affidavit). Defendants shall have until **December 28, 2012**, to file any further supplemental response. Also, if Plaintiff desires, he may file a memorandum, also **on or before December 28, 2012**, with regard to the court's initial analysis of the ***res ipsa*** *loquitur* ***medical malpractice*** averments plaintiff is asserting here. The parties shall have until **January 14, 2013**, to file reply memoranda, if any. Following briefing, this court will issue a Report and **[*1021]** Recommendation on the issues raised in Plaintiff's motion to amend.

IT IS SO ORDERED.

DATED: December 18, 2012.

/s/ William G. Cobb

WILLIAM G. COBB

UNITED STATES MAGISTRATE JUDGE

End of Document

Banks v. Sunrise Hosp.

Supreme Court of Nevada

December 17, 2004, Decided

No. 38801

Reporter
120 Nev. 822 *; 102 P.3d 52 **; 2004 Nev. LEXIS 121 ***; 120 Nev. Adv. Rep. 89

OTHO LEE BANKS, AS GUARDIAN AD LITEM FOR JAMES LEE BANKS, JR.; AND JAMES LEE BANKS, JR., INDIVIDUALLY, Appellants/Cross-Respondents, vs. SUNRISE HOSPITAL, Respondent/Cross-Appellant.

Prior History: [*1]** Appeal and cross-appeal from a judgment on a jury verdict in a medical malpractice suit and appeal from an order denying a motion for a new trial. Eighth Judicial District Court, Clark County; Michael A. Cherry, Judge.

Disposition: Affirmed.

Core Terms

district court, damages, surgery, hedonic, anesthesia, jury instructions, machine, settlement, proximate, pain and suffering, expert testimony, jury award, contends, tortfeasor, comparative negligence, res ipsa loquitur, provides, new trial, sanctions, preserve evidence, settlement amount, cardiac arrest, anesthesiologist, malfunctioning, jurisdictions, malpractice, adverse inference, awarding damages, blood pressure, wrongful death

Case Summary

Procedural Posture
Plaintiff patient and his guardian ad litem sued defendants hospital, surgeon, and anesthesiologist, in the Eighth Judicial District, Clark County Court (Nevada). A jury found the hospital liable for the patient's injury and awarded substantial damages. It later denied the hospital's motion for a new trial. The hospital appealed, and the patient cross-appealed.

Overview
The patient, undergoing surgery, suffered cardiac arrest. The surgeon and anesthesiologist settled before trial. The trial court reduced the award by the settlement amount. The hospital alleged reversible errors occurred at trial, and the patient challenged the trial court's reduction of the award. Because the hospital's failure to document which machines were used prevented investigation of the machinery's functionality, there was no abuse of discretion in imposing sanctions, including allowing the jury to draw an adverse inference concerning the functionality of the equipment. There was not abuse of discretion in submitting a res ipsa loquitur instruction to the jury or in permitting expert testimony concerning the hospital's duty to sequester the equipment. Though the trial court erroneously permitted an award of hedonic damages, it was not prejudicial, as the jury could have added the hedonic loss to the pain and suffering award. The hospital's motion for a directed verdict was properly denied, as conflicting evidence existed as to whether the patient's brain injury was proximately related to rotator cuff surgery. The award was properly reduced by the settlement amount.

Outcome
The judgment was affirmed.

LexisNexis® Headnotes

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Civil Procedure > Appeals > Dismissal of Appeals > Involuntary Dismissals

***HN1*[↓] Trials, Judgment as Matter of Law**

An appeal does not lie from a district court order that denies a post-judgment motion for judgment notwithstanding the verdict.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Discovery & Disclosure > Discovery > Misconduct During Discovery

HN2[] Standards of Review, Abuse of Discretion

Discovery sanctions are within the power of the district court and an appellate court will not reverse the particular sanctions imposed absent a showing of abuse of discretion.

Evidence > Relevance > Preservation of Relevant Evidence > Spoliation

HN3[] Preservation of Relevant Evidence, Spoliation

When a potential for litigation exists, the litigant is under a duty to preserve evidence that it knows or reasonably should know is relevant to the action.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

HN4[] Standards of Review, Abuse of Discretion

A party is entitled to jury instructions on every theory of her case that is supported by the evidence. Appellate courts will review a district court's decision to give a particular instruction for an abuse of discretion or judicial error.

Evidence > Inferences & Presumptions > Presumptions > Rebuttal of Presumptions

Torts > ... > Proof > Res Ipsa Loquitur > Evidentiary Effect

Torts > Malpractice & Professional Liability > General Overview

Torts > Malpractice & Professional Liability > Healthcare Providers

Torts > ... > Proof > Res Ipsa Loquitur > General Overview

HN5[] Presumptions, Rebuttal of Presumptions

Nev. Rev. Stat. § 41A.100 has replaced the doctrine of res ipsa loquitur in medical malpractice cases. A rebuttable presumption of medical malpractice applies when the plaintiff has provided some evidence of one of the factual predicates enumerated in Nev. Rev. Stat. § 41A.100(1). Nev. Rev. Stat. § 41A.100(1)(d) provides that a rebuttable presumption of medical malpractice arises when the patient suffers an injury during the course of treatment to a part of the body not directly involved in the treatment or proximate thereto.

Evidence > ... > Testimony > Expert Witnesses > General Overview

HN6[] Testimony, Expert Witnesses

See Nev. Rev. Stat. § 20.275.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Evidence > Relevance > Exclusion of Relevant Evidence > Confusion, Prejudice & Waste of Time

Evidence > ... > Testimony > Expert Witnesses > General Overview

Evidence > Admissibility > Expert Witnesses

HN7[] Standards of Review, Abuse of Discretion

A district court may generally admit expert testimony on matters outside the average person's common understanding. Such testimony must also be relevant and its probative value must not be substantially outweighed by the danger of unfair prejudice. Because the admission of expert testimony is in the sound discretion of the district court, an appellate court will not reverse the district court's decision absent an abuse of discretion.

Healthcare Law > ... > Actions Against Facilities > Standards of Care > General Overview

Torts > ... > Standards of Care > Reasonable Care > General Overview

Evidence > ... > Testimony > Expert Witnesses > General Overview

Torts > Malpractice & Professional Liability > Healthcare Providers

HN8 **Actions Against Facilities, Standards of Care**

Pursuant to *Nev. Rev. Stat. § 41A.100(1)*, expert testimony is required in medical malpractice actions to establish the accepted standard of care.

Healthcare Law > ... > Actions Against Facilities > Standards of Care > General Overview

Torts > ... > Proof > Custom > Expert Testimony

Torts > Malpractice & Professional Liability > Healthcare Providers

Torts > ... > Duty > Standards of Care > General Overview

HN9 **Actions Against Facilities, Standards of Care**

Generally, a medical expert is expected to testify only to matters that conform to the reasonable degree of medical probability standard.

Torts > ... > Pain & Suffering > Emotional Distress > Evidence

Torts > ... > Types of Losses > Pain & Suffering > General Overview

Torts > ... > Pain & Suffering > Emotional Distress > General Overview

Torts > ... > Pain & Suffering > Emotional Distress > Loss of Enjoyment

HN10 **Emotional Distress, Evidence**

Hedonic loss has been described as damages for loss of enjoyment of life, compensation for the limitations, resulting from the defendant's negligence, on the injured person's ability to participate in and derive pleasure from the normal activities of daily life, or for the individual's inability to pursue his talents, recreational interests, hobbies, or avocations.

Evidence > Relevance > Exclusion of Relevant Evidence > Confusion, Prejudice & Waste of Time

Evidence > ... > Testimony > Expert Witnesses > General Overview

Evidence > Admissibility > Expert Witnesses > Helpfulness

HN11 **Exclusion of Relevant Evidence, Confusion, Prejudice & Waste of Time**

In Nevada, the district court has discretion to qualify a witness as an expert. If an expert's specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, the expert may testify to matters within the scope of such knowledge. *Nev. Rev. Stat. § 50.275*. This rule is tempered by *Nev. Rev. Stat. § 48.035(1)*, which prohibits the admission of relevant evidence where its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.

Torts > ... > Pain & Suffering > Emotional Distress > Loss of Enjoyment

Torts > ... > Types of Losses > Pain & Suffering > General Overview

HN12 **Emotional Distress, Loss of Enjoyment**

In cases permitting experts to testify as to the value of hedonic loss, economists have used various methods to arrive at their conclusions. One methodology for the valuation of hedonic damages is called the "willingness to pay" theory. There are two methods under the "willingness to pay theory." The first method, the "survey" method, asks people how much they are willing to spend to reduce the probability of death from 3

deaths per 20,000 to 1 death per 20,000. The second method, the "wage risk" method, examines the salary people in high fatality risk jobs receive and the amount of money people are willing to forego to work a lower fatality risk job.

Torts > ... > Pain & Suffering > Emotional Distress > Loss of Enjoyment

Torts > ... > Types of Losses > Pain & Suffering > General Overview

HN13[] Emotional Distress, Loss of Enjoyment

Hedonic damages may be included as an element of a pain and suffering award of damages.

Civil Procedure > Trials > Judgment as Matter of Law > Directed Verdicts

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

Civil Procedure > ... > Standards of Review > Substantial Evidence > General Overview

HN14[] Judgment as Matter of Law, Directed Verdicts

Nev. R. Civ. P. 50(a) states that a motion for a directed verdict shall be denied, if the evidence is sufficient to sustain a verdict for the opponent. The district court may not judge the credibility of the witnesses or the weight of the evidence. Further, if there is conflicting evidence on a material issue, or if reasonable persons could draw different inferences from the facts, the question is one of fact for the jury and not one of law for the court. In ruling on a directed verdict motion, the district court must view the evidence and all inferences therefrom in a light most favorable to the non-moving party. This same standard is applied on appeal.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

Civil Procedure > Judgments > Relief From Judgments > General Overview

Civil Procedure > Judgments > Relief From Judgments > Motions for New Trials

HN15[] Standards of Review, Abuse of Discretion

A district court's denial of a new trial motion is reviewed for an abuse of discretion.

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

Torts > ... > Proof > Res Ipsa Loquitur > General Overview

Civil Procedure > Judgments > Relief From Judgments > Motions for New Trials

HN16[] Jury Trials, Jury Instructions

Nev. R. Civ. P. 59(a)(5) provides that the district court may grant a new trial, if manifest disregard by the jury of the instructions of the court materially affected a party's substantial rights.

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

Torts > ... > Proof > Res Ipsa Loquitur > Evidentiary Effect

Civil Procedure > Judicial Officers > Masters > General Overview

Civil Procedure > Judgments > Relief From Judgments > Motions for New Trials

Criminal Law & Procedure > ... > Jury Instructions > Particular Instructions > Adverse Inferences

HN17[] Jury Trials, Jury Instructions

Nev. R. Civ. P. 59(a)(1) provides for a new trial upon a showing of irregularity in the proceedings of the court, jury, master, or adverse party, or any order of the court, or master, or abuse of discretion by which either party

was prevented from having a fair trial.

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

Civil Procedure > Judgments > Relief From Judgments > Motions for New Trials

HN18 **Jury Trials, Jury Instructions**

Nev. R. Civ. P. 59(a)(7) provides for a new trial upon a showing of error in law occurring at the trial and objected to by the party making the motion.

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

Torts > ... > Types of Losses > Pain & Suffering > General Overview

HN19 **Jury Trials, Jury Instructions**

In order to award damages for pain and suffering, a jury must find substantial evidence that the damages are probable.

Civil Procedure > ... > Jury Trials > Jurors > Misconduct

Torts > ... > Settlements > Multiple Party Settlements > Partial Settlements

Torts > Procedural Matters > Settlements > General Overview

Torts > ... > Settlements > Multiple Party Settlements > General Overview

HN20 **Jurors, Misconduct**

Nev. Rev. Stat. § 17.245(1)(a) allows a plaintiff to settle with one tortfeasor without losing the right to proceed against additional tortfeasors. However, to prevent double recovery to the plaintiff, the statute also provides that claims against nonsettling tortfeasors must be reduced by the amount of any settlement with settling tortfeasors. Moreover, while a plaintiff may proceed against an additional tortfeasor, in order to prevent improper speculation by the jury, the parties may not inform the jury as to either the existence of a settlement or the sum paid.

Torts > Procedural Matters > Settlements > General Overview

Torts > ... > Defenses > Comparative Fault > General Overview

Torts > ... > Comparative Fault > Multiple Parties > Absent Defendants

Torts > ... > Comparative Fault > Multiple Parties > Release & Settlement

Torts > Procedural Matters > Multiple Defendants > General Overview

HN21 **Procedural Matters, Settlements**

Nev. Rev. Stat. § 41.141(3) states that, if a codefendant settles with the plaintiff in a case in which the remaining defendant asserts a comparative negligence defense, the jury may not consider the codefendant's comparative negligence or the settlement amount.

Torts > ... > Defenses > Comparative Fault > Intentional & Reckless Conduct

Torts > ... > Defenses > Comparative Fault > General Overview

HN22 **Comparative Fault, Intentional & Reckless Conduct**

See Nev. Rev. Stat. § 41.141.

Civil Procedure > Settlements > Releases From Liability > Covenants Not to Sue

Torts > Procedural Matters > Multiple Defendants > Joint & Several Liability

Civil Procedure > Settlements > Releases From Liability > General Overview

HN23 **Releases From Liability, Covenants Not to Sue**

See Nev. Rev. Stat. § 17.245(1)(a).

Civil Procedure > Appeals > Standards of Review > De Novo Review

Governments > Legislation > Interpretation

HN24[↓] Standards of Review, De Novo Review

Statutory interpretation is a question of law and is reviewed de novo. When interpreting a statute, words are given their plain meaning, unless attributing the plain meaning would violate the spirit of the statute. If more than one reasonable meaning can be discerned from the statute's language, or it is ambiguous, the plain meaning rule does not apply. Instead, courts look to the statute's terms and context, along with reason and public policy to ascertain the legislature's intent. When interpreting a portion of a statute, courts read the statute as a whole and give meaning to all of its parts where possible. Finally, statutory interpretation should avoid absurd results.

Governments > Legislation > Statute of Limitations > General Overview

Torts > Malpractice & Professional Liability > Healthcare Providers

Torts > Procedural Matters > Statute of Limitations > General Overview

Torts > Wrongful Death & Survival Actions > Defenses > Statute of Limitations

HN25[↓] Legislation, Statute of Limitations

Nev. Rev. Stat. § 41A.097(1) states that an action for injury or death against a provider of health care may not be commenced more than four years after the date of injury. "Injury" pertains to legal injury. Because death is an essential element of a wrongful death claim, the legal injury is death.

Torts > Wrongful Death & Survival Actions > Remedies > General Overview

Torts > Wrongful Death & Survival Actions > General Overview

HN26[↓] Wrongful Death & Survival Actions, Remedies

A wrongful death claim pertains to the injury suffered by the heirs rather than by the decedent.

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Judges: MAUPIN, J., with whom BECKER, J., agreed, dissented in part.

Opinion by: AGOSTI, J.

Opinion

[*827] [56]** BEFORE THE COURT EN BANC.

By the Court, AGOSTI, J.:

On August 25, 1995, James Banks, Jr. (James), while undergoing rotator cuff surgery at Sunrise Hospital, suffered cardiac arrest. James has since that time persisted in a permanent vegetative state. James and his guardian ad litem, Otho Lee Banks (collectively, Banks) sued Sunrise Hospital, the surgeon and the anesthesiologist. The surgeon and anesthesiologist settled with Banks shortly before trial. A jury found Sunrise liable for James's **[***2]** injury and awarded substantial damages. Subsequently, the district court reduced the jury award by the sums paid by the surgeon and the anesthesiologist in settlement of Banks's claims against them and entered judgment in that amount. It later denied Sunrise's motion for a new trial. [1] Sunrise appeals, alleging that various reversible errors occurred at trial, and Banks cross-appeals, challenging the district

[1] Even though Sunrise states that it also appeals from the district court's order denying its motion for judgment notwithstanding the verdict, HN1[↑] an appeal does not lie from a district court order that denies a post-judgment motion for judgment notwithstanding the verdict. *See Dow Chemical Co. v. Mahlum, 114 Nev. 1468, 1475 n.1, 970 P.2d 98, 103 n.1 (1998), modified on other grounds by GES, Inc. v. Corbitt, 117 Nev. 265, 21 P.3d 11, 14-15 (2001).*

court's reduction of the jury award.

We conclude that Sunrise has failed to demonstrate error that would entitle it to a **[***3]** reversal or a new trial. We also conclude that the district court properly reduced the jury award by the sums paid in settlement by the surgeon and the anesthesiologist. Accordingly, we affirm the district court's judgment and order.

FACTUAL BACKGROUND

On August 25, 1995, fifty-one-year-old James Banks, Jr., was admitted to Sunrise Hospital for rotator cuff surgery. Prior to the surgery, the orthopedic surgeon, Dr. James Manning, discussed with James the risks of the surgery. Additionally, Dr. Robert L. Kinsman, the anesthesiologist, discussed the risks associated with the use of anesthesia. James signed an informed consent form that detailed the risks associated with surgery and with anesthesia.

Doctors performed surgery on James in operating room number 8, utilizing the hospital's equipment, which included a Narkomed **[*828]** II anesthesia machine. The Narkomed II provides oxygen and anesthetic agents to patients. Only anesthesiologists are qualified to operate the Narkomed II. Dr. Kinsman, an independent contractor hired by Sunrise to operate the equipment during James's surgery, utilized the equipment to anesthetize James and to monitor his physiological condition.

Immediately before **[***4]** James's surgery, Dr. Manning performed surgery on a different patient in operating room number 8, for which Dr. Kinsman was also the anesthesiologist and had used the same equipment. During the course of the first surgery, the equipment presented no problems. Dr. Kinsman checked the anesthesia and monitoring equipment before using it in James's surgery.

[57]** During the course of James's surgery, Dr. Kinsman monitored James's condition continuously. Near the end of surgery, Dr. Kinsman noticed a decrease in James's blood pressure. Concerned that the blood pressure would continue to decrease, Dr. Kinsman turned off the nitrous oxide, decreased the anesthesia and increased the oxygen. About a minute later, James's blood pressure dropped again. Dr. Kinsman administered Robinal to increase the heart rate, which would then increase blood pressure, but to no avail. As James's blood pressure was still dropping, Dr. Kinsman turned off all of the anesthetic agents and gave James one hundred-percent oxygen. He also administered ephedrine to increase the pulse rate and blood pressure. Dr. Kinsman checked the endotracheal tube, the circuit ventilation of the Narkomed II and the placement of the intravenous **[***5]** tube (IV) in an attempt to find out what was wrong. After a second administration of ephedrine, James went into cardiac arrest. Dr. David Navratil, a cardiologist, was summoned and assisted Doctors Manning and Kinsman in an effort to resuscitate and stabilize James. Physicians attempted a precordial thump to shock James's heart back to a normal rhythm, attempted cardiopulmonary resuscitation, gave James atropine to get his heart started and administered electrical shock twice before James was finally resuscitated. Concerned that the open shoulder wound would become infected, and to alleviate the need for future surgeries, physicians finished the surgery. Dr. Kinsman was unsure of the cause of James's cardiac arrest but stated that James was stable for completion of the shoulder surgery. The physicians continued to use the same equipment to complete the surgery. Following surgery, James failed to regain consciousness and has since persisted in a permanent vegetative state.

Immediately after the incident, Sunrise completed an occurrence report. The report did not indicate any problems with the anesthesia equipment, and therefore, the equipment continued to be used in Sunrise's operating **[***6]** rooms for several months following James's injury until November 1995, when Sunrise sold the **[*829]** Narkomed II anesthesia machine involved in James's surgery, along with several other Narkomed II machines, to the same buyer. The sale was pursuant to a contract executed by Sunrise several months before James's surgery. As part of the construction of new operating rooms, Sunrise's parent corporation had contracted to purchase new anesthesia equipment to standardize the equipment and as part of the normal replacement of equipment. Prior to the transfer, Sunrise received no complaints concerning any of the equipment.

On April 24, 1996, James and Otho Lee Banks, as guardian ad litem for James, brought negligence claims against Sunrise, Dr. Kinsman and Dr. Manning in a complaint to the Medical Legal Screening Panel. Banks did not allege negligent maintenance or any cause of action concerning equipment malfunction. Banks relied upon an affidavit of anesthesiologist Dr. Casey Blitt, who stated that Dr. Kinsman's care fell below the standard of care in that he failed to "recognize, respond to and reverse decreasing blood pressure and pulse rate in the

absence of blood loss," and that he failed "to **[***7]** use appropriate resuscitation protocol including, but not limited to[,] failure to use the appropriate drugs of choice in this setting." Dr. Blitt further opined that James "sustained permanent, irreversible hypoxic brain damage." The Panel determined that there was no reasonable probability of medical malpractice on the part of Dr. Manning or Sunrise, but was unable to reach a decision as to Dr. Kinsman. Shortly thereafter, Banks sued Dr. Manning, Dr. Kinsman and Sunrise. The complaint did not allege negligent maintenance against Sunrise, although it did contain a Doe/Roe allegation of negligent maintenance of the equipment. [2]

On March 2, 1999, nearly four years after James's **[***8]** injury and more than two years after filing the complaint, Banks was granted leave, over Sunrise's objection, to file a first **[**58]** amended complaint in which Banks asserted an additional claim of negligence pertaining to the anesthesia equipment. The district court directed Banks to file a second amended complaint alleging faulty or negligent maintenance of equipment and to also include the previously alleged res ipsa loquitur claim. The district court dismissed all other claims. On the eve of trial, Banks settled with both Dr. Manning and Dr. Kinsman.

Before trial, Banks sought sanctions against Sunrise based upon Sunrise's failure to preserve the anesthesia equipment that had been used during James's surgery. The district court determined that Sunrise's failure to identify the specific machines used during **[*830]** James's surgery before selling the anesthesia equipment constituted spoliation of evidence and so, as a sanction the district court instructed the jury that:

Sunrise Hospital had a duty to identify all of the anesthesia equipment and monitors which were used in the Banks surgery. Defendant Sunrise failed in this duty and because of its failure, no independent review or inspection **[***9]** of the equipment could ever be done. You may infer that had the equipment been preserved and tested that it would have been found to be not operating properly.

The first jury trial resulted in a mistrial because of a hung jury. The case was reassigned to another judge, who, over Sunrise's objection, refused to reconsider the above-described sanction excluding evidence. At the second trial, the jury rendered a verdict in favor of Banks, awarding $ 5,412,030.88 in damages, which totaled $ 6,903,044.61 after adding the prejudgment interest on the past damages. The district court subsequently reduced the jury award by the combined $ 1.9 million paid in settlement by Doctors Manning and Kinsman [3] and entered a second amended judgment in the amount of $ 4,825,450.17. The district court then denied Sunrise's motion for judgment notwithstanding the verdict or a new trial. Sunrise thereafter timely appealed from the second amended judgment and the order denying its new trial motion, assigning numerous errors in the district court proceedings. Banks also appealed, contesting the district court's reduction of the jury award by the sums paid in settlement of his claims against Doctors Manning **[***10]** and Kinsman. [4]

DISCUSSION

Sanctions and adverse inference instruction

Sunrise contends that the district court abused its discretion when it imposed sanctions against Sunrise for spoliation of evidence. We have held that ***HN2***[↑] "discovery sanctions are within the power of the district court and this court will not reverse the particular sanctions imposed absent a showing of abuse of discretion." [5]

HN3[↑] When a potential for litigation exists, "'the litigant is under a duty to preserve evidence which it knows or reasonably should **[*831]** know is relevant **[***11]** to the action.'" [6] Here, James's cardiac arrest while under anesthesia and his subsequent persistent vegetative state put Sunrise on notice that an error may have occurred in the operating room, whether caused by the physicians or the equipment and, therefore, that litigation was foreseeable. Consequently,

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[2] A work-related injury necessitated James's surgery, which was being covered by his workers' compensation carrier. Several companies responsible for payment of the workers' compensation claim filed a complaint in intervention. Before the second trial commenced, the plaintiffs in intervention dismissed their claims against Sunrise.

[3] This included $ 1.8 million from the settlement with Dr. Kinsman and $ 100,000 from the arbitration agreement with Dr. Manning.

[4] Pursuant to NRAP 28(h), Banks is deemed the appellant.

[5] *GNLV Corp. v. Service Control Corp., 111 Nev. 866, 869, 900 P.2d 323, 325 (1995)*.

[6] *Id.* (quoting *Fire Ins. Exchange v. Zenith Radio Corp., 103 Nev. 648, 651, 747 P.2d 911, 914 (1987)*).

Sunrise had a duty to preserve information relating to the attending physicians and the equipment.

Here, although Sunrise had a prearranged contract to sell the anesthesia equipment, after James's injury, it was on notice that certain equipment could be the subject of litigation. In fact, if the equipment had been functioning properly, it is reasonable under any circumstance to infer that Sunrise would have wanted to preserve it in order to protect itself from a false claim of negligence. Moreover, the district court heard expert testimony that the medical industry was **[**59]** aware of a problem **[***12]** with Narkomed II anesthesia machines relating to improperly maintained or checked interlock devices. In addition, testimony was presented that Sunrise had a duty, when faced with a cardiac arrest for no apparent reason, to identify and sequester the equipment until Sunrise investigated and determined whether the equipment was a factor in the cardiac arrest and oxygen deprivation.

Given this evidence, the district court determined that Sunrise had, at the very least, a duty to record the machine's serial numbers. Sunrise's failure to document which machines were used in James's surgery prevented Banks from investigating the machinery's functionality as part of the investigation of James's injury. Accordingly, we perceive no abuse of discretion on the part of the district court in imposing sanctions, including the court's decision to instruct the jury that it could draw an adverse inference concerning the functionality of the equipment based upon Sunrise's failure to preserve it. We note, in passing, that the district court did not instruct the jury that it shall draw an adverse inference from Sunrise's disposal of the equipment, only that it may draw an adverse inference. Under **[***13]** the facts of this case, the district court did not abuse its discretion in imposing sanctions even though there was no evidence that Sunrise willfully disposed of the machines in order to frustrate discovery in subsequent litigation proceedings. We emphasize that our holding is limited to the facts of this case, considering the catastrophic nature of James's injury, the unique position of Sunrise and its knowledge concerning the incident, and should therefore be narrowly construed.

[*832] *Res ipsa loquitur*

Sunrise contends that the district court abused its discretion when it submitted a res ipsa loquitur instruction to the jury. ***HN4***[↑] "[A] party is entitled to jury instructions on every theory of her case that is supported by the evidence." [7] We will review a district court's decision to give a particular instruction for an abuse of discretion or judicial error. [8]

[*14]** ***HN5***[↑] *NRS 41A.100* has replaced the doctrine of res ipsa loquitur in medical malpractice cases. [9] A rebuttable presumption of medical malpractice applies when the plaintiff has provided *some* evidence of one of the factual predicates enumerated in *NRS 41A.100(1)*. [10] *NRS 41A.100(1)(d)* provides that a rebuttable presumption of medical malpractice arises when the patient suffers an injury "during the course of treatment to a part of the body not directly involved in the treatment or proximate thereto."

In *Johnson v. Egtedar*, [11] we held that the district court erred in refusing the appellant's proffered jury instruction on res ipsa loquitur. During surgery to appellant's lower back, the surgeon operated at the wrong level of appellant's spine, puncturing her spinal dura, psoas major muscle, colon and left ureter, **[***15]** causing severe personal injuries. We concluded that the circumstances justified an instruction on *NRS 41A.100(1)(d)* because the appellant had sought tn12reatment to her lower back but suffered injury to her colon and ureter, parts of the body not directly or proximately related to lower back surgery. [12]

Similarly, in *Born v. Eisenman*, [13] we concluded that the district court erred when it precluded the appellant from presenting a res ipsa loquitur theory to the jury. Several days after Born underwent surgery to have her uterus and ovary removed, she complained of severe pelvic pain. Doctors determined that Born's left ureter had been ligated during surgery. About a week later, Born underwent a second surgery to repair the ligated ureter. During that procedure, the surgeon also removed

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[7] *Johnson v. Egtedar, 112 Nev. 428, 432, 915 P.2d 271, 273 (1996)*.

[8] *Ringle v. Bruton, 120 Nev. 82, 86 P.3d 1032, 1037 (2004)*.

[9] *Johnson, 112 Nev. at 433, 915 P.2d at 273-74*.

[10] *Id. at 433-34, 915 P.2d at 274*.

[11] *Id. at 434, 915 P.2d at 275*.

[12] *Id.*

[13] *114 Nev. 854, 859, 962 P.2d 1227, 1231 (1998)*.

a partially diseased **[**60]** right ovary. Over two years later, Born sought treatment for pain in her abdomen, which she had experienced since **[***16]** the second surgery. **[*833]** Doctors discovered that a portion of her small bowel had been cut during the closure procedure from the second surgery.

We concluded in *Born* that the district court should have instructed the jury based upon NRS 41A.100(1)(e) "because a surgical procedure was performed on the wrong organ or the wrong part of a patient's body." [14] Although Born was decided based upon NRS 41A.100(1)(e) rather than NRS 41A.100(1)(d), the case is nonetheless instructive and its reasoning applies here. Born suffered an injury to her ureter during the course of treatment to her uterus and ovary and later suffered an injury to her bowel during the course of treatment to her ureter and ovary. These facts demonstrate that submission of an instruction under either (d) or (e) would have been appropriate.

[*17]** The instant case is similar to *Johnson* and *Born*. James underwent surgery for treatment to his shoulder, but suffered an injury to his brain, causing his vegetative state. The brain is not directly or proximately related to the rotator cuff surgery. Therefore, the district court did not abuse its discretion when it submitted a res ipsa loquitur instruction to the jury.

Expert testimony

NRS 50.275 provides, **HN6**[↑] "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by special knowledge, skill, experience, training or education may testify to matters within the scope of such knowledge." Accordingly, **HN7**[↑] the district court may generally admit expert testimony on matters outside the average person's common understanding. [15]Such testimony must also be relevant and its probative value must not be substantially outweighed by the danger of unfair prejudice. [16] Because the admission of expert testimony is in the sound discretion of the district court, we will not reverse the district court's decision absent an abuse of discretion. [17] **[***18]**

Duty to sequester

Sunrise contends that the district court abused its discretion when it permitted Banks to introduce expert testimony on Sunrise's duty to preserve the anesthesia equipment. During the course of **[*834]** trial, Banks's expert witnesses, Robert Morris and Dr. Casey Blitt, testified that Sunrise had a duty to sequester the anesthesia equipment after James's cardiac arrest. At the conclusion of the case, the district court instructed the jury, as we previously discussed, that Sunrise had a duty to identify all the equipment and monitors used in James's surgery.

The evidence concerning Sunrise's duty to preserve the evidence assisted the jury in relation to its prerogative to draw a **[***19]** negative inference from Sunrise's consummated sale of the equipment. Consequently, this evidence assisted the jury in understanding the pertinent issue of whether the anesthesia equipment had malfunctioned during James's surgery. We note that **HN8**[↑] pursuant to NRS 41A.100(1), expert testimony is required in medical malpractice actions to establish the accepted standard of care. We do not believe the district court could therefore be in error in admitting evidence concerning a duty to sequester the equipment, as the existence of such a duty seems to assume a standard of care relevant to the issues being litigated. Therefore, we conclude that the district court did not abuse its discretion when it permitted Banks's experts to testify concerning Sunrise's duty to sequester the equipment.

Opinion testimony

Sunrise contends that the district court abused its discretion when it admitted the opinion testimony of expert Robert Morris **[**61]** concerning the anesthesia equipment's malfunctioning. Sunrise contends that Morris's testimony was speculative and that he could only offer opinions as to mere possibilities and not to a reasonable degree of probability.

As mentioned, **[***20]** NRS 41A.100(1) provides that expert testimony is required in medical malpractice cases to establish the accepted standard of care, a

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[14] *Id. at 859, 962 P.2d at 1230-31.*

[15] *See Mercado v. Ahmed, 974 F.2d 863, 870 (7th Cir. 1992).*

[16] *K-Mart Corporation v. Washington, 109 Nev. 1180, 1186, 866 P.2d 274, 278 (1993); NRS 48.035.*

[17] *Krause Inc. v. Little, 117 Nev. 929, 34 P.3d 566, 569 (2001).*

breach of that standard and causation. ***HN9***[↑] Generally, "a medical expert is expected to testify only to matters that conform to the reasonable degree of medical probability standard." [18] **[***21]** In *United Exposition Service Co. v. SIIS*, we concluded that a finding of negligence in a medical malpractice case "cannot be based solely upon possibilities and speculative testimony." [19] In *United Exposition*, we stated that "[a] testifying physician must state to a degree of reasonable medical probability that the condition in question was caused by the industrial injury, or sufficient **[*835]** facts must be shown so that the trier of fact can make the reasonable conclusion that the condition was caused by the industrial injury." [20] We determined that the speculative nature of the expert's opinion that the injury "'possibly could have been'" a precipitating factor was insufficient to support a finding of causation between the defendant's negligence and the plaintiff's injuries. [21]

During his deposition, Morris described his role in the case as follows: "I have to[,] using my experience and knowledge[,] come up with possible causes of things related to devices that *might have* contributed to the adverse event." (Emphasis added.) At trial, Morris testified as to the possible ways in which the interlock system on a Narkomed II could fail. At one point, Morris stated that "any device can fail any time." He also testified that "everyone I have spoken to who had Narkomed 2's for any length of time experienced failures in the interlock system." Finally, Morris admitted that, under the circumstances, he could not determine whether the equipment contributed to James's injury since he was unable to examine the equipment because Sunrise had failed to properly identify which machines were used during James's surgery.

Morris's testimony **[***22]** and opinions established that it was possible for the Narkomed II's interlock device to malfunction intermittently. His testimony was also helpful to establish the standard of care for preserving the identity of the machines and providing grounds for the imposition of sanctions for failure to preserve evidence. It assisted the jury in understanding how the machines could have malfunctioned and why it was reasonable to draw an adverse inference from Sunrise's failure to identify the machines. Accordingly, we conclude that the district court did not abuse its discretion when it permitted Morris to give opinion testimony based on less than a reasonable degree of probability.

Hedonic damages

Sunrise contends that the district court erred in permitting expert testimony concerning the monetary range of hedonic damages, *i.e.*, loss of enjoyment of life damages.

We turn first to whether hedonic damages are a compensable element of damages. The term "hedonic" is derived from the Greek language and refers to the pleasures of life. [22] Hedonic damages are **[*836]** therefore monetary remedies awarded to compensate injured persons for their noneconomic loss of life's pleasures or the loss of enjoyment **[***23]** of life. The Supreme Court of South Carolina has succinctly explained ***HN10***[↑] hedonic loss, as distinguished from pain and suffering:

An award for pain and suffering compensates the injured person for the physical **[**62]** discomfort and the emotional response to the sensation of pain caused by the injury itself. Separate damages are given for mental anguish where the evidence shows, for example, that the injured person suffered shock, fright, emotional upset, and/or humiliation as the result of the defendant's negligence.

On the other hand, damages for "loss of enjoyment of life" compensate for the limitations, resulting from the defendant's negligence, on the injured person's ability to participate in and derive pleasure from the normal activities of daily life, or for the individual's inability to pursue his talents, recreational interests, hobbies, or avocations. [23]

[*24]** Awarding damages for hedonic losses appears

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[18] *Brown v. Capanna, 105 Nev. 665, 671-72, 782 P.2d 1299, 1304 (1989)*; *see also Prabhu v. Levine, 112 Nev. 1538, 1544, 930 P.2d 103, 108 (1996)*; *Fernandez v. Admirand, 108 Nev. 963, 972-73, 843 P.2d 354, 360 (1992)*.

[19] *109 Nev. 421, 424, 851 P.2d 423, 425 (1993)*.

[20] *Id. at 424-25, 851 P.2d at 425*.

[21] *Id. at 425, 851 P.2d at 425* (stating that "[a] possibility is not the same as a probability").

[22] *The American Heritage Dictionary* 610 (1980).

[23] ***Boan v. Blackwell, 343 S.C. 498, 541 S.E.2d 242, 244 (S.C. 2001)*** (citation omitted).

to be a recent concept. The long-standing objection to such an award was the "fear of speculativeness and duplication." [24] **[***25]** While the majority of jurisdictions recognize hedonic loss as a recoverable element of damages, the jurisdictions differ as to how hedonic loss should be presented and awarded. In particular, jurisdictions disagree as to whether an expert should be permitted to testify concerning the value of hedonic loss. Some jurisdictions will not permit an expert to testify concerning the value of a person's life on the grounds that the loss is subjective, that the damages are incapable of being accurately measured or that the methods used by experts to measure hedonic losses are unreliable. [25] Other courts permit experts, such as economists, to testify concerning the value of hedonic loss, [26] recognizing that the jury is ultimately responsible for computing **[*837]** damages [27] and that expert testimony will often assist the jury in making its determination. [28]

We agree with these latter jurisdictions. **[***26]** ***HN11***[↑] In Nevada, the district court has discretion to qualify a witness as an expert. [29] As noted above, if an expert's "specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue," the expert "may testify to matters within the scope of such knowledge." [30] This rule is tempered by NRS 48.035(1), which prohibits the admission of relevant evidence where its "probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury." Furthermore, the jury must find that the "party will probably suffer such damages in the future." [31]

Here, Banks offered Robert Johnson, a forensic economist, as an expert on hedonic damages to assist the jury in determining the monetary value of **[***27]** the pleasure of living that James will be denied as a result of his injury. ***HN12***[↑] In cases permitting experts to testify as to the value of hedonic loss, economists have used various methods to arrive at their conclusions. [32] **[***28]** Johnson's methodology for the valuation of hedonic damages is called the "willingness to pay" theory. Johnson testified that he relied on particular studies written **[**63]** about and evaluated by other authors concerning two methods under the "willingness to pay theory." The first method, the "survey" method, asks people how much they are willing to spend to reduce the probability of death from 3 deaths per 20,000 to 1 death per 20,000. The second method, the "wage risk" method, examines the salary people in high fatality risk jobs receive and the amount of money people are willing to forego to work a lower fatality risk job. Johnson then extrapolated a total value of hedonic damages from the differentials in salary. [33] Using these two methods, Johnson determined that a low $ 2.5 million to an average of $ 8.7 million with no ceiling was the tangible value of a person's life.

Johnson's methodology for the valuation of hedonic damages assisted the jury to understand the amount of damages that would **[*838]** compensate James for the loss of his enjoyment of life. Johnson's valuation theories were matters within the scope of his specialized knowledge concerning the monetary value of intangibles. Moreover, the probative value of Johnson's

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[24] Pierce v. New York Central Railroad Company, 409 F.2d 1392, 1399 (6th Cir. 1969); see, e.g., McAlister v. Carl, 233 Md. 446, 197 A.2d 140, 143-46 (Md. 1964).

[25] Mercado, 974 F.2d at 871 (noting that expert testimony did not provide expert assistance to the jury); Kumcz v. Honda North America, Inc., 166 F.R.D. 386, 388-90 (W.D. Mich. 1996) (noting that expert opinion testimony on hedonic damages is unreliable and unhelpful); Scharrel v. Wal-Mart Stores, Inc., 949 P.2d 89, 92 (Colo. Ct. App. 1998) (noting that the expert's opinions on hedonic loss did not assist the jury).

[26] See Sherrod v. Berry, 629 F. Supp. 159, 164 (N.D. Ill. 1985), rev'd on other grounds, 856 F.2d 802 (7th Cir. 1988); Couch v. Astec Industries, Inc., 2002 NMCA 84, 132 N.M. 631, 53 P.3d 398, 403 (N.M. Ct. App. 2002); Lewis v. Alfa Laval Separation, Inc., 128 Ohio App. 3d 200, 714 N.E.2d 426, 436 (Ohio Ct. App. 1988).

[27] See Canterino v. Mirage Casino-Hotel, 117 Nev. 19, 16 P.3d 415, 418 (2001).

[28] Sherrod, 629 F. Supp. at 163-64; Couch, 53 P.3d at 403.

[29] Mahlum, 114 Nev. at 1482, 970 P.2d at 108.

[30] NRS 50.275.

[31] Sierra Pacific v. Anderson, 77 Nev. 68, 76, 358 P.2d 892, 896 (1961).

[32] See Mercado, 974 F.2d at 871; Kumcz, 166 F.R.D. at 388-91; Lewis, 714 N.E.2d at 434-35; see also Stephen T. Riley, The Economics of Hedonic Damages, Nevada Lawyer, Aug. 1993, at 25-28.

[33] See Hein v. Merck & Co., Inc., 868 F. Supp. 230, 233-34 (M.D. Tenn. 1994).

testimony was not substantially outweighed by the danger of unfair prejudice. Therefore, the district court properly exercised its discretion in qualifying Johnson as an expert and permitting him to testify concerning hedonic damages. We observe that Sunrise had the ability to use traditional methods of disputing Johnson's testimony, such as presenting witnesses on its behalf to persuade the jury that Johnson's methods were inaccurate or unreliable. The jury was then free to determine whether Johnson's valuation theories were credible and to weigh his testimony accordingly. [34]

[*29]** With respect to an award of hedonic damages, some jurisdictions permit an award of hedonic damages as a separate and distinct compensatory award, in addition to the three common compensatory damages of lost earnings, medical expenses and pain and suffering. [35] These jurisdictions believe that compensating a victim for hedonic loss in a separate award prevents inadequate awards to the victim [36] **[***30]** and facilitates judicial review. [37] Other jurisdictions permit the trier of fact to treat hedonic loss as a factor in determining general damage awards or pain and suffering awards. [38] These courts reason that, because of the intangible nature of hedonic loss, separating hedonic loss into a distinct category will produce duplicative damage awards or overcompensate the victim. [39]

For example, in *Huff v. Tracy*, [40] a California court **[***31]** determined that the injured plaintiff, who suffered severe lacerations to his **[*839]** tongue during an automobile accident that permanently impaired his sense of taste, was entitled to argue, as one factor for a pain and suffering award, that he should receive compensation of his loss of enjoyment of life. The court noted that California did not have a "rule restricting a plaintiff's attorney from arguing this element [of damages] to a **[**64]** jury." [41] The court analogized the treatment of hedonic loss to the treatment of mental damages, another element of a pain and suffering award of damages. [42]

We agree with California and those jurisdictions permitting plaintiffs to seek compensation for hedonic loss as an element of the general award for pain and suffering. Like California, Nevada does not restrict a plaintiff's attorney from arguing hedonic damages. Moreover, by including hedonic losses as a component of pain and suffering, **[***32]** we perceive no problem of confusion or duplication of awards by the jury. Accordingly, we hold that ***HN13***[↑] hedonic damages may be included as an element of a pain and suffering award of damages.

Here, however, the district court permitted the jury to award hedonic damages as a separate and distinct damage award, rather than including hedonic loss as a component of the pain and suffering damages award. Although the district court erroneously permitted the jury to give Banks a separate award for hedonic damages, the error was not prejudicial because the jury could have easily added the value of the hedonic loss to the pain and suffering award. Therefore, the record does not reveal that the hedonic damages award was duplicative or excessive. Accordingly, the error was harmless.

Directed verdict motion

At the conclusion of the trial, Sunrise moved for a

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[34] *Krause, 34 P.3d at 569*.

[35] *See Thompson v. National R. R. Passenger Corp., 621 F.2d 814, 824-25 (6th Cir. 1980); Fantozzi v. Sandusky Cement Products Co., 64 Ohio St. 3d 601, 1992 Ohio 138, 597 N.E.2d 474, 486-87 (Ohio 1992)*.

[36] ***Boan, 541 S.E.2d at 245*** (noting that permitting hedonic damages as a separate damages award minimizes the risk of under- or overcompensating the victim by the jury).

[37] *Pierce, 409 F.2d at 1399; Fantozzi, 597 N.E.2d at 486; see also Thompson, 621 F.2d at 824* (recognizing that a "pain and suffering [award] compensates the victim for the physical and mental discomfort caused by the injury," whereas a hedonic damage award "compensates the victim for the limitations on the person's life created by the injury").

[38] *See Loth v. Truck-A-Way Corp., 60 Cal. App. 4th 757, 70 Cal.Rptr.2d 571, 575 (Ct. App. 1998); Poyzer v. McGraw, 360 N.W.2d 748, 753 (Iowa 1985); First Trust Co. v. Scheels Hardware, 429 N.W.2d 5, 13-14 (N.D. 1988); Missouri Pac. R. Co. v. Lane, 720 S.W.2d 830, 834 (Tex. App. 1986); Judd v. Rowley's Cherry Hill Orchards, Inc., 611 P.2d 1216, 1221 (Utah 1980); Flannery v. United States, 171 W. Va. 27, 297 S.E.2d 433, 438 (W. Va. 1982)*.

[39] *Poyzer, 360 N.W.2d at 753; Flannery, 297 S.E.2d at 438*.

[40] *57 Cal. App. 3d 939, 129 Cal.Rptr. 551, 553 (Ct. App. 1976)*.

[41] *Id.*

[42] *Id.*

directed verdict. ***HN14***[↑] NRCP 50(a) states that a motion for a directed verdict shall be denied "if the evidence is sufficient to sustain a verdict for the opponent." The district court may not judge the credibility of the witnesses or the weight of the evidence. [43] Further, "if there is conflicting evidence on a material issue, or if reasonable **[***33]** persons could draw different inferences from the facts, the question is one of fact for the jury and not one of law for the court." [44] In ruling on a directed verdict motion, "the district court must view the evidence and all inferences therefrom in a light most favorable to the non-moving party." [45] We apply this same standard on appeal. [46]

[*840] To recover for medical malpractice based on negligent maintenance of equipment, Banks had to demonstrate that Sunrise's conduct departed from the accepted standard of medical practice, that Sunrise's conduct was both the actual and proximate cause of James's injury and that James suffered damages. [47] The adverse inference instruction, discussed above, permitted the jury to infer that, had Sunrise preserved the equipment, it would have been found in **[***34]** a defective condition. The uncontroverted evidence at trial demonstrated that the anesthesia equipment was not preserved. Banks also introduced expert physician testimony demonstrating that the failure of the Narkomed II would have caused James's injury. Therefore, the jury could have reasonably determined that Sunrise's conduct departed from the accepted standard of care and that Sunrise's failure to maintain equipment actually and proximately caused James's injury. Conflicting evidence existed as to whether the equipment's malfunctioning caused James's injury. Viewing the evidence and the inferences therefrom in the light most favorable to Banks, we conclude that the district court properly denied Sunrise's motion for a directed verdict.

Similarly, because conflicting evidence existed as to whether James's brain injury was proximately related to his rotator cuff surgery, the res ipsa loquitur issue was one for the jury, not the court. Accordingly, **[***35]** viewing the evidence in a light most favorable to Banks, we conclude that the district court properly denied Sunrise's motion for a directed verdict.

[65]** *New trial*

HN15[↑] We review a district court's denial of a new trial motion for an abuse of discretion. [48] Sunrise contends that the jury manifestly disregarded numerous jury instructions, warranting a new trial under NRCP 59(a)(5). [49] Sunrise argues that the jury disregarded instructions (1) stating that the plaintiff must prove by a preponderance of the evidence that the defendant was negligent and that the negligence was the proximate cause of the plaintiff's injuries; (2) defining proximate cause; (3) defining preponderance of evidence; (4) stating that the plaintiff had the burden of establishing all the facts necessary to prove negligence and causation, except as stated in the res ipsa loquitur instruction and the adverse inference instruction; **[*841]** (5) setting forth the hospital's duty to use reasonable care to maintain equipment; and (6) stating that "the fact that a particular injury suffered by a patient as a result of an operation is something that rarely occurs does not in itself prove that the injury was probably caused by negligence. **[***36]** " [50]

Because the evidence does not support Sunrise's allegation that the jury disregarded the above jury instructions, we conclude that Sunrise's argument is without merit. For instance, the jury could have reasonably found that Sunrise was negligent in its duty to maintain equipment based on evidence that the equipment was fifteen years old; that while Sunrise had regularly scheduled maintenance checks, the checks may have been insufficient; that because the equipment was not available for inspection, experts were unable to testify to a reasonable degree of certainty that the

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[43] *See* Broussard v. Hill, 100 Nev. 325, 327, 682 P.2d 1376, 1377 (1984).

[44] *Id.*

[45] Chowdhry v. NLVH, Inc., 109 Nev. 478, 482, 851 P.2d 459, 462 (1993).

[46] *Id.*

[47] *See* Prabhu, 112 Nev. at 1543, 930 P.2d at 107.

[48] *Id.*

[49] ***HN16***[↑] NRCP 59(a)(5) provides that the district court may grant a new trial if "manifest disregard by the jury of the instructions of the court" materially affected a party's substantial rights.

[50] Sunrise also takes issue with the res ipsa loquitur instruction. However, as discussed above, substantial evidence supported the jury's verdict as to the res ipsa loquitur issue.

equipment was functioning properly; and **[***37]** that no one in the operating room had heard alarms which should have sounded once James's blood pressure dropped. The jury also may have concluded that, despite Sunrise's testimony that Dr. Kinsman's negligence was the sole proximate cause of James's cardiac arrest, Banks's witnesses' testimony that the malfunctioning equipment would have affected James's ventilation was more persuasive. Finally, although Sunrise presented physician testimony that cardiac arrests and vasovagal events could occur during outpatient surgery, the jury could reasonably have found that Banks's expert's testimony, that such events did not usually occur during outpatient surgery in the absence of negligence, was more persuasive.

Sunrise also contends that it was deprived of a fair trial [51] **[***38]** as a result of the district court's decision to instruct the jury with Jury Instruction Nos. 22, 27, 28 [52] and 32. Additionally, Sunrise claims that these instructions should not have been given to the jury as they were not supported by the evidence. Finally, Sunrise claims these instructions misstate the law. [53]

Jury Instruction No. 22 read:

> **[*842]** There may be more than one proximate cause of an injury. When negligent conduct of two or more persons contributes concurrently as proximate causes of an injury, the conduct of each of said persons is a proximate cause of the injury regardless of the extent to which each contributes to the injury. A cause is concurrent if it was operative at the moment of injury and acted with another cause to produce the injury. It is no defense that the negligent conduct of a person not joined as a party was also a proximate cause of the injury.

[66]** This instruction is substantively identical to Nevada Pattern Civil Jury Instruction (Nev. Civ. J.I.) No. 405, which is an adaptation of California Civil Jury Instruction (BAJI) No. 3.77. The **[***39]** comment to BAJI 3.77 states that a trial court should give this instruction whenever the issue of negligence of two or more defendants or contributory negligence is submitted to the jury. [54] In the instant case, the parties presented conflicting testimony over the cause of James's injury: Banks argued that the malfunctioning equipment caused James's injury, and Sunrise attempted to direct the blame at Dr. Kinsman. The district court explained that this instruction was a standard instruction included in every negligence case. The instruction cautioned jurors that, even if Sunrise was not the sole cause of the injury, but a contributing cause, the jury could still find Sunrise liable. The instruction is also consistent with our previous holding that "where two or more causes proximately contribute to the injuries complained of, recovery may be had against either one or both of the joint tort-feasors." [55]

[*40]** Jury Instruction No. 32 instructed the jury that there is no definite method of calculating compensation for pain and suffering. Sunrise argues that instructing the jury that damages for pain and suffering were recoverable is an error of law because such an award requires that the injured person be conscious of the pain. We have held that, ***HN19***[↑] in order to award damages for pain and suffering, a jury must find substantial evidence that the damages are probable. [56] In the instant case, jurors had the ability to view a video of James throughout the course of his day. Additionally, at trial, Charles Braden, James's nurse, testified that James was able to respond to his environment. Braden, through his five years of assisting James, stated that James would occasionally smile during a comedy show on television or when his family visited and had tears at times based on news and various exchanges with family **[*843]** members. Although Sunrise's physician expert testified that persons with hypoxic brain injury are unable to react to their environment, the expert based his testimony on his observations of the video. The expert never personally met with James. Accordingly, the jury was free to weigh the **[***41]** credibility of the witnesses on whether James was conscious of his pain

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[51] ***HN17***[↑] NRCP 59(a)(1) provides for a new trial upon a showing of "irregularity in the proceedings of the court, jury, master, or adverse party, or any order of the court, or master, or abuse of discretion by which either party was prevented from having a fair trial."

[52] We concluded above that the district court properly submitted Jury Instruction No. 27, the res ipsa loquitur instruction, and Jury Instruction No. 28, the adverse inference instruction.

[53] ***HN18***[↑] NRCP 59(a)(7) provides for a new trial upon a showing of "error in law occurring at the trial and objected to by the party making the motion."

[54] BAJI 3.77 (9th ed. West 2002).

[55] *Mahan v. Hafen, 76 Nev. 220, 225, 351 P.2d 617, 620 (1960)*.

[56] *Sierra Pacific, 77 Nev. at 75, 358 P.2d at 896*.

and suffering. The above jury instruction simply instructed the jury that it would be responsible for calculating the damages. Accordingly, Sunrise's argument that a new trial is warranted is without merit.

Reduction of the jury award

Unclean hands

Banks contends that, because the right of offset is an equitable remedy and because Sunrise has unclean hands, Sunrise is not entitled to a reduction of the jury award. Banks relies on this court's decision in *Evans v. Dean Witter Reynolds, Inc.*, [57] for the proposition that the district court should not reduce a judgment against an intentional tortfeasor by a settlement from a joint tortfeasor. In *Evans*, the tortfeasors, a stockbroker and stock brokerage firm, intentionally converted a client's securities. We concluded that the intent behind "the Nevada 'contribution' statutes prohibits one intentional tortfeasor **[***42]** from taking advantage of restitution made by another." [58]

The instant case is unlike *Evans*. While Sunrise acted improperly in its failure to preserve the anesthesia equipment, Sunrise was not an intentional tortfeasor because its acts were not intended or designed to cause harm to James. Accordingly, this argument is without merit.

Reference to Dr. Robert Kinsman's negligence

Banks contends that Sunrise was not entitled to an offset for the sum paid in settlement of his claim against Dr. Kinsman **[**67]** because the jury heard evidence of Dr. Kinsman's negligence and, therefore, properly accounted for it in its judgment.

HN20[↑] *NRS 17.245(1)(a)* allows a plaintiff to settle with one tortfeasor without losing the right to proceed against additional tortfeasors. However, to prevent double recovery to the plaintiff, the statute also provides that claims against nonsettling **[***43]** tortfeasors must be reduced by the amount of any settlement with settling tortfeasors. Moreover, while a plaintiff may proceed against an additional tortfeasor, **[*844]** in order to prevent improper speculation by the jury, the parties may not inform the jury as to either the existence of a settlement or the sum paid. [59]

Here, Sunrise did not elicit testimony or expose the jury to the fact that Dr. Kinsman had entered into settlements with Banks, nor did it mention the sum paid. *NRS 17.245* does not prevent a defendant from pointing the blame at another defendant or from arguing that it was not responsible for the plaintiff's injury. Therefore, Sunrise was free to argue that Dr. Kinsman's negligence proximately caused James's injury, rather than the equipment malfunction. This line of argument did not compromise Sunrise's rights to an equitable setoff under *NRS 17.245*.

We likewise **[***44]** reject Banks's contentions that the jury reduced the verdict based upon alleged violations of ***HN21***[↑] *NRS 41.141(3)*, which states that if a codefendant settles with the plaintiff in a case in which the remaining defendant asserts a comparative negligence defense, the jury may not consider the codefendant's comparative negligence or the settlement amount. [60] **[***46]** We conclude that *NRS 41.141(3)*

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[57] *116 Nev. 598, 609-10, 5 P.3d 1043, 1050 (2000)*.

[58] *Id. at 611, 5 P.3d at 1051*.

[59] *Moore v. Bannen, 106 Nev. 679, 680-81, 799 P.2d 564, 565 (1990)*.

[60] *NRS 41.141* provides, in pertinent part:

> ***HN22***[↑] 1. In any action to recover damages for death or injury to persons or for injury to property in which comparative negligence is asserted as a defense, the comparative negligence of the plaintiff or his decedent does not bar a recovery if that negligence was not greater than the negligence or gross negligence of the parties to the action against whom recovery is sought.
>
> 2. In those cases, the judge shall instruct the jury that:
>
> (a) The plaintiff may not recover if his comparative negligence or that of his decedent is greater than the negligence of the defendant or the combined negligence of multiple defendants.
>
> (b) If the jury determines the plaintiff is entitled to recover, it shall return:
>
> (1) By general verdict the total amount of damages the plaintiff would be entitled to recover without regard to his comparative negligence; and
>
> (2) A special verdict indicating the percentage of negligence attributable to each party remaining in the action.
>
> 3. If a defendant in such an action settles with the plaintiff

has no bearing on the issues of whether Sunrise could argue a nonparty's fault in this instance and whether such an argument per force leads to the conclusion that the jury reduced the award based upon the nonparty's relative culpability. First, NRS 41.141 only prevents admission of evidence in support of a "comparative **[*845]** fault" or apportionment analysis of the case as to nonparties, and a jury may only "compare" the negligence as between parties and nonparties. [61] Nothing in NRS 41.141 prohibits a party defendant from attempting to establish that either no negligence occurred or that the entire responsibility for a plaintiff's injuries rests with nonparties, including those who have separately settled their **[***45]** liabilities with the plaintiff. Second, the fact that Sunrise pleaded comparative negligence as an affirmative defense is not pertinent to whether Sunrise could argue its defense theory of third-party culpability. Third, the defense was abandoned. [62] Fourth, neither **[**68]** party submitted a comparative negligence instruction nor requested special verdict forms delineating the comparative negligence of Sunrise and Dr. Kinsman. In light of the above, there is no indication that the jury accounted for Dr. Kinsman's negligence in its award of damages. Accordingly, we conclude that this argument is without merit.

No finding of liability

Banks also contends that the district court improperly reduced the jury award by the sum paid in settlement on his claim against Dr. Manning because the arbitrator did not find Dr. Manning negligent. Banks relies on an Ohio appellate decision for the proposition that the defendant must demonstrate **[***47]** that his former codefendants were at least partially responsible for tort damages before he is entitled to an offset. [63]

The controlling law in Nevada, however, is NRS 17.245(1)(a), which provides:

HN23[↑] 1. When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:

[*846] (a) It does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater.

HN24[↑] Statutory interpretation is a question of law and is reviewed de novo. [64] When interpreting a statute, we give words their plain meaning unless attributing the plain **[***48]** meaning would violate the spirit of the statute. [65] If more than one reasonable meaning can be discerned from the statute's language, it is ambiguous, and the plain meaning rule does not apply. [66] Instead, we look to the statute's terms and context, along with reason and public policy to ascertain the legislature's intent. [67]When interpreting a portion of a statute, we read the statute as a whole and give meaning to all of its parts where possible. [68] Finally, statutory interpretation should avoid absurd results. [69]

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before the entry of judgment, the comparative negligence of that defendant and the amount of the settlement must not thereafter be admitted into evidence nor considered by the jury. The judge shall deduct the amount of the settlement from the net sum otherwise recoverable by the plaintiff pursuant to the general and special verdicts.

[61] *See* Warmbrodt v. Blanchard, 100 Nev. 703, 709, 692 P.2d 1282, 1286 (1984) (holding that district court erred in instructing the jury to consider and apportion negligence of nonparties to the trial via special verdict).

[62] Mere assertion of comparative negligence as an affirmative defense does not, in any case, implicate the operation of NRS 41.141. *See* Buck v. Greyhound Lines, 105 Nev. 756, 763-64, 783 P.2d 437, 442 (1989); *see also* Carlton v. Manuel, 64 Nev. 570, 576, 187 P.2d 558, 561 (1947) (noting that, although the appellant raised an affirmative defense, where the record did not disclose any formal offer of proof regarding the affirmative defense, the affirmative defense was abandoned).

[63] *In re Miamisburg Train Derailment*, 132 Ohio App. 3d 571, 725 N.E.2d 738, 747 (Ohio Ct. App. 1999).

[64] Barrick Goldstrike Mine v. Peterson, 116 Nev. 541, 545, 2 P.3d 850, 852 (2000).

[65] McKay v. Bd. of Supervisors, 102 Nev. 644, 648, 730 P.2d 438, 441 (1986).

[66] *Id.* at 649, 730 P.2d at 442.

[67] *Id.* at 649-51, 730 P.2d at 442-43.

[68] Building & Constr. Trades v. Public Works, 108 Nev. 605, 610, 836 P.2d 633, 636 (1992).

[69] General Motors v. Jackson, 111 Nev. 1026, 1029, 900 P.2d 345, 348 (1995).

[*49]** Here, the statute is couched in terms of a release or covenant not to sue, *i.e.*, a settlement before a verdict is reached. Although the statute states "persons liable," requiring a final judgment of liability would create absurd results when read in context with the prejudgment language. The express language of the statute contemplates that the defendant and plaintiff have worked out a settlement prior to a final judgment of liability. Therefore, the plain meaning of the statute does not require that a party be found liable. Here, Banks and Dr. Manning opted to settle the matter through an arbitration agreement that included a minimum $ 100,000 award to Banks if the arbitrator found in favor of Dr. Manning and a maximum $ 1,000,000 if the arbitrator found Dr. Manning liable. Because the arbitrator determined that Dr. Manning's conduct did not fall below the standard of care, the arbitrator awarded Banks $ 100,000 as agreed. The parties entered into the agreement in good faith, and the agreement addressed the same injury for which the jury found Sunrise liable. Thus, the district court properly reduced the jury award by the settlement amount from Dr. Manning and Banks's argument **[***50]** is without merit.

[69] [*847]** *Potential wrongful death claimants*

Banks contends that the Kinsman and Manning settlements were given, at least in part, in exchange for the release of potential wrongful death claims by prospective heirs. Banks asserts that reducing the jury award by the settlement amounts pertaining to wrongful death claims does not promote the policy against double recovery.

Sunrise responds that the statute of limitations for a wrongful death action had run by the time the parties settled in October 1999. ***HN25***[↑] NRS 41A.097(1) states that "an action for injury or death against a provider of health care may not be commenced more than 4 years after the date of injury." Sunrise contends that, because James was injured in August 1995, the wrongful death action was time barred after August 1999. However, we have previously held that "injury" in NRS 41A.097 pertains to legal injury. [70] Because death is an essential element of a wrongful death claim, the legal injury here is death. Because the record reveals that James was alive at the time of this appeal, Sunrise's argument is without merit.

[*51]** We have previously held that ***HN26***[↑] a wrongful death claim pertains to the injury suffered by the heirs rather than by the decedent. [71] A California appellate court held that, where a judgment did not include damages for wrongful death claimants, the settlement amounts to the potential wrongful death claimants could not be used to offset the judgment against the nonsettling defendant. [72] Here, the jury's award did not include damages for the potential wrongful death claimants. Nor does the record reveal that the jury considered these claims. Although the record indicates that the potential wrongful death claimants were signatories on the settlement agreements, the record is devoid of any evidence indicating that the potential wrongful death claimants benefited from, were entitled to or received any portion of the settlement amount. It appears that the entire settlement amount went to Banks. Therefore, Banks would have received double recovery if the district court had failed to reduce the jury award by the settlement amounts.

[*52]** *CONCLUSION*

We conclude that Sunrise has failed to demonstrate error that would entitle it to a reversal or a new trial. We also conclude that Banks has failed to demonstrate that the reduction of the jury **[*848]** award was improper. Accordingly, we affirm the judgment and order of the district court.

SHEARING, C.J., ROSE, GIBBONS and DOUGLAS, JJ., concur.

Concur by: MAUPIN (In Part)

Dissent by: MAUPIN (In Part)

Dissent

MAUPIN, J., with whom BECKER, J., agrees, concurring in part and dissenting in part:

The majority opinion today addresses a myriad of undecided issues concerning tort litigation in Nevada. These include duties of a potential defendant to

[70] Fernandez v. Kozar, 107 Nev. 446, 449, 814 P.2d 68, 70 (1991).

[71] *Id.*

[72] Wilson v. John Crane, Inc., 81 Cal. App. 4th 847, 97 Cal.Rptr.2d 240, 250 (Ct. App. 2000).

preserve evidence, the scope of expert testimony concerning preservation issues, the scope of the doctrine of res ipsa loquitur, whether Nevada recognizes the concept of hedonic damages, whether expert testimony is admissible in aid of a claim for hedonic damages, and the extent to which defendants in different scenarios are entitled to equitable offsets for pretrial settlements. I agree that expert evidence is admissible on questions of evidence spoliation, that general damage awards may include hedonic damages for conscious loss of enjoyment of life, **[***53]** that expert testimony may assist the fact-finder in resolving hedonic damage claims, and that defendants are entitled to equitable offsets in negligence actions regardless of whether the settlement monies are paid pursuant to an arbitration agreement and regardless of whether a defendant at trial argues that the settling defendant was at fault. I conclude, however, that the district court erred in its sanction instruction concerning preservation of evidence and in its application of the doctrine of res ipsa loquitur. In my view, these two errors require **[**70]** reversal and remand to the district court for retrial.

DISCUSSION

In light of Sunrise's failure to preserve either the Narkomed II anesthesia machine or records that would enable Mr. Banks's attorneys to trace the machine for testing, the district court gave the following instruction:

Sunrise Hospital had a duty to identify all of the anesthesia equipment and monitors which were used in the Banks surgery. Defendant Sunrise failed in this duty and because of its failure, no independent review or inspection of the equipment could ever be done. You may infer that had the equipment been preserved and tested that it would have been **[***54]** found to be not operating properly.

In this instruction, the district court applied an absolute pre-litigation duty upon a potential defendant to preserve evidence. This action unfairly and retrospectively imposed a duty to preserve evidence at a time many months before the plaintiff first generated even so much as a remote reference to the evidence and years before **[*849]** the plaintiff took formal action against the defendant in connection with it. Additionally, the instruction found as a matter of law that the duty had been breached.

The case authority which the majority relies upon imposes sanctions for destruction or loss of evidence where a potential plaintiff discarded critical evidence prior to filing suit and then proceeded with the action. [1] Because a potential plaintiff has absolute control over whether to file a lawsuit and which theories of recovery he or she chooses to allege, it is perfectly appropriate to impose a duty to preserve evidence and impose sanctions in connection with its loss or destruction. However, a broad duty to preserve becomes problematic when applied to a potential defendant who may either never be sued or be sued upon a particular theory.

[*55]** In a perfect world, a hospital or physician should investigate all possible reasons for a catastrophic surgical result, and any person involved in a catastrophic event would be wise to undertake some sort of investigation and preserve evidence to guard against the possibility of impending litigation. But the majority applies a wide ranging preservation duty under a very discrete set of circumstances. In my view, we should not impose a presuit duty upon a defendant unless there is evidence that supports an inference that the destruction was calculated to gain a competitive advantage in the event of litigation. [2] Here, Banks never claimed that Sunrise willfully destroyed evidence to avoid exposure to this case, and the claim that the machine was implicated in Mr. Bank's profound neurological damage did not surface until well after the machine was turned over to a purchaser under an agreement that predated the surgery.

[*56]** Having said this, the jury should have been allowed to hear evidence concerning the possibilities if testing had been available and been instructed on permissible inferences from the loss of the machine. However, the district court should not have instructed the jury that an absolute duty existed to preserve evidence and that Sunrise breached this duty, particularly when there was no indication that the machine was implicated until Mr. Banks filed his initial complaint some seven months after the disposal of the

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[1] *See* Fire Ins. Exchange v. Zenith Radio Corp., 103 Nev. 648, 651, 747 P.2d 911, 914 (1987). Although *Fire Ins. Exchange* embraced a general duty to preserve relevant evidence that would apply to any party on notice of litigation, the decision did not flush out public policy considerations concerning when a defendant has such a duty.

[2] *See* Stubli v. Big D International Trucks, 107 Nev. 309, 810 P.2d 785 (1991) (Rose, J., dissenting) (concluding that loss of evidence was not entirely willful and that sanction of dismissal was too harsh).

machine, the original complaint only referred to the machine in connection with allegations against fictitiously named defendants, **[*850]** the anesthesiologist renounced any difficulty with the machine, the defendant disposed of the equipment pursuant to an agreement that predated the surgery, and Mr. Banks failed to allege any claims against Sunrise concerning **[**71]** the machine until some four years after the fact.

The majority imposes a duty to preserve evidence, which a potential defendant knows or should know may be relevant to an unfiled action. This standard, in its broad application, forces potential parties to anticipate or speculate as to the mere prospect of a particular type **[***57]** of suit, and likewise imposes sanctions for a failure to do so. While this case is marked by a compelling and tragic set of circumstances, this is not the way to provide a just adjudication of Mr. Banks's claims against the hospital.

Res ipsa loquitur

In my view, this is also not a res ipsa loquitur case. NRS 41A.100 requires that medical malpractice claims be supported by expert opinion testimony. Such evidence, however, is unnecessary when the claimant offers some evidence of one or more of the circumstances enumerated in NRS 41A.100(1)(a) through (e), which embody former res ipsa loquitur principles. The majority concludes that the district court properly instructed the jury under NRS 41A.100(1)(d). Paragraph (d) forgives the expert testimony requirement when the injury occurs "during the course of treatment to a part of the body not directly involved in the treatment or proximate thereto." The majority embraces this provision, reasoning that Mr. Banks's brain was not proximately or directly related to his rotator cuff surgery. I respectfully disagree.

To explain, the damage claim in this case was **[***58]** based upon profound and irreversible brain injury secondary to complications of general anesthesia. The use of general anesthesia, *i.e.*, the sedation of the central nervous system, was part and parcel of the surgical treatment of the patient. Because sedation of the central nervous system constitutes treatment directly involving the brain, NRS 41A.100(1)(d) is not implicated.

CONCLUSION

In my view, the district court erred in the construct of its spoliation instruction and in its res ipsa loquitur instructions under NRS 41A.100(1)(d). Accordingly, while I agree with the majority in all other respects, I would reverse and remand this matter for retrial.

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Washington v. United States

United States District Court for the District of Nevada

May 19, 2017, Decided; May 19, 2017, Filed

Case No. 2:17-CV-229 JCM (VCF)

Reporter
2017 U.S. Dist. LEXIS 76940 *; 2017 WL 2213128

JOHN T. WASHINGTON, Plaintiff(s), v. UNITED STATES OF AMERICA, et al., Defendant(s).

Prior History: Washington v. United States, 2017 U.S. Dist. LEXIS 59081 (D. Nev., Apr. 18, 2017)

Core Terms

ipsa, medical malpractice claim, suture, affidavit requirement, healthcare provider, surgery, licensed, loquitur, infection, provides, notice

Case Summary

Overview

HOLDINGS: [1]-Because plaintiff filed a notice of appeal, thereby divesting the court of jurisdiction, the court lacked authority to grant plaintiff's motion to reconsider; [2]-Plaintiff's response to defendants' motion to dismiss was timely. Therefore, if the court of appeals remanded for this purpose, the court would grant plaintiff's motion as to the timeliness issue; [3]-The court would deny plaintiff's motion as to the issue regarding Nev. Rev. Stat. § 41A.071's affidavit requirement because dismissal of plaintiff's medical malpractice complaint without prejudice on that ground was proper in light of plaintiff's failure to submit the requisite medical affidavit therewith; [4]-Although no medical affidavit was needed for medical malpractice claims based solely on the res ipsa loquitur doctrine, plaintiff's complaint had not sufficiently stated claim based on res ipsa locquitur.

Outcome
Motion denied.

LexisNexis® Headnotes

Civil Procedure > Judgments > Relief From Judgments > Indicative Rulings

HN1 **Relief From Judgments, Indicative Rulings**

Fed. R. Civ. P. 62.1 provides that if a motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may: (1) defer considering the motion; (2) deny the motion; or (3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantive issue. Fed. R. Civ. P. 62.1(a).

Governments > Legislation > Statute of Limitations > Time Limitations

Healthcare Law > ... > Actions Against Facilities > Defenses > Statute of Limitations

Torts > Malpractice & Professional Liability > Healthcare Providers

Governments > Legislation > Statute of Limitations > Tolling

Torts > Procedural Matters > Statute of Repose > Professional Malpractice

HN2 **Statute of Limitations, Time Limitations**

Pursuant to Nev. Rev. Stat. § 41A.097, an action for injury or death against a provider of health care may not be commenced more than 3 years after the date of injury or 1 year after the plaintiff discovers or through

the use of reasonable diligence should have discovered the injury, whichever occurs first. *Nev. Rev. Stat. § 41A.097(2)*.

Civil Procedure > ... > Pleadings > Complaints > Prelitigation Notices

Torts > ... > Liability > Federal Tort Claims Act > Procedural Matters

***HN3*[↓] Complaints, Prelitigation Notices**

28 U.S.C.S. § 2401 provides as follows: A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented. *28 U.S.C.S. § 2401(b)*.

Torts > ... > Liability > Federal Tort Claims Act > Procedural Matters

***HN4*[↓] Federal Tort Claims Act, Procedural Matters**

Claims under the *Federal Tort Claims Act* are governed by the substantive law of the state in which the claim arose. *28 U.S.C.S. § 1346(b)(1)*.

Civil Procedure > ... > Pleadings > Complaints > Prelitigation Notices

Torts > Malpractice & Professional Liability > Healthcare Providers

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

***HN5*[↓] Complaints, Prelitigation Notices**

Nev. Rev. Stat. § 41A.071 provides that 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—specifically, 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. *Nev. Rev. Stat. § 41A.071*. A medical malpractice complaint filed without a supporting medical expert affidavit is void ab initio, meaning it is of no force and effect.

Torts > ... > Healthcare Providers > Types of Liability > Negligence

***HN6*[↓] Types of Liability, Negligence**

"Professional negligence" means the failure of a provider of health care, in rendering services, to use the reasonable care, skill or knowledge ordinarily used under similar circumstances by similarly trained and experienced providers of health care. *Nev. Rev. Stat. § 41A.015*. *Nev. Rev. Stat. § 41A.017* defines "provider of health care" as follows: A physician licensed pursuant to chapter 630 or 633 of Nev. Rev. Stat., physician assistant, dentist, licensed nurse, dispensing optician, optometrist, registered physical therapist, podiatric physician, licensed psychologist, chiropractor, doctor of Oriental medicine, medical laboratory director or technician, licensed dietitian or a licensed hospital, clinic, surgery center, physicians' professional corporation or group practice that employs any such person and its employees. *Nev. Rev. Stat. § 41A.017*.

Civil Procedure > ... > Pleadings > Complaints > Prelitigation Notices

Torts > Malpractice & Professional Liability > Healthcare Providers

Torts > ... > Comparative Fault > Common Law Concepts > Res Ipsa Loquitur

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

***HN7*[⬇] Complaints, Prelitigation Notices**

The general rule is that the expert affidavit requirement in *Nev. Rev. Stat. § 41A.071* does not apply to a res ipsa loquitur case under *Nev. Rev. Stat. § 41A.100(1)*.

Evidence > Inferences & Presumptions > Presumptions > Creation

Torts > ... > Comparative Fault > Common Law Concepts > Res Ipsa Loquitur

Evidence > Inferences & Presumptions > Presumptions > Particular Presumptions

***HN8*[⬇] Presumptions, Creation**

Nev. Rev. Stat. § 41A.100 provides, in part, that a rebuttable presumption that a personal injury or death was caused by negligence arises where evidence is presented that the provider of health care caused the personal injury or death occurred in any one or more of the following circumstances: (a) A foreign substance other than medication or a prosthetic device was unintentionally left within the body of a patient following surgery; (b) An explosion or fire originating in a substance used in treatment occurred in the course of treatment; (c) An unintended burn caused by heat, radiation or chemicals was suffered in the course of medical care; (d) An injury was suffered during the course of treatment to a part of the body not directly involved in the treatment or proximate thereto; or (e) A surgical procedure was performed on the wrong patient or the wrong organ, limb or part of a patient's body.

Counsel: **[*1]** John T Washington, Plaintiff, Pro se, Las Vegas, NV.

For Eugene P Libby, D.O., Eugene P Libby, D.O. A Professional Corporation, Defendants: Matthew C Zirzow, Zachariah Larson, LEAD ATTORNEYS, Larson & Zirzow, Las Vegas, NV; Shara Lynn Larson, LEAD ATTORNEY, Larson & Zirzow, LLC, Las Vegas, NV.

Judges: James C. Mahan, UNITED STATES DISTRICT JUDGE.

Opinion by: James C. Mahan

Opinion

ORDER

Presently before the court is *pro se* plaintiff John T. Washington's motion to reconsider, or in the alternative, to modify order. (ECF No. 13). Defendants Eugene P. Libby, D.O. ("Dr. Libby") and Eugene P. Libby, D.O., a professional corporation (collectively, as "defendants") filed a non-opposition response. (ECF No. 15).

I. Background

This is a medical malpractice action arising from plaintiff's shoulder surgery, which Dr. Libby, a doctor for the Veteran Administration ("VA"), performed on February 28, 2008. (ECF No. 1).

On March 31, 2008, during a follow-up visit, Dr. Libby noted that plaintiff developed a postoperative wound infection, which Dr. Libby treated with antibiotics. (ECF No. 1 at 5). A subsequent follow-up on April 7, 2008, indicated that the infection was resolving. (ECF No. 1 at 5). On April 15, 2008, Dr. Libby performed **[*2]** a second surgery to remove the sutures in plaintiff's shoulder from the first surgery, which had failed, and to repeat the cuff tear repair. (ECF No. 1 at 5).

Plaintiff alleges that he began to notice increasing pain in his left shoulder rotator cuff in December 2014 and consulted Dr. Mark Erickson, another doctor for VA, who told plaintiff that he had a methicillin-resistant Staphylococcus aureus ("MSRA") infection. (ECF No. 5-6). On January 27, 2015, Dr. Erickson surgically removed an abscess containing a piece of suture. (ECF No. 1 at 6).

Plaintiff further alleges that Dr. Libby used recalled suture materials containing MSRA in plaintiff's surgery and that the allegedly defective suture materials caused an abscess cyst and infection. (ECF No. 1 at 9).

On January 27, 2017, plaintiff filed the underlying complaint against defendants United States of America, Dr. Libby, and Eugene P. Libby, D.O., a professional corporation, alleging two claims for relief: (1) medical malpractice; and (2) *res ipsa loquitur* medical negligence. (ECF No. 1).

On April 3, 2017, defendants filed a motion to dismiss the complaint as time-barred by the statute of limitations and for failure to attach a medical **[*3]** affidavit. (ECF No. 7).

On April 18, 2017, the court granted defendants' motion

to dismiss (ECF No. 7) and dismissed plaintiff's complaint (ECF No. 1) on two grounds: (1) failure to comply with NRS 41A.071's affidavit requirement; and (2) failure to timely respond so as to constitute consent. (ECF No. 9).

On April 25, 2017, plaintiff filed the instant motion, requesting reconsideration of the court's April 18th order for two reasons: (1) his response (ECF No. 11) to defendants' motion to dismiss (ECF No. 7) was timely filed; and (2) NRS 41A.071's affidavit requirement did not apply pursuant to Szydel v. Markman, 121 Nev. 453, 117 P.3d 200 (Nev. 2005). (ECF No. 13). On May 3, 2017, defendants filed a non-opposition response to plaintiff's motion for reconsideration. (ECF No. 15).

On May 17, 2017, plaintiff filed a notice of appeal. (ECF No. 16).

II. Notice of Appeal

Because plaintiff filed a notice of appeal (ECF No. 16) on May 17, 2017, thereby divesting the court of jurisdiction, the court lacks authority to grant plaintiff's instant motion. *See* Mayweathers v. Newland, 258 F.3d 930, 935 (9th Cir. 2001); *see also* Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58, 103 S. Ct. 400, 74 L. Ed. 2d 225 (1982) (*per curiam*). ***HN1***[↑] Federal Rule of Civil Procedure 62.1, however, provides that if a motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may:

> (1) defer considering the **[*4]** motion;
> (2) deny the motion; or
> (3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantive issue.

Fed. R. Civ. P. 62.1(a).

Upon reviewing the record, the court finds that plaintiff's response (ECF No. 11) to defendants' motion to dismiss (ECF No. 7) was timely. Therefore, if the court of appeals remands for this purpose, the court would grant plaintiff's motion (ECF No. 13), in part, as to the timeliness issue.

However, the court would deny plaintiff's motion (ECF No. 13), in part, as to the remaining issue regarding NRS 41A.071's affidavit requirement because dismissal of plaintiff's complaint without prejudice on that ground was appropriate. More specifically, the two medical malpractice claims set forth in plaintiff's complaint were subject to NRS 41A.071's affidavit requirement, and dismissal of the claims without prejudice was proper in light of plaintiff's failure to submit the requisite medical affidavit therewith.

Further, plaintiff's claims are otherwise time-barred by the statute of limitations under both NRS 41A.097 and 28 U.S.C. § 2401.[1]

III. Discussion

Plaintiff's complaint alleged two medical malpractice claims under the *Federal Tort Claims Act, 28 U.S.C. § 1346* ("FTCA"). ***HN4***[↑] Claims under the FTCA are governed by the substantive law of the state in which the claim arose. *28 U.S.C. § 1346(b)(1).* Here, plaintiff's claim arose in Nevada; therefore, Nevada law applied.

HN5[↑] Section 41A.071 of the Nevada Revised Statutes provides that "[i]f 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"—specifically, **[*6]** an affidavit that:

1. Supports the allegations contained in the action;
2. Is submitted by a medical expert who practices

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[1] ***HN2***[↑] Pursuant to NRS 41A.097, "an action for injury or death against a provider of health care may not be commenced more than 3 years after the date of injury or 1 year after the plaintiff discovers or through the use of reasonable diligence should have discovered the injury, whichever occurs first." Nev. Rev. Stat. § 41A.097(2). ***HN3***[↑] Title 28 U.S.C. § 2401 provides as follows:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within **[*5]** two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

28 U.S.C. § 2401(b). Plaintiff alleged that he discovered the injury on or about January 27, 2015, when Dr. Erickson surgically removed an abscess containing a piece of suture. (ECF No. 1 at 6). Plaintiff failed to filed the complaint within a year after January 27, 2015, and did not file until 2017. Further, plaintiff's complaint failed to allege or set forth any facts to support a reasonable inference that plaintiff timely presented the instant tort claims in writing to the proper Federal agency.

> 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.

Nev. Rev. Stat. § 41A.071.[2] "[A] medical malpractice complaint filed without a supporting medical expert affidavit is void ab initio, meaning it is of no force and effect." Washoe Med. Ctr. v. Second Judicial Dist. Court of State of Nev. ex rel. Cty. of Washoe, 122 Nev. 1298, 148 P.3d 790, 794 (Nev. 2006) ("A complaint that does not comply with NRS 41A.071 is void and must be dismissed.").

The instant action is subject to NRS 41A.071's affidavit requirement because it is an action for professional negligence.[3] In particular, plaintiff has alleged two medical malpractice claims and was therefore obligated to submit an affidavit when he filed suit. *See* Swails v. United States, 406 F. App'x 124 (9th Cir. 2010). Plaintiff failed to submit the requisite medical affidavit upon filing the instant action, rendering dismissal without prejudice appropriate.

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[2] The "affidavit" can take the form of either a "sworn affidavit or an unsworn declaration made under penalty of perjury." Buckwalter v. Eighth Judicial Dist. Court, 234 P.3d 920, 922 (Nev. 2010).

[3] ***HN6***[↑] "Professional negligence" means "the failure of a provider of health care, in rendering services, to use the reasonable care, skill or knowledge ordinarily used under similar circumstances by similarly trained and experienced providers of health care." Nev. Rev. Stat. § 41A.015. Section 41A.017 of the NRS defines "provider of health care" as follows:

> [A] physician licensed pursuant to chapter 630 or 633 of NRS, physician **[*7]** assistant, dentist, licensed nurse, dispensing optician, optometrist, registered physical therapist, podiatric physician, licensed psychologist, chiropractor, doctor of Oriental medicine, medical laboratory director or technician, licensed dietitian or a licensed hospital, clinic, surgery center, physicians' professional corporation or group practice that employs any such person and its employees.

Nev. Rev. Stat. § 41A.017.

Citing to *Szydel*, plaintiff argued that no medical affidavit is needed for medical malpractice claims based solely on the *res ipsa loquitur* doctrine. (ECF Nos. 11 at 6; 13 at 4). Plaintiff's medical malpractice claims, however, were not based solely thereon. In particular, plaintiff's complaint alleged two medical malpractice claims, only one of which (specifically, claim 2) was based on the doctrine of *res ipsa locquitur*. (ECF No. 1).

Indeed, ***HN7***[↑] the general rule is that "the expert affidavit requirement in NRS 41A.071 does not apply to a res ipsa loquitur case under NRS 41A.100(1)." Szydel, 117 P.3d at 205.

> When, however, a plaintiff files a res ipsa loquitur claim in conjunction with other medical malpractice claims that do not rely on the res ipsa loquitur doctrine, those other claims are subject to the requirements of NRS 41A.071 and must be supported **[*8]** by an appropriate affidavit from a medical expert. In addition, any res ipsa claim filed without an expert affidavit must, when challenged by the defendant in a pretrial or trial motion, meet the prima facie requirements for a res ipsa loquitur case. Consequently, the plaintiff must present facts and evidence that show the existence of one or more of the situations enumerated in NRS 41A.100(1)(a)-(e).

Id. (footnote omitted).

Plaintiff's *res ipsa locquitur* medical malpractice claim (claim 2) failed to meet the *prima* facie requirements for a *res ipsa locquitur* case. Specifically, the complaint failed to set forth sufficient facts to support a reasonable inference that any of the enumerated situations in NRS 41A.100(1)(a)-(e) were applicable. In particular, ***HN8***[↑] NRS 41A.100 provides as follows:

> 1. Liability for personal injury or death is not imposed upon any provider of health care based on alleged negligence in the performance of that care unless evidence consisting of expert medical testimony, material from recognized medical texts or treatises or the regulations of the licensed medical facility wherein the alleged negligence occurred is presented to demonstrate the alleged deviation from the accepted standard of care in the specific circumstances **[*9]** of the case and to prove causation of the alleged personal injury or death, except that such evidence is not required and a rebuttable presumption that the personal injury or death was caused by negligence arises

where evidence is presented that the provider of health care caused the personal injury or death occurred in any one or more of the following circumstances:

> (a) A foreign substance other than medication or a prosthetic device was unintentionally left within the body of a patient following surgery;
>
> (b) An explosion or fire originating in a substance used in treatment occurred in the course of treatment;
>
> (c) An unintended burn caused by heat, radiation or chemicals was suffered in the course of medical care;
>
> (d) An injury was suffered during the course of treatment to a part of the body not directly involved in the treatment or proximate thereto; or
>
> (e) A surgical procedure was performed on the wrong patient or the wrong organ, limb or part of a patient's body.

Nev. Rev. Stat. § 41A.017.

Plaintiff's complaint did not allege that Dr. Libby caused plaintiff's injuries by unintentionally leaving a foreign substance (*i.e.*, the suture) in his body following surgery. Rather, plaintiff alleged that Dr. Libby caused **[*10]** plaintiff's injuries by using allegedly defective suture materials containing MRSA and failing to remove the sutures upon knowing that they would become infected. (*See* ECF No. 1 at 9-10). Therefore, plaintiff's complaint has not sufficiently stated a *prima facie* claim for medical malpractice based on *res ipsa loquitur* within the situations enumerated in *NRS 41A.100*.

Accordingly, both of plaintiff's medical malpractice claims were subject to *NRS 41A.071*'s affidavit requirement and both claims were properly dismissed without prejudice based on plaintiff's failure to submit the requisite affidavit.

IV. Conclusion

Based on the aforementioned, the court will deny plaintiff's motion for reconsideration (ECF No. 13) with leave to refile pending a decision by the Ninth Circuit to remand.

Accordingly,

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that plaintiff's motion for reconsideration, or in the alternative, to modify order (ECF No. 13) be, and the same hereby is, DENIED with leave to refile pending a decision by the Ninth Circuit to remand.

DATED May 19, 2017.

/s/ James C. Mahan

UNITED STATES DISTRICT JUDGE

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IN THE SUPREME COURT OF THE STATE OF NEVADA

MELISSA CUMMINGS Appellant, vs. ANNABEL BARBER, M.D. AND UNIVERSITY MEDICAL CENTER Respondents.	Case No. 76972 Dist. Court Case No. : A729065

RESPONDENT ANNABEL BARBER, M.D.'S ANSWERING BRIEF

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I.

NRAP 26.1 DISCLOSURE

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 in order that the Judges of this Court may evaluate possible disqualification or recusal.

RELATED ENTITIES:

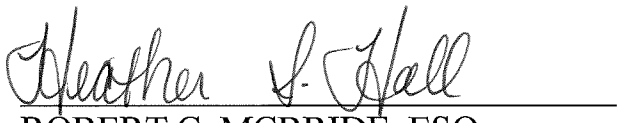
None.

LAW FIRMS APPEARING FOR RESPONDENT IN THE CASE OR EXPECTED TO APPEAR IN THIS COURT:

Robert C. McBride, Esq. and Heather S. Hall, Esq. of Carroll, Kelly, Trotter, Franzen, McBride & Peabody represent Respondent Annabel Barber, MD.

DATED: April 12th, 2019.

CARROLL, KELLY, TROTTER,
FRANZEN, McBRIDE & PEABODY



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IV.

ISSUES PRESENTED

1. Did the District Court correctly find that Plaintiff had not articulated a viable res ipsa loquitur claim under NRS 41A.100?

2. Did the District Court appropriately enter summary judgment in favor of Defendant Annabel Barber, M.D. because Plaintiff had not articulated a viable res ipsa loquitur claim under NRS 41A.100 and had no expert to establish a claim for medical malpractice?

V.

STATEMENT OF THE FACTS

This is a medical malpractice case filed on December 16, 2015. *See* Appellant's Appendix, Volume I, 001 – 015. Plaintiff/Appellant's only claim is for "Medical Negligence – Res Ipsa". *See* 003. Respondent Dr. Barber performed two surgical procedures for Plaintiff: On September 3, 2013, Dr. Barber and the surgery residents implanted a gastric stimulator and Dr. Barber surgically removed the stimulator on June 6, 2014. *See* 057.

Plaintiff originally alleged that during the course of removing the gastric pacemaker for Ms. Cummings on June 6, 2014, Dr. Barber overlooked or unintentionally left surgical clips in her abdomen. *See* 002 – 003, para. 6 – 11. The only allegation advanced by Plaintiff in the Complaint is related to the surgical

clips left in following the June 6, 2014 surgery. *Id.* Plaintiff has never made any allegations of negligence related to the September 3, 2013 surgery. During discovery, as evidenced by the discovery responses referred to in Appellant's Brief, Plaintiff contended both wires and surgical clips were left in from the earlier surgery.

By Stipulation of the parties, Initial Expert Disclosures were due on May 19, 2017. *See* 043 – 50. Rebuttal Expert Disclosures were due on June 19, 2017. *Id.* On May 19, 2017, Dr. Barber timely served her Initial Expert Disclosure in this case, providing the curriculum vitae, fee schedule, testimonial history and initial expert report of Dr. Andrew Warshaw M.D., F.A.C.S., FRCS Ed (Hon.), a surgeon and professor of surgery with Harvard Medical School. *See* 052 – 141. An Errata providing Dr. Warshaw's testimonial history was e-served on May 22, 2017. *See* 143 – 148. Plaintiff did not provide an Initial Expert Disclosure. Plaintiff also did not provide a Rebuttal Expert Disclosure.

Several years into this litigation, Plaintiff disclosed that she had the materials removed by a surgeon. On October 30, 2017, Plaintiff underwent a surgical procedure with Dr. Stephen Horsely. *See* 154 – 155. As a result, Plaintiff filed a Motion to Extend Discovery to allow the defense to explore the issue, and the discovery cut-off deadline was extended to April 4 2018 and the dispositive motion deadline was extended to May 4, 2018. *See* 150 – 152.

Plaintiff states that Dr. Horsely's surgery confirmed that there were wires present in Ms. Cummings' abdomen after the June 6, 2014 surgery, but that issue was never disputed. *See* Opening Brief, 18. In fact, both Dr. Barber and her expert acknowledge this. *See* 057 – 58; *See* 168 – 169, para. 10 – 12. When treating surgeon Dr. Horsely was deposed on March 14, 2018, he testified that when he performed an appendectomy for Ms. Cummings, he secondarily removed the lead wire fragments and surgical clips. *See* 161:14 – 18; 163:2 – 4; and 165:13 – 17. He further testified that they were not causing any infectious process and he removed them secondarily. 162:14 – 22. Importantly, Dr. Horsely did not offer an opinion on whether Dr. Barber violated the standard of care in this case, as he does not install gastric pacemakers and, thus, has no knowledge of what materials are commonly left inside the abdomen following removal of a gastric pacemaker. 166:18 – 27. Dr. Horsely testified that in his practice, he sees surgical clips left in the body following various surgical procedures and those are surgical clips meant to be left in the body. 159:4 – 12. Dr. Horsely's testimony does not provide any support for Plaintiff's contention that the factual allegations in this case state a viable claim for res ipsa loquitur.

Plaintiff has no expert to even attempt to establish Dr. Barber committed medical malpractice. Dr. Warshaw, the only retained surgical expert in this case, has opined that Dr. Barber met the standard of care in performing the June 6, 2014

surgery. *See* 058. Dr. Warshaw reviewed the available radiologic imaging in this case and opined that he saw no clips upon review of multiple abdominal images. *See* 057. He further notes that although the operative report for the June 6, 2014 surgery "states that wires were completely and easily extracted, part of the wire which was embedded in the stomach wall must have remained behind." *Id.* He found no evidence of infection or inflammation around the wires, nor did the Chief of Abdominal Imaging at Mass General Hospital, who Dr. Warshaw consulted. *Id.*

Dr. Warshaw has further opined that:

> "The residual wire fragments are innocent, probably forever encapsulated in fibrous tissue. They are most definitely not the cause of any pain. Removal, should it be attempted, would be complex, difficult and serve no useful purpose."
>
> *Id.*

Dr. Barber was never deposed in this case. Had Plaintiff taken her deposition, Dr. Barber would have explained that she intended to leave surgical clips in place following her June 6, 2014 surgical procedure. *See* 168, para. 7, 8, and 12. The reason for leaving the surgical clips in place is to control post-operative bleeding. *Id.* at para. 8 and 9. The small, wire fragments were lead wires from her pacemaker (implanted on 9/3/13) that Dr. Barber intentionally left in during the June 6, 2014 procedure. *See* 168 – 169, para. 10 – 12. To the extent

these could be visualized Dr. Barber exercised her medical judgment and determined that removing these fragments, that were embedded in the wall of Ms. Cummings' stomach, was not medically indicated and would pose a greater risk to the patient than leaving them in place. *See* 168, para. 11. Dr. Horsely's deposition testimony does not dispute Dr. Barber's sworn affidavit and the opinions of retained expert Dr. Warshaw. Defense expert, Dr. Warshaw.

On May 4, 2018, Dr. Barber timely filed a Motion for Summary Judgment. *See* 26 – 169. The basis of the Motion was that Plaintiff's factual allegations did not fall under any of the circumstances enumerated in NRS 41A.100. With regard to the surgical clips left in during the June 6, 2014 surgery, those were intentionally left in the body to control post-operative bleeding and, therefore, did not fall under NRS 41A.100(1)(a), "a foreign substance other than medication or a prosthetic device was unintentionally left within the body of a patient following surgery." NRS 41A.100(1)(a). Likewise, the lead wire fragments were intentionally left in the patient's body. Dr. Barber exercised her medical judgment and determined that removing these fragments, that were embedded in the wall of Ms. Cummings' stomach, was not medically indicated and would pose a greater risk to the patient than leaving them in place. *See* 168, para. 11. As a result, that allegation also did not fall under res ipsa loquitur. Because Plaintiff's sole theory was res ipsa loquitur, none of the allegations fell under NRS 41A.100, and Plaintiff

had no expert to support a claim against Dr. Barber, Dr. Barber sought summary judgment.

In her Opposition to the Motion for Summary Judgment, Plaintiff conceded that the surgical clips from the June 6, 2014 surgery were **intentionally** left in her body. *See* 182:21 – 23 ("Dr. Barber's surgical report did reference placing two surgical clips, i.e., Vicryl sutures, inside the Plaintiff's stomach wall area. Plaintiff agrees that the placement of Vicryl sutures was intentional by Dr. Barber").

The District Court held a hearing on Dr. Barber's Motion for Summary Judgment on June 5, 2018. *See* 223 – 238. As argued by defense counsel at the hearing, because of Plaintiff's admission that the surgical clips were intentionally left, the only remaining issue to be decided was whether an allegation that Dr. Barber failed to remove wire fragments during her June 6, 2014 surgery that were placed at the time of her September 3, 2013 surgery stated a viable claim for res ipsa loquitur. *See* 225:1 – 226:7.

After hearing argument, the District Court took the matter under advisement and invited the parties to provide additional case law in support of their respective positions. *See* 237. On June 7, 2018, counsel for Dr. Barber provided supplemental cases to the Court and all parties. *See* R APP 0001 – 47.

After the supplemental cases were provided, the District Court held a second hearing on July 18, 2018. *See* 239 – 242. At the second hearing, the District Court

determined that NRS 41A.100 is not as broad as claimed by Plaintiff and that the allegation that lead wires from the original surgery were left in during the second surgery does not fall under NRS 41A.100(1)(a). *See* 241. Because the allegations did not fall under NRS 41A.100, Plaintiff was required to present expert testimony that Dr. Barber fell below the standard of care. *See* 248. Because Plaintiff has no expert to support a claim for medical malpractice, the District Court had no choice but to grant Dr. Barber's Motion for Summary Judgment. *See* 248. Judgment was entered in favor of both Dr. Barber and University Medical Center. *Id.* This appeal followed.

VI.

SUMMARY OF ARGUMENT

The District Court properly granted summary judgment in favor of Defendants. The allegations in this case do not state a viable claim for res ipsa loquitur under NRS 41A.100. Dr. Barber's sworn affidavit that the surgical clips were intentionally left in during the June 6, 2014 surgery is undisputed. Plaintiff acknowledged as much in her Opposition to the Motion for Summary Judgment.

On appeal, Plaintiff's primary contention is that Dr. Barber's sworn affidavit that the lead wire fragments placed during the September 3, 2013 surgery were intentionally left in during the June 6, 2014 surgery is contradicted by her Operative Report which makes no reference to embedded lead wire fragments. *See*

Opening Brief, page 18. The absence of this information does not contradict Dr. Barber's affidavit. Dr. Barber's Operative Report states that: "The capsule was entered. The stimulator was then able to be removed easily, and the leads were gently tugged until they were removed from the stomach. Both were removed easily." *See* 202. This documentation also does not contradict Dr. Barber's affidavit. The lead wires were, in fact, removed during the June 6, 2014 surgery. Fragments are different than the actual lead wires. Plaintiff has no admissible evidence to dispute Dr. Barber's sworn affidavit that the wire fragments were ***intentionally*** left in Plaintiff's abdominal wall.

Further, Plaintiff's position ignores the main basis for the District Court's ruling. First and foremost, the District Court determined that the allegation that Dr. Barber failed to remove wire fragments placed during the September 3, 2013 surgery when she performed surgery on June 6, 2014 does not fall under NRS 41A.100(1)(a). The District Court was not persuaded that NRS 41A.100(1)(a) was intended to cover such a circumstance, nor would that be consistent with the purpose of the statute. Because Plaintiff failed to state a viable res ipsa loquitur claim, Plaintiff was required to have expert testimony to establish that Dr. Barber fell below the standard of care and caused injury to Plaintiff. Plaintiff has no expert to establish the requisite standard of care and alleged breaches. The undisputed evidence in this case is that Dr. Barber met the standard of care. Both

Dr. Warshaw (the only retained expert qualified to comment on standard of care) and Dr. Barber herself have opined that the standard of care was met in all aspects of Ms. Cummings' care.

It is clear from the record that Dr. Barber's decision to leave small, wire fragments which were embedded in the patient's tissue was what she believed was best for the patient. Simply because Plaintiff disagrees with Dr. Barber's medical decision making is not enough to defeat summary judgment. To defeat summary judgment, Plaintiff was required to provide competent medical evidence, in the form of expert testimony, supporting her contention that the standard of care was violated. In opposing the Motion for Summary Judgment, Plaintiff did not provide any evidence sufficient to defeat summary judgment. Accordingly, the decision of the District Court should be affirmed.

VII.

LEGAL ARGUMENT

A. STANDARD OF REVIEW.

An order on a motion for summary judgment is reviewed de novo. *Pressler v. City of Reno*, 118 Nev. 506, 509, 50 P.3d 1096, 1098 (2002); *Winn v. Sunrise Hosp. & Med. Ctr.*, 128 Nev. 246, 252, 277 P.3d 458, 462 (2012). Summary judgment should be entered when the evidence, viewed in the light most favorable to the non-moving party, demonstrates that no genuine issue of material fact

remains and that the moving party is entitled to judgment as a matter of law. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026 (2005); *See also*, NRCP 56(c).

B. THE DISTRICT COURT'S FINDING THAT PLAINTIFF DID NOT STATE A VIABLE RES IPSA LOQUITUR CLAIM WAS CORRECT.

To establish the elements of a medical malpractice claim, expert testimony is required unless the facts fit the factual scenario of a res ipsa loquitur claim. *See* NRS 41A.100; *See also*, *Ferdinand v. Admirand*, 108 Nev. 963, 843 P.2d 354 (1992); *See also*, *Bronneke v. Rutherford*, 120 Nev. 230, 235, n.9, 89 P.3d 40, 44, n. 9 (2004). Throughout this matter, Plaintiff took the position that this case falls under NRS 41A.100(1)(a), which creates a rebuttable presumption that the personal injury was caused by negligence where evidence is presented that the personal injury was due to foreign substance left unintentionally within the body of a patient following surgery.

In order to meet that statutory definition, Plaintiff must establish that a foreign substance was ***unintentionally*** left in a patient's body. Plaintiff's factual allegations center around Dr. Barber's alleged, unintentional leaving behind of lead wire fragments and surgical clips when she performed Ms. Cummings' June 6, 2014 surgery. With respect to the lead wire fragments, these were placed during Dr. Barber's original surgery on September 3, 2013. They were not items used during her June 6, 2014 surgery. The surgical clips were to control post-operative

bleeding during the June surgery and were intentionally left behind. As discussed more fully below, neither of these allegations falls under NRS 41A.100.

When the viability of a res ipsa allegation is challenged, the District Court must determine whether the allegations fall under any of the specifically enumerated circumstances set forth in NRS 41A.100. *Szydel v. Markman*, 121 Nev. 453, 460 – 61, 117 P.3d 200, 205 (2005); *Kinford v. Bannister*, 913 F. Supp. 2d 1010, 1015 – 16 (Dist. Nev. 2012). The Motion for Summary Judgment challenged the viability of Plaintiff's res ipsa loquitur claim and the Court's determination that Plaintiff did not state a viable claim under NRS 41A.100 should be affirmed.

1. Surgical Clips Which Were Intentionally Left Behind During the June 6, 2014 Surgery Do Not Fall Under NRS 41A.100(1)(a).

It is undisputed in this matter that Dr. Barber intended to leave surgical clips following her June 6, 2014 surgery. *See* 168, para. 7, 8, and 12. The purpose of leaving the surgical clips in place is to control post-operative bleeding. *Id.* at para. 8 and 9. In her Opposition to the Motion for Summary Judgment, Plaintiff conceded that the surgical clips from the June 6, 2014 surgery were **intentionally** left in her body. *See* 182:21 – 23 ("Dr. Barber's surgical report did reference placing two surgical clips, i.e., Vicryl sutures, inside the Plaintiff's stomach wall

area. Plaintiff agrees that the placement of Vicryl sutures was intentional by Dr. Barber").

Given Plaintiff's concession that the surgical clips were intentionally left behind, it was undisputed that this circumstance falls outside of NRS 41A.100(1)(a). A contention that surgical clips were intentionally left within the body does not fall under the circumstances described in NRS 41A.100(1)(a), "a foreign substance other than medication or a prosthetic device was unintentionally left within the body of a patient following surgery." NRS 41A.100(1)(a).

2. Lead Wire Fragments From the September 3, 2013 Surgery Intentionally Left in During the June 6, 2014 Surgery Do Not Fall Under NRS 41A.100(1)(a).

The allegation that Dr. Barber failed to remove previously implanted hardware during the June 6, 2014 surgery does not state a viable claim for res ipsa. Such an allegation is markedly different from an allegation that materials used during the course of a surgery (i.e., a sponge, surgical towel, or needle) were errantly left behind.

In *Kinford v. Bannister*, 913 F. Supp. 2d 1010 (Dist. Nev. 2012), the U.S. District Court of Nevada considered whether a plaintiff was permitted to proceed without the expert affidavit required by NRS 41A.071 under a res ipsa loquitur claim. In response to a Motion to Dismiss, the pro se plaintiff sought to amend to

add a claim for res ipsa loquitur. *Id.* at 1016. Although not specifically referenced, the plaintiff's averments possibly implicated NRS 41A.100(1)(a), in that plaintiff claimed the physician, Dr. Pincock, failed to remove broken screws and implants leaving foreign substances in his body. *Id.* The subject screws and implants were not alleged to have been placed within plaintiff's body during Dr. Pincock's surgery. *Id.* It was undisputed that the materials were originally placed during a previous, reconstructive surgery. *Id.* at 1016 – 17.

The *Kinford* Court concluded that "failing to remove previously implanted hardware, which is the gravamen of Plaintiff's res ipsa claim for relief, differs markedly from the statutory res ipsa circumstance of leaving behind and failing to remove such a device following surgery." *Id.* at 1017. In reaching this conclusion, the Court discussed the factual allegations in *Szydel* regarding leaving behind an unaccounted for surgical needle compared to the allegation that material placed during an original surgery was not removed during a second surgery. *Id.* The Court reasoned that "errantly leaving behind a surgical device which the physician used during surgery, is markedly different from not removing previously implanted hardware. While the failure to do so might conceivably constitute professional negligence (which would have to be the subject of a medical affidavit), such circumstances do not state a viable res ipsa claim under Nev. Rev. Stat. 41A.100(1)(a)." *Id.*

Here, Plaintiff claimed that Dr. Barber failed to remove lead wire fragments that were implanted on September 3, 2013, during her June 6, 2014 surgery. This is analogous to the facts of *Kinford.* Just as the *Kinford* Court concluded that this does not state a claim under NRS 41A.100, the District Court determined that the allegation that Dr. Barber failed to remove previously implanted hardware during her June 6, 2014 surgery does not state a viable res ipsa claim. *See* 248.

In *James v. Wormuth*, 997 N.E. 2d 133, 974 N.Y.S. 2d 308 (2013), the Court of Appeals of New York considered a directed verdict entered in favor of a physician defendant. The case was premised upon a localization guide wire left in during a biopsy of the patient's lung. *Id.* at 134, 543. Just like Dr. Barber, the physician claimed to have exercised his professional judgment in deciding to leave in the material, because it was riskier to try and remove it. *Id.* at 137, 547. The Court concluded that the doctor explained his decision to leave the wire in terms of his medical assessment of what was best for the patient under the circumstances. *Id.* His testimony that it was his professional judgment to leave the wire could not be assessed by the jury based upon the common knowledge of lay people. *Id.* [Internal citations omitted].

Similarly, Dr. Barber's affidavit that she exercised her professional judgment in choosing to leave the small fragments, embedded in the patient's tissue cannot be assessed by a jury based upon the common knowledge of a non-

medical person and expert testimony is necessary. In *Szydel v. Markman*, 121 Nev. 453, 117 P.3d 200 (2005), this Court recognized that expert testimony is not necessary in res ipsa cases:

> "Undeniably, the res ipsa loquitur doctrine codified in NRS 41A.100 permits medical malpractice claims to go forward without expert testimony when the plaintiff is able to present some evidence that one or more of the factual situations enumerated in NRS 41A.100(1)(a)-(e) exist. **These are factual situations where the negligence can be shown without expert medical testimony**, as when a foreign substance is found in the patient's body following surgery, NRS 41A.100(1)(a), or when a surgical procedure is performed on the wrong limb of the patient's body, NRS 41A.100(1)(e). It would be unreasonable to require a plaintiff to expend unnecessary effort and expense to obtain an affidavit from a medical expert when expert testimony is not necessary for the plaintiff to succeed at trial.

Id. at 459-460, 117 P.3d at 204. (emphasis added).

Here, negligence cannot be shown absent expert testimony and the District Court correctly determined that a viable res ipsa claim had not been asserted. Plaintiff's reliance on *Born v. Eisenman*, 962 P.2d 1227 (Nev. 1998) is misplaced, as that case is factually distinguishable. In *Born*, the plaintiff was prevented from

presenting evidence to establish the applicability of res ipsa loquitur doctrine and having the jury determine whether res ipsa loquitur applied. *Id.* at 856. Notably, the surgeon who performed an exploratory surgery and discovered a ureter injury that was alleged to have occurred during Dr. Eisenman's surgery (and the basis for the res ipsa claim) opined that the injury likely occurred during Dr. Eisenman's surgery. *Id.* This evidence supported plaintiff's contention that there was an injury to the part of the body not involved in the care and the Court determined that it was error for the plaintiff to be denied an opportunity to present that evidence. *Id.*

Under the current circumstances, Plaintiff has no evidence to establish the applicability of the res ipsa loquitur doctrine codified at NRS 41A.100. Plaintiff has no retained expert. The testimony of treating surgeon, Dr. Horsely, does not establish the applicability of res ipsa, nor did he dispute the information set forth in Dr. Barber's affidavit or the opinions of Dr. Warshaw. Nothing in *Born* supports Plaintiff's contention that the District Court's decision was erroneous.

In addition to the fact that the lead wire fragments were from a prior surgery, not the June 6th surgery, Plaintiff had no admissible evidence to dispute Dr. Barber's sworn affidavit that she intentionally left in the lead wire fragments. The wire fragments were small pieces of the lead wires from her pacemaker (implanted on 9/3/13) that Dr. Barber intentionally left in during the June 6, 2014 procedure. *See* 168 – 169, para. 10 – 12. To the extent these could be visualized Dr. Barber

exercised her medical judgment and determined that removing these fragments, that were embedded in the wall of Ms. Cummings' stomach, was not medically indicated and would pose a greater risk to the patient than leaving them in place. *See* 168, para. 11.

While Plaintiff focuses on the absence of any mention of lead wire fragments in Dr. Barber's Operative Report, this absence does not dispute Dr. Barber's sworn affidavit. *See* Opening Brief, pages 8, 22. Further, the expert opinions of Dr. Warshaw establish that Dr. Barber met the standard of care in leaving in these wire fragments and removal would have posed a greater risk to the patient. *See* 058. Dr. Warshaw, the only retained surgical expert in this case, has opined that Dr. Barber met the standard of care in performing the June 6, 2014 surgery and Plaintiff has no expert to refute this and establish a claim for medical malpractice.

C. PLAINTIFF HAS NO EXPERT TO SUPPORT A MEDICAL MALPRACTICE CLAIM AND SUMMARY JUDGMENT WAS APPROPRIATELY ENTERED.

To prevail in a medical malpractice case, a plaintiff must show that: (1) the doctor's conduct departed from the accepted standard of care; (2) the doctor's conduct was both actual and proximate cause of plaintiff's injury; and (3) plaintiff suffered damages. *Prabhu v. Levine*, 112 Nev. 1538, 1543, 930 P.2d 103, 107 (1996) (citing *Perez v. Las Vegas Medical Center*, 107 Nev. 1, 4, 805 P.2d 589,

590-91 (1995); *Orcutt v. Miller*, 95 Nev. 408, 411, 595 P.2d 1191, 1193 (1979)). To establish the elements of a medical malpractice claim, expert testimony is required unless the facts fit the factual scenario of a res ipsa loquitur claim. *See* NRS 41A.100; *See also*, *Ferdinand v. Admirand*, 108 Nev. 963, 843 P.2d 354 (1992); *See also*, *Bronneke v. Rutherford*, 120 Nev. 230, 235, n.9, 89 P.3d 40, 44, n. 9 (2004).

The Motion for Summary Judgment appropriately relied upon the expert report of Dr. Warshaw, as well as an affidavit of Defendant Dr. Barber. While Plaintiff refers to this affidavit as self-serving, it is proper to support a Motion for Summary Judgment with evidence and affidavits. *See Ferreira v. P.C.H., Inc.*, 105 Nev. 305, 306, 774 P.2d 1041, 1042 (1989); NRCP 56(e).

Once the District Court correctly concluded that Plaintiff had not stated a viable res ipsa loquitur claim, Plaintiff needed an expert to establish the elements of a medical malpractice claim against Dr. Barber. Plaintiff had no expert to establish breach of the standard of care or causation for Dr. Barber, because Plaintiff did not designate an expert. The only expert testimony presented to the District court was that of Dr. Warshaw, who opined that Dr. Barber fully complied with the standard of care. *See* 058. Plaintiff did not designate a single expert to offer opinions on the standard of care, any alleged breaches, or any alleged injuries. Given the inability of Plaintiff to dispute Dr. Warshaw's opinions

regarding the care, the District Court correctly granted Dr. Barber's Motion for Summary Judgment and Defendant University Medical Center's Joinder to same. The entry of judgment in favor of Defendants should be affirmed.

VIII.

CONCLUSION

For the reasons stated herein, the District Court's decision to grant Dr. Barber's Motion for Summary Judgment and University Medical Center's joinder thereto should be affirmed. Plaintiff did not state a viable claim for res ipsa loquitur. Absent the required expert testimony, Plaintiff's case could not proceed and summary judgment in favor of both Defendants was required.

IX.

NRAP 28.2 CERTIFICATE OF COMPLIANCE

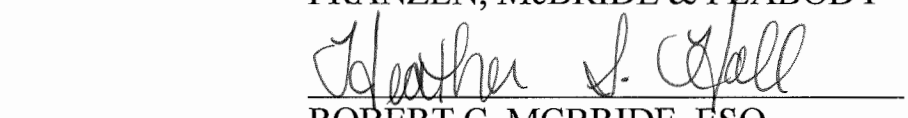
1. I, Heather S. Hall, Esq., hereby certify that this Answering Brief Under NRAP 27(e) complies with the formatting requirements of N.R.A.P. 32(a)(4), the typeface requirements of N.R.A.P. 32(a)(5) and the type style requirements of N.R.A.P. 32(a)(6).

2. I further certify that this Answering Brief complies with the page or type-volume limitations of N.R.A.P. 32(a)(7) because, excluding the parts of the brief exempted by N.R.A.P. 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, and contains 4,398 words.

3. Finally, I hereby certify that I have read the Answering Brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I understand that I may be subject to sanctions for failure to comply with the Nevada Rules of Appellate Procedure.

DATED: April 12th, 2019.

CARROLL, KELLY, TROTTER, FRANZEN, McBRIDE & PEABODY



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 12th day of April 2019, service of the foregoing **RESPONDENT ANNABEL BARBER, M.D.'S ANSWERING BRIEF,** was made this date by the Supreme Court's electronic service addressed as follows:

__X__ VIA ELECTRONIC SERVICE: by mandatory electronic service (e-service), proof of e-service attached to any copy filed with the Court; or

__X__ VIA U.S. MAIL: By placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, addressed as indicated on the service list below in the United States mail at Las Vegas, Nevada

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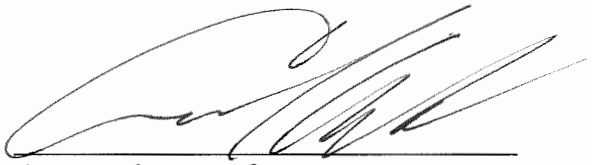

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