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



ROSAISET JARAMILLO, as Special Administrator of the ESTATE OF MARIA JARAMILLO,

Appellant,

vs.

SUSAN R. RAMOS, M.D., F.A.C.S.,

Respondent.

Case No. 77385

APPEAL FROM THE SECOND JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE;
THE HONORABLE KATHLEEN DRAKULICH, DISTRICT JUDGE
DISTRICT COURT CASE NO. CV17-00221

# RESPONDENT'S ANSWERING BRIEF

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## NRAP 26.1 DISCLOSURE STATEMENT

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

1. All parent corporations and publicly-held companies owning 10 percent or more of respondent's stock: None.

2. Names of all law firms whose attorneys have appeared for respondent (including proceedings in the district court) who are expected to appear in this court:

LEMONS GRUNDY & EISENBERG

3. If using a pseudonym, the litigant's true name: None.

DATED: April 17, 2019

for Robert T. Eisenberg

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## JURISDICTIONAL STATEMENT

Respondent agrees with Appellant's Jurisdictional Statement.

## ROUTING STATEMENT

Respondent agrees with Appellant's Routing Statement.

## I.

## STATEMENT OF ISSUES

Whether the district court properly granted summary judgment in this professional negligence action because the defendant health care providers rebutted the presumption of negligence triggered by NRS 41A.100(1)(a) with direct evidence consisting of uncontroverted expert testimony.

## II.

## STATEMENT OF THE CASE[1]

Appellant's Statement of the Case provides a general overview of the case but omits important facts of which the court should be aware in determining whether the district court properly granted summary judgment to the defendants, and specifically to respondent, Susan Ramos, M.D., F.A.C.S. ("Dr. Ramos").

A complaint for professional negligence was filed on behalf of Maria Jaramillo on February 2, 2017, against Dr. Ramos and Prime Health Care, dba St. Mary's Regional Medical Center (hereafter, "St. Mary's"). *A.App. 001.* The complaint relied upon the rebuttable presumption in NRS 41A.100(1)(a) based on the allegation that a foreign substance was unintentionally left in the patient's body. *A.App. 005, ¶¶ 29-30.*

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[1] Appellant's Appendix will be cited as *"A.App."* and Respondent's Appendix will be cited as *"R.App."*

Dr. Ramos filed her answer to the complaint on March 14, 2017. *A.App. 015.* St. Mary's filed its answer on May 5, 2017. *A.App. 023.* Thereafter, the parties filed the NRCP 16.1 Joint Case Conference Report ("JCCR"). *A.App. 128:26-27.* Under the JCCR, the deadline for initial expert disclosures was June 22, 2018, and the deadline for rebuttal expert disclosures was July 23, 2018. *A.App. 128:26-129:1.*

On October 23, 2017, plaintiff Maria Jaramillo died of unrelated causes. *A.App. 055, 059, 128.* Rosaiset Jaramillo, as the estate representative (hereafter, "the Estate" or "Jaramillo"), was substituted as the plaintiff. *A.App. 036:6-11.*

Plaintiff's Expert Witness Disclosure was served on June 22, 2018. It identified some of the treating health care providers, but stated there were "no retained expert witnesses to disclose at this time." *A.App. 062, 064.*

Dr. Ramos served her Expert Witness Disclosure on June 22, 2018. *A.App. 071-074.* Accompanying Dr. Ramos' Expert Witness Disclosure was the Declaration of Andrew B. Cramer, M.D, along with his curriculum vitae and fee schedule. *A.App. 075-082.* Dr. Cramer opined that Dr. Ramos' care was appropriate and he saw no aspect of that care in which she was negligent. *A.App. 084.*

St. Mary's Expert Witness Disclosure identified Paul M. Goldfarb, M.D., a surgical oncologist, as its expert. In his report dated June 12, 2018, Dr. Goldfarb opined that leaving a piece of a localization wire in a patient is a known complication

of needle biopsies. *R.App. 70-71.* He also opined that the care the patient received was within the standard of care. *R.App. 71.*

No rebuttal experts were disclosed by any of the parties either before or after the rebuttal expert disclosure deadline. *A.App. 129:3-4; R.App.133*:9-13.

On August 3, 2018, Dr. Ramos filed a motion for summary judgment. It was supported by, among other things, Dr. Cramer's expert declaration demonstrating the retention of a localization wire can occur in the absence of negligence and that Dr. Ramos' care was within the standard of care. *A.App. 032-097.*

On August 7, 2018, St. Mary's filed a motion for summary judgment. *R.App. 1-16.* It was supported by, among other things, the declaration and report of Dr. Goldfarb, rebutting the presumption of negligence of NRS 41A.100(1)(a) on which Jaramillo relied. *R.App. 67-68.*

On August 27, 2018, the Estate filed an opposition to Dr. Ramos' motion for summary judgment. *A.App. 098.* The opposition did not include any expert evidence. *A.App. 098-111.* Dr. Ramos filed her reply on August 29, 2018. *A.App. 112.*

On September 4, 2018, the Estate filed an opposition to St. Mary's motion for summary judgment. *R.App. 83-89.* The opposition did not include any evidence. *Id.* St. Mary's filed a reply on September 11, 2018. *R.App. 90-100.*

Discovery closed on September 21, 2018. *A.App. 129:5.* A hearing on the motions for summary judgment was held on September 24, 2018. *R.App. 103.*[2]

On October 9, 2018, the district court entered an Order Granting Defendant Susan R. Ramos, M.D.'s Motion for Summary Judgment. *A.App. 126-133.* The same day, the district court entered an Order Granting Defendant Saint Mary's Motion for Summary Judgment. *A.App. 135-143.* Notice of entry of the order granting Dr. Ramos' motion was served on October 10, 2018. *A.App. 145-147.* The Estate's Notice of Appeal was timely filed on November 8, 2018. *A.App. 157.*

## III.

## STATEMENT OF FACTS

As reflected in the brief Statement of Facts in Appellant's Opening Brief, the facts are largely undisputed. While accurately summarizing the facts giving rise to this medical negligence action, Appellant's Opening Brief unfortunately omits important procedural facts that are central to this appeal, which seeks an interpretation of NRS 41A.100(1) regarding the effect of the rebuttable presumption.

[2] Inexplicably, appellant did not file the hearing transcript with this court, nor was the transcript included in Appellant's Appendix. The transcript is included in Respondent's Appendix, filed concurrently herewith. *R.App. 103-164.*

### A. Medical Facts

The district court's synopsis of the undisputed medical facts is quoted in Appellant's Opening Brief. *See AOB 3, citing A.App. 128.* For ease of reference, the facts underlying this action are summarized below.

On March 26, 2015, the patient, Maria Jaramillo, had a mammogram of her left breast; it showed a lesion. *A.App. 003.* The radiologist recommended a direct surgical incision to confirm the findings. The patient was referred to Dr. Ramos. *Id.*

On or about April 29, 2015, the patient presented to Saint Mary's radiology department and underwent an ultrasound-guided left breast localization. In this procedure, a wire is deployed through the mass in the left breast in order to mark the mass. *R.App. 62, 114.* Ms. Jaramillo then returned to the hospital to undergo surgery. *R.App. 115.*

Dr. Ramos performed a wire localization procedure of Ms. Jaramillo's left breast. *A.App. 003; R.App. 60.* Dr. Ramos noted that the mass was palpable and the wire was going into it. She dissected it free a bit, grasped it, and excised the entire mass. She placed the mass on the Bioview for imaging and received confirmation from the radiologist that the surgical specimen contained the mass; the radiologist did not note a missing wire fragment. *R.App. 60, 64.* There is no indication the radiologist brought any missing fragment to Dr. Ramos' attention. *A.App. 084, ¶6.* Dr. Ramos irrigated, closed and dressed the surgical wound. *R.App. 60.*

On or about January 28, 2016, Ms. Jaramillo returned to Dr. Ramos for a follow-up appointment. She complained of pain in her left breast. *A.App. 003, ¶11.* Dr. Ramos ordered a mammogram and ultrasound, which showed a three-centimeter-length localization wire fragment in the upper left breast. *A.App. 003-004, ¶¶ 12-14.* On February 9, 2016, Dr. Ramos informed the patient of the presence of the wire fragment, the removal of which would require surgery. *A.App. 004, ¶15.*

Ms. Jaramillo was evaluated by Sharon Wright, M.D., and on March 28, 2016, Dr. Wright performed the surgical excision of the wire fragment. *A.App. 047.*

On or about August 19, 2016, Maria Jaramillo was diagnosed with stomach cancer. *A.App. 052.* On October 23, 2017, while this action was pending, she died from causes unrelated to the subject medical treatment. *A.App. 055, 059.*

**B. Procedural Facts**

A complaint for professional negligence was filed on behalf of Maria Jaramillo on February 2, 2017, against Dr. Ramos and St. Mary's. The complaint was unaccompanied by a medical expert's affidavit based on the allegation that an expert's affidavit was not required pursuant to NRS 41A.100(1)(a). *A.App. 004, ¶20.* The complaint asserted that an expert affidavit is not required in circumstances where a foreign substance is unintentionally left in the patient's body, which gives rise to a rebuttable presumption that the plaintiff's injuries were the proximate and legal result of the defendants' negligence. *A.App. 005, ¶¶ 29-30.*

Dr. Ramos filed her answer to the complaint on March 14, 2017, generally denying the allegations against her and asserting various affirmative defenses, including the provisions and limitations of NRS Chapter 41A (Nevada's Medical Malpractice Act). *A.App. 015-020.* St. Mary's filed its answer on May 5, 2017. *A.App. 023.*

In June and July of 2017, the parties exchanged their initial document disclosures and filed their Joint Case Conference Report. Initial expert disclosures were due to be made on June 22, 2018, with rebuttal disclosures due on July 23, 2018. *A.App. 128-29.* Thereafter, discovery ensued. *A.App. 128.* Discovery included interrogatories to Maria Jaramillo. Her responses, which she personally verified on September 15, 2017, stated that she was unaware of any treating physicians who had opined that Dr. Ramos was negligent in her care and treatment of Maria Jaramillo. *A.App. 048, 49.* When asked about any future limitations to the patient's activities, plaintiff's counsel objected that the request sought expert medical opinions. *Id.*

Supplemental interrogatory answers regarding expert opinions were never served on behalf of Maria Jaramillo or the Estate. Nor did she disclose any expert witnesses. Plaintiff's Expert Witness Disclosure stated that she had "no retained expert witnesses to disclose at this time." *A.App. 064.*

Dr. Ramos served her Expert Witness Disclosure on June 22, 2018. *A.App. 071.* In her Disclosure, Dr. Ramos disclosed Andrew B. Cramer, M.D., a

Board Certified general and vascular surgeon. *A.App. 072.* Dr. Ramos' disclosure included the Declaration of Andrew B. Cramer, M.D. *A.App. 072.* Dr. Cramer's declaration reflects that he reviewed Maria Jaramillo's medical records from various providers; based on his review, he opined that retention of the wire fragment was something that can occur without negligence by the surgeon and that no aspect of Dr. Ramos' care was negligent *A.App. 084.* Specifically, Dr. Cramer's sworn declaration stated:

> 5. It is my opinion, to a reasonable degree of medical probability, that the wire fragment left in the patient's breast in this case does not denominate negligence on the part of the surgeon. It is something that a surgeon should be unhappy to have happen but it isn't due to negligence. This is something that can happen without negligence on the part of the surgeon.
>
> 6. It is also my opinion that it was reasonable for Dr. Ramos to ask the radiologist to image the area, which was done using Bioview, and confirm that the dissected tissue was what radiology wanted her to find and remove. It does not appear that the radiologist noted any retained wire fragment or that he brought any retained fragment to Dr. Ramos' attention.
>
> 7. In conclusion, based on the information currently available to me, Dr. Ramos' care and treatment of Maria Jaramillo was appropriate and within the applicable standards of care of a Board Certified Surgeon. There is nothing about the care by Dr. Ramos which was negligent in this case.

*A.App. 084.*

St. Mary's also disclosed a medical expert in support of the care rendered to Maria Jaramillo, that of Paul Goldfarb, M.D., F.A.C.S., a surgical oncologist.

*R.App. 70-71.* Dr. Goldfarb rendered the following opinions to a reasonable degree of medical certainty:

> Inadvertent cutting of the wire and leaving a piece of wire within the breast is a known complication of doing needle localized biopsies. If the clinician and/or radiologist, who reviewed the specimen mammogram, realized that the wire had been divided and the remaining wire within the breast was not immediately apparent to the physician by palpation, then the approach taken was the appropriate method of managing the situation at the time, i.e., allow the wounds to heal, repeat the mammogram, and localize the residual wire with a new wire localization procedure.
>
> . . .
>
> The patient tolerated both of these procedures well and has no subsequent issues with the breast itself. The care that the patient received was well within the standard of care and appropriate for the situation.

*R.App. 70-71.*

No rebuttal experts were disclosed on behalf of plaintiff or either defendant. *A.App. 129.* Neither at the time rebuttal experts were due or before the deadline for filing dispositive motions did Jaramillo disclose an expert to rebut the defense expert opinions. *A.App. 129; R.App. 133:9-13.*

Consequently, based on the uncontroverted medical expert opinions rendered by Dr. Cramer and Dr. Goldfarb, Dr. Ramos and St. Mary's moved for summary judgment. Dr. Ramos' motion was filed on August 3, 2018. *A.App. 032.* St. Mary's motion was filed on August 7, 2018. *R.App. 1.* These filing dates are after the time to disclose rebuttal experts had expired. *A.App. 129; R.App. 133:9-13.*

Dr. Ramos' motion for summary judgment was supported by Maria Jaramillo's verified discovery responses and by the sworn declaration of Dr. Ramos' expert, Dr. Cramer. *A.App. 046-049; 084; 086-097.* The uncontroverted expert evidence showed that the essential elements of breach of the standard of care and causation were clearly lacking as a matter of law. Dr. Ramos' evidence showed that retention of the wire fragment in the subject procedure is something that can occur without negligence and that Dr. Ramos conformed to the standard of care. *A.App. 035-036; 084.* The motion also showed that the Estate had presented no evidence of causation. *A.App. 041-042.*

Specifically regarding the statutory *res ipsa loquitur* doctrine, Dr. Ramos' motion showed that NRS 41A.100(1)(a) did not preclude summary judgment because the statute only provides for a rebuttable presumption of negligence and Dr. Ramos had rebutted the presumption by presenting expert testimony that the retention of the wire is something that can occur without negligence by the surgeon, and that Dr. Ramos was not negligent. *A.App. 039-040.* Having rebutted the presumption, Dr. Ramos showed that the burden shifted to Jaramillo to present evidence that Dr. Ramos had breached the standard of care and that such breach was the cause of the claimed injuries. *A.App. 040.* Dr. Ramos' motion showed that Jaramillo had not met her burden because she had no expert to refute Dr. Cramer's opinions in order to create a triable issue of fact; nor could she do so at trial because

the time to disclose experts had expired. *A.App. 038-041.* Dr. Ramos' motion showed that Jaramillo's failure to present expert testimony or any other evidence to rebut Dr. Cramer's opinions and to establish the essential elements of her claim required the entry of summary judgment. *A.App. 041-042.*

St. Mary's motion for summary judgment presented similar arguments regarding the rebuttable presumption of NRS 41A.100(1)(a). Among other things, it showed that the presumption had been rebutted by expert evidence, which consisted of Dr. Goldfarb's declaration. *R.App. 10-12, 67-71.* St. Mary's also showed that once the presumption was rebutted, the burden shifted back to the plaintiff to present evidence that the defendant health care provider was negligent, and that Jaramillo had presented no such evidence in this case. *R.App. 10-12.*

Jaramillo filed an opposition to Dr. Ramos' motion for summary judgment. *A.App. 098-102.* The opposition lacked expert medical support, and did not dispute that Jaramillo did not disclose medical experts to support her malpractice claim. *A.App. 098-111.* The only medical exhibits were photocopies of the February 4, 2016 ultrasound imaging report and mammogram report that confirmed the presence of a 2.5 to 3 cm wire fragment in the breast. *A.App. 104, 108, 110.* The crux of the statement of facts and the two exhibits attached to her opposition is that a localization wire fragment was retained following the procedure Dr. Ramos performed on Maria Jaramillo. *A.App. 099.* Relying entirely on the retained wire, Jaramillo's opposition

argued that she was not required to present expert testimony because negligence was presumed under NRS 41A.100(1)(a). *A.App. 100-101.* The opposition argued that the defense medical expert testimony did not rebut the presumption of negligence because the jury could simply disregard the sworn expert testimony. *A.App. 101.* The opposition concluded that the question of whether the statutory presumption was rebutted by Dr. Cramer's sworn expert opinion was a question of fact for the jury to decide. *Id.* Jaramillo was thus implicitly arguing, as she now expressly argues on appeal, that the presumption of negligence constitutes substantive evidence (as compared to a rule of evidence) that must be weighed against the sworn expert testimony of Dr. Ramos' expert. *Id.*

Jaramillo also filed an opposition to St. Mary's motion; it employed the same statement of facts as were asserted in opposition to Dr. Ramos' motion, and also lacked expert support. *R.App. 83-84.* With regard to the rebuttable presumption issue, Jaramillo repeated the arguments she made in opposition to Dr. Ramos' motion. In this opposition, however, Jaramillo explicitly argued that the statutory presumption of NRS 41A.100 was "substantive evidence of negligence." *R.App. 86.*

Dr. Ramos filed a reply to Jaramillo's opposition. *A.App. 112.* Dr. Ramos showed that Jaramillo had not satisfied the requirements to defeat summary judgment. *A.App. 114.* She showed that Jaramillo presented no legal authority to support her assertion that the jury was free to disregard Dr. Cramer's sworn

testimony and rely entirely on the now-rebutted presumption. *A.App. 115-116.* Dr. Ramos also showed that, in accordance with NRS Chapter 47, Dr. Ramos had disproved the presumed fact (negligence), thereby negating essential elements of Jaramillo's professional negligence claim (standard of care and causation). *A.App. 116-117.* As Jaramillo could no longer rely on the presumption of negligence under NRS 41A.100(1)(a), and she presented no evidence contrary to Dr. Ramos' expert evidence, Dr. Ramos argued that there were no genuine issues of material fact and Dr. Ramos was entitled to summary judgment. *A.App. 117-118.*

St. Mary's reply contained similar arguments. *R.App. 96-99.* Addressing Jaramillo's assertion that NRS 41A.100(1) constituted substantive evidence of negligence, St. Mary's showed that the rebuttable presumption of NRS 41A.100(1) was a burden-shifting rule of evidence as reflected in the provisions of Chapter 47 of the Nevada Revised Statutes and Nevada case law. *R.App. 96-97.* Like Dr. Ramos, St. Mary's showed that the presumption of negligence was rebutted by Dr. Goldfarb's sworn expert declaration that the standard of care was not breached by the retention of the wire fragment, and that Jaramillo produced no evidence to the contrary. *R.App. 99.*

Discovery closed on September 21, 2018. *Id.* A hearing on the summary judgment motions was held on September 24, 2018, before the Honorable Kathleen Drakulich. During the course of the hearing, the district court observed, and

Jaramillo's counsel agreed, that a foreign object was unintentionally left within the body of the patient following surgery, thus creating a rebuttable presumption of negligence. *R.App. 126.* The district court then observed that the defense expert testimony showed that the retention of the wire fragment is something that could happen without negligence, thereby rebutting the presumption. *R.App. 127.* Jaramillo's counsel argued that this was "burden-shifting" which was not applicable under the statutory *res ipsa* doctrine. *R.App. 127:13-18.* His argument was that despite expert affidavits that rebutted the presumption of negligence, the plaintiff was entitled to go to trial, where the jury was free to disregard the expert's testimony and consider only the presumption of negligence as evidence. *R.App. 127:19-128:5.* The district court questioned whether rebuttal of the presumption could be the end of the analysis, noting if that were the case, a defendant would have no opportunity to seek summary judgment even though it had rebutted the presumption with uncontroverted expert evidence. *R.App. 131:24-132:3.*

On October 9, 2018, the district court issued its Order Granting Defendant Susan R. Ramos, M.D.'s Motion for Summary Judgment. *A.App. 126.* The district court rejected Jaramillo's arguments that (1) she only needed to establish a prima facie case that a foreign objection was left inside the patient to trigger the statutory *res ipsa* presumption of negligence; (2) that burden-shifting does not occur under the statutory *res ipsa loquitur*; and (3) that the presumption of negligence

"automatically applies" so plaintiff is not obligated to present any other evidence and it is up to the jury to decide whether the statutory presumption has been rebutted. *A.App. 120:26-130:14.* The district court found Jaramillo's position to be against the prevailing law in Nevada. *A.App. 130.*

The district court's decision included a detailed analysis of relevant provisions of NRS Chapter 47 regarding the definition and existence of presumptions. *A.App. 132-133.* The district court found that the basic fact, *i.e.*, a 3 cm wire fragment was unintentionally left in the patient's left breast, triggered the rebuttable presumption under NRS 41A.100(1)(a) that retention of the wire was the result of negligence by Dr. Ramos. *A.App. 132:11-14.* Continuing the NRS Chapter 47 analysis, the district court next found that Dr. Ramos had presented direct evidence rebutting the presumption, consisting of a sworn expert declaration that retention of the wire fragment in the patient's breast does not denominate negligence, but is instead something that can occur without negligence and that Dr. Ramos' care and treatment was within the applicable standard of care (*i.e.*, Dr. Ramos was not negligent). *A.App. 132:14-21.* Because Jaramillo, by her own admission, had not filed any expert affidavits in response to Dr. Ramos' disclosure of Dr. Cramer, the district court also found that no direct evidence existed to oppose Dr. Ramos' evidence supporting the nonexistence of negligence in this case, and that Dr. Cramer's expert affidavit was undisputed. *A.App. 132:23-27.* The district court noted

that pursuant to NRS 47.200, "'if reasonable minds would necessarily agree that the direct evidence renders the nonexistence of the presumed fact more probable than not, the judge shall direct the jury to find against the existence of the presumed fact.'" *A.App. 133:1-3.* The district court concluded that good cause existed to grant summary judgment in favor of Dr. Ramos because it was uncontroverted that unintentionally leaving a wire fragment in the patient's body was not the result of negligence, and because discovery deadlines had passed, there were no questions of fact remaining for the jury to decide. *A.App. 133:6.*

The district court engaged in the same analysis and reached the same result in deciding St. Mary's motion for summary judgment. *A.App. 139-142.*

After notice of entry of the district court's order was served, the Estate settled with St. Mary's for a nominal sum. *A.App. 121-122 (now under seal).* The Estate is pursuing this appeal solely against Dr. Ramos. *A.App. 157.*

## IV.

## SUMMARY OF ARGUMENT

The district court correctly articulated the issue before it as whether Dr. Ramos rebutted the presumption of negligence triggered by NRS 41A.100(1)(a) to support a grant of summary judgment. *A.App. 132:4-6.* Based on the uncontroverted evidence before the district court and the application of NRS 41A.100(1) and

NRS Chapter 47, the district court properly granted summary judgment to Dr. Ramos in this medical negligence action.

NRS 41A.100(1)(a) provides a rebuttable presumption of negligence in circumstances where a foreign substance is unintentionally left in the patient's body. When a rebuttable presumption is rebutted by direct evidence, the presumption disappears. The party who relied on the presumption must then provide direct evidence of negligence.

The medical negligence claim in this case relied solely upon the application of the statutory *res ipsa loquitur* doctrine codified in NRS 41A.100(1)(a), which provides for a rebuttable presumption of negligence when a foreign substance is unintentionally left in a patient's body. Without disputing the basic fact that gave rise to the presumption – the retention of the wire fragment -- Dr. Ramos' motion for summary judgment rebutted the presumption of negligence by presenting direct evidence consisting of the expert testimony of Dr. Cramer, which established that the retention of such wire fragments can occur even in the absence of negligence, and that Dr. Ramos conformed to the applicable standard of care. Appellant's opposition to Dr. Ramos' motion for summary judgment did not include any expert evidence to the contrary, and the time to disclose experts had lapsed.

Consequently, the district court correctly found that Dr. Ramos had proved with direct, uncontroverted expert testimony that the nonexistence of the presumed

fact (*i.e.*, negligence) was more probable than its existence, and that Jaramillo had no evidence to the contrary. The district court correctly interpreted and applied NRS 41A.100(1) and prevailing Nevada law regarding presumptions.

Appellant's Opening Brief has not demonstrated error in the district court's legal analysis. Nor has it shown that the rebuttable presumption of NRS 41A.100(1) is substantive evidence that creates a genuine issue of material fact even when the presumption is rebutted. The order granting summary judgment may, therefore, be affirmed.

## V.

## ARGUMENT

### A. STANDARDS OF REVIEW

This court reviews an order granting summary judgment do novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Questions of statutory construction are also subject to de novo review. *Zohar v. Zbiegien*, 130 Nev. 733, 736, 334 P.3d 402, 405 (2014).

### B. SUMMARY JUDGMENT STANDARDS

Summary judgment is proper when the pleadings and other evidence before the court demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. NRCP 56(c); *Wood*, 121 Nev. at 732, 121 P.3d at 1031. "A factual dispute is genuine when the evidence

is such that a rational trier of fact could return a verdict for the nonmoving party." *Wood*, 121 Nev. at 731, 121 P.3d at 1031.

If the nonmoving party bears the burden of persuasion at trial, the moving party has the burden of producing evidence that negates an essential element of the nonmoving party's claim, or pointing out that there is an absence of evidence to support the nonmoving party's case. *Cuzze v. University and Community College System of Nevada*, 123 Nev. 598, 602-03, 172 P.3d 131, 134 (2007). Although breach of the standard of care and causation are *generally* issues of fact, a claim of professional negligence may be decided as a matter of law where the evidence negates an essential element of the claim. *See Bakerink v. Orthopaedic Associates, Ltd.*, 94 Nev. 428, 430, 581 P.2d 9 (1978) (court affirmed summary judgment in favor of physician where plaintiff failed to present an affidavit or other document to contradict the competent opinion of expert that the physician conformed to the standard of care).

The pleadings and proof must be construed in the light most favorable to the non-moving party; however, the non-moving party is required to "do more than simply show that there is some metaphysical doubt" as to the operative facts to avoid summary judgment. *Wood*, 121 Nev. at 732, 121 P.3d at 1031, *citing Matsushita Elect. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 586 (1986). Once the moving party meets its burden, "the nonmoving party must transcend the pleadings and, by

affidavit or other admissible evidence, introduce specific facts that show a genuine issue of material fact." *Cuzze*, 123 Nev. at 602-03, 172 P.3d at 134 (citations omitted). A party cannot escape summary judgment by attempting "to build a case on the gossamer threads of whimsy, speculation, and conjecture." *Wood*, 121 Nev. at 732, 121 P.3d at 1031 (internal quotation omitted).

### C. THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF DR. RAMOS BECAUSE THE STATUTORY PRESUMPTION OF NEGLIGENCE WAS REBUTTED BY UNCONTROVERTED EXPERT EVIDENCE

In a medical malpractice action, a plaintiff must demonstrate that the physician breached the standard of care and that the physician's conduct legally caused the plaintiff's injuries. *See Prabhu v. Levine*, 112 Nev. 1538, 1543, 930 P.2d 103, 107 (1996); *see also* NRS 41A.100(1). Expert medical testimony is generally required to establish standard of care and causation in a medical malpractice action. NRS 41A.100(1). The expert requirement may be obviated under the circumstances enumerated in NRS 41A.100(1)(a) through (e) that give rise to a rebuttable presumption of negligence. The presumption may be rebutted, however, by direct evidence that establishes the nonexistence of the presumed fact. NRS 47.180. Here, Dr. Ramos rebutted the presumption of negligence with direct evidence consisting of expert testimony. Because the presumption was rebutted and Jaramillo produced no expert evidence to support her claim, the district court properly granted summary

judgment, finding no genuine issue of material fact existed as to the essential elements of Jaramillo's claim.

Jaramillo contends that the district court erred in granting summary judgment to Dr. Ramos notwithstanding that Dr. Ramos presented uncontroverted expert testimony that rebutted the presumption of NRS 41A.100(1)(a). *AOB 4*. Jaramillo asserts that the rebuttable presumption triggered by any of the circumstances enumerated in subsections (a) through (e) of NRS 41A.100(1) does not cease to exist once it is rebutted by direct evidence. Instead, Jaramillo posits that the rebuttable presumption is substantive evidence against which other evidence must be weighed.

Jaramillo's argument cannot be reconciled with the plain language of NRS 41A.100(1), which provides 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:
>
> . . .
>
> (a) A foreign substance other than medication or a prosthetic device was unintentionally left within the body of a patient following surgery [.] (Emphasis added.)

NRS 41A.100(1)(a) through (e) codifies the common law doctrine of *res ipsa loquitur.* At issue here is subsection (a), quoted above. This court has held that the statutory presumption of NRS 41A.100(1) is intended to "replace, rather than supplement, the classic res ipsa loquitur formulation." *Johnson v. Egtedar*, 112 Nev. 428, 433, 915 P.2d 271, 274 (1996); *Banks v. Sunrise Hospital*, 120 Nev. 822, 832, 102 P.3d 52, 59 (2004) (NRS 41A.100(1) replaces the common law doctrine of *res ipsa loquitur* in medical malpractice cases).

Jaramillo interprets NRS 41A.100(1) to mean that once the presumption arises, it does not cease to exist even in the face of substantive, uncontroverted medical expert evidence. She interprets the statute as exempting her "from the burden of establishing her claim through expert medical testimony." *AOB 12.* Jaramillo's interpretation is contrary to basic rules of statutory construction.

In interpreting the meaning of a statute, the court begins with the plain language of the relevant statutes. *Hernandez v. Bennett–Haron*, 128 Nev. 580, 595, 287 P.3d 305, 315-16 (2012). Under the plain meaning rule, "[t]his court will not look beyond the plain language of the statute, unless it is clear that this meaning was not intended." *Szydel v. Markman*, 121 Nev. 453, 456, 117 P.3d 200, 202 (2005); *see also Berkson v. LePome*, 126 Nev. 492, 497, 245 P.3d 560, 563 (2010) (holding that words in a statute will be given their plain meaning). "[W]hen 'the language of a statute is plain and unmistakable, there is no room for construction, and the courts

are not permitted to search for its meaning beyond the statute itself.'" *Estate of Smith v. Mahoney's Silver Nugget*, 127 Nev. 855, 857–58, 265 P.3d 688, 690 (2011) (quoting *Attorney General v. Nevada Tax Comm'n*, 124 Nev. 232, 240, 181 P.3d 675, 680 (2008)).

Notably, this court has stated that the language of NRS 41A.100(1) is unambiguous. *Syzdel*, 121 Nev. at 458, 117 P.3d at 203 (concluding the language of NRS 41A.100 and NRS 41A.070 were unambiguous). Therefore, the court need only look at the plain language of NRS 41A.100(1) to construe it.

NRS 41A.100(1) gives rise to a *rebuttable presumption* of negligence when one of the circumstances enumerated in NRS 41A.100(1)(a)-(e) is present. *Szydel*, 121 Nev. at 460, 117 P.3d at 205. NRS 41A.100(1) plainly uses the word "rebuttable" in enumerating the circumstances under which *res ipsa loquitur* claims arise. "Rebuttable" means it is "capable of being proved false or untrue." *Black's Law Dictionary* (10th ed. 2014). In this context, "rebuttable presumption" is "[a]n inference drawn from certain facts that establish a prima facie case, which may be overcome by the introduction of contrary evidence." *Id.*

Jaramillo's interpretation of the statute requires one to disregard or excise the word "rebuttable" from the statute. Such an interpretation would be contrary to the basic tenet of statutory construction that all words of a statute must be given meaning. *Berkson*, 126 Nev. at 497, 245 P.3d at 563 (the court will construe a statute

"in order to give meaning to its entirety," and "will read each sentence, phrase, and word to render it meaningful within the context of the purpose of the legislation.") (internal quotation and citation omitted). A reasonable construction of the statute thus requires that the word "rebuttable" be given meaning.

This is precisely what the district court did in rendering its ruling in this case. *See A.App. 132-133* (district court's order). Citing several provisions of NRS Chapter 47 regarding presumptions, the district court found that Jaramillo was entitled to the rebuttable presumption of NRS 41A.100(1)(a) because a 3 cm piece of wire was unintentionally left in the patient's left breast. *A.App. 132:11-12.* Establishing this basic fact triggered the rebuttable presumption, or "presumed fact," that leaving the piece of wire was a result of negligence by Dr. Ramos. *A.App. 132:13-14.* The district court then found that direct, uncontroverted evidence established the non-existence of the presumed fact:

> Dr. Ramos has presented direct evidence, through the affidavit of expert witness Dr. Cramer, that "the wire fragment left in the patient's breast . . . does not denominate negligence," rather "[t]his is something that can happen without negligence on the part of the surgeon." *Decl. of Andrew B. Cramer, M.D., at* ¶*5.* Further, Dr. Cramer states that "Dr. Ramos' care and treatment of Maria Jaramillo was appropriate and within the applicable standards of care of a Board Certified Surgeon." *Id. at* ¶*7.* Through this direct evidence, Defendant has rebutted the presumption that the unintentional leaving of the wire fragment was a result of negligence.

*A.App. 132:14-21 [alteration in original].*

Continuing, the district court observed the undisputed fact that Jaramillo did not file an expert affidavit either when the complaint was filed or when expert disclosures were served, and that the deadline to do so had expired. *A.App. 132:21-26.* Jaramillo's counsel acknowledged these facts at the hearing. *R.App. 133:9-14.* Further, neither of Jaramillo's oppositions to the summary judgment motions included evidence consisting of expert medical opinions that refuted any of the expert opinions proffered by Dr. Ramos and St. Mary's. *A.App. 098-111; R.App. 83-89.* Not surprisingly, the district court concluded that "no direct evidence exists to oppose Defendant's evidence supporting the nonexistence of negligence in this case." *A.App. 132:26-27.* In concluding its order granting summary judgment to Dr. Ramos, the district court reasoned:

> Pursuant to NRS 47.200, "if reasonable minds would necessarily agree that the direct evidence renders the nonexistence of the presumed fact more probable than not, the judge shall direct the jury to find against the existence of the presumed fact." Here, it is uncontroverted that the unintentional leaving of a wire fragment in Plaintiff's body was not a result of negligence. As such, this Court finds good cause to grant summary judgment in favor or Defendant Ramos.

*A.App. 133:1-5.*

Jaramillo challenges the district court's ruling, but does not cogently establish error. She takes issue with the district court analysis and conclusion regarding the effect of direct evidence on the rebuttable presumption of NRS 41A.100(1), but fails to demonstrate how the district court erred in its application of the cited provisions

of NRS Chapter 47. Indeed, even though the district court's determination was supported by a detailed analysis of pertinent provisions of NRS Chapter 47, Appellant's Opening Brief does not mention any provision of NRS Chapter 47.[3]

Jaramillo challenges the district court decision based on the contentions that the rebuttable presumption "acts as substantive evidence" rather than as a rule of evidence, and that NRS 41A.100(1)(a) exempts Jaramillo from the burden of establishing her malpractice claim through expert medical testimony. *AOB 7, 12.* Jaramillo's interpretation of NRS 41A.100(1) and her arguments are discordant with Nevada law regarding rebuttable presumptions.

First, although this court has not specifically addressed the effect of the rebuttable presumption in NRS 41A.100(1), Nevada statutory and case law has addressed the nature and effect of rebuttable presumptions. *See, generally,* NRS Chapter 47. More specifically, NRS 47.180 provides:

> 1. A presumption, other than a presumption against the accused in a criminal action, imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence.
>
> 2. As applied to presumptions, 'direct evidence' means evidence which tends to establish the existence or nonexistence of the presumed fact independently of the basic facts.

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[3] This court need not consider any argument that the district court's analysis under NRS Chapter 47 was erroneous. *Edwards v. Emperor's Garden Restaurant*, 122 Nev. 317, 330, n.38, 130 P.3d 1280, 1288 n.8 (2006) (if an appellant neglects to fulfill his or her responsibility to cogently argue and present relevant authority in support of his or her appellate concerns, this court will not consider the claims).

Further, this court has provided extensive guidance regarding the nature and effect of rebuttable presumptions. In *Law Offices of Barry Levinson v. Milko*, this court instructs:

> In general, rebuttable presumptions require the party against whom the presumption applies to disprove the presumed fact.[fn] The presumed fact is the factual conclusion created by the presumption.[fn] A presumption is established by proof of the basic facts.[fn] An opposing party may attempt to rebut the presumption by adducing evidence, independent of the basic facts, that tends to disprove the presumed fact.[fn] In a case like this, in which the basic facts were established, but the opposing party offered direct evidence to rebut the presumed fact, the appeals officer must determine how probable the existence of the presumed fact is.[fn] If reasonable people would necessarily agree that the nonexistence of the presumed fact is more probable than not, the appeals officer must find against the presumed fact's existence, meaning that the opposing party successfully rebutted the presumption.

124 Nev. 355, 366, 184 P.3d 378, 386 (2008) (footnotes and citations omitted); *see also Bass-Davis v. Davis,* 122 Nev. 442, 448, n.11, 134 P.3d 103, 107, n.11 (2006) ("A rebuttable presumption is a rule of law by which the finding of a basic fact gives rise to a presumed fact's existence, unless the presumption is rebutted.") (citation omitted).

Under prevailing Nevada law, a rebuttable presumption shifts the burden of proof from the plaintiff to the defendant. *Sherburne v. Miller,* 94 Nev. 585, 587, 583 P.2d 1090, 1091 (1978); *see Bass-Davis,* 122 Nev. at 448, 134 P.3d at 107 (discussing burden-shifting); *see also* NRS 47.180. To rebut the presumption, the

defendant must prove by a preponderance of the evidence that the presumed fact (here, the presumption of negligence) does not exist. *See Bass-Davis,* 122 Nev. at 448, 134 P.3d at 107; *see also* NRS 47.180.

This burden-shifting is not confined to the "traditional" *res ipsa* doctrine, as Jaramillo argued below and seems to be arguing on appeal. *AOB 13; R.App. 124:16-19, 125:13-18.* Indeed, the jury instruction for medical negligence cases, which is premised on NRS 41A.100, employs the same burden-shifting language found in *Sherburne. See*, Nevada Medical Malpractice Instruction 9MM.18. Once the presumption is rebutted with direct evidence, the presumed fact disappears. *See also Privette v. Faulkner,* 92 Nev. 353, 358, 550 P.2d 404, 407-08 (1976) (Gunderson, J., dissenting) (recognizing that disputable presumptions evaporate when any contrary evidence is adduced). This is the prevailing theory regarding presumptions. *See Franciscan Sisters Health Care Corp. v. Dean,* 448 N.E.2d 872, 877 (Ill. 1983) (the prevailing theory regarding presumptions is Thayer's bursting-bubble hypothesis: "once evidence is introduced contrary to the presumption, the bubble bursts and the presumption vanishes."); *accord, Johnston v. Illinois Workers' Compensation Comm'n*, 80 N.E.3d 573, 582-83 (Ill. Ct. App. 2017) ("[O]nce evidence has been presented to rebut a presumption, the metaphorical bubble bursts and the trier of fact must then consider the evidence presented in the case as if the presumption had never existed."); *Birge v. Charron*, 107 So.3d 350, 359-60, n.16

(Fla. 2012), *citing Universal Ins. Co. of N. Am. v. Warfel,* 82 So.3d 47, 54 (Fla. 2012) ("'Bursting bubble presumption' or 'vanishing presumption' is established to facilitate a particular type of legal action, and once the presumption is rebutted, it disappears and the jury is not told of it."); *Cain v. Custer County Board of Equalization*, 906 N.W.2d 285, 298-99 (Neb. 2018) ("A presumption may take the place of evidence unless and until evidence appears to overcome or rebut it, and when evidence sufficient in quality appears to rebut it, the presumption disappears and thereafter the determination of the issues depends upon the evidence."); *In re Marriage of Akon*, 248 P.3d 94, 101 (Wash. App. 2011) ("A presumption is not evidence and its efficacy is lost when the other party adduces credible evidence to the contrary."). As colorfully stated by the Washington Appellate Court: "Presumptions are the bats of the law, flitting away in the light of evidence." *In re Indian Trail Trunk Sewer,* 670 P.2d 675, 677 (Wash. App. 1983), *review denied,* 100 Wash.2d 1037 (1984).

The prevailing view that a presumption is not substantive evidence that continues to exist after it has been rebutted is consistent with Nevada law. Established Nevada case law instructs that a presumption is not evidence, but is simply a *rule of* evidence. In the context of medical malpractice actions, this court stated that NRS 41A.100(1) is "Nevada's limited codification of *res ipsa loquitur*, and is a **rule of evidence** creating a rebuttable presumption that a defendant is

negligent in medical malpractice cases." *Szydel v. Markman*, 121 Nev. at 461, 117 P.3d at 205 (emphasis added); (Hardesty, J., dissenting). *See also Privette,* 92 Nev. at 356, 550 P.2d at 406 ("Presumptions are no more than rules of evidence predicated on probability and general experience[.]"). Nevada law is clear: A presumption is not substantive evidence; it is simply a rule of evidence. As stated by the Nebraska Supreme Court in *Cain,* "A presumption is not evidence and should never be placed in the scale to be weighed as evidence." 906 N.W.2d at 299. Once the presumption of validity disappears, the burden of proof shifts back to the plaintiff to establish her claim. *Id.*

The foregoing authorities, especially Nevada case law, refute Jaramillo's argument that the rebuttable presumption of NRS 41A.100(1) is substantive evidence that the jury must weigh against the undisputed defense expert evidence presented in this case. *AOB 7-8, citing Deuel v. Surgical Clinic, PLLC,* 2010 WL 3237297 (Tenn. Ct. App., Aug. 16, 2010). Jaramillo's arguments are not only contrary to long-standing Nevada law, they also find no support in the extrajurisdictional authorities cited in Appellant's Opening Brief. Dr. Ramos submits that the authorities cited in Jaramillo's brief provide no bases for discarding Nevada precedent or for reversing the district court's order.

Jaramillo places great stock in the unpublished Tennessee opinion of *Deuel* (which cites three other cases[4] on which Jaramillo relies). Jaramillo has misconstrued *Deuel,* which, in any event, bears no resemblance to this case. *Deuel* was a retained surgical sponge case. Critically, unlike NRS 41A.100(1), application of Tennessee's *res ipsa loquitur* statute required a showing of control of the instrumentality that is alleged to have caused the injury, and the injury must be one that does not ordinarily occur in the absence of negligence. *Deuel,* 2010 WL 3237297 at *9 *citing* Tenn. Code Ann. §29-26-115(c). The doctor moved for summary judgment based on the argument that he was not in exclusive control of the sponges. His motion was supported by an expert affidavit that stated the nurses were responsible for the sponge count. The plaintiff opposed the motion arguing that she did not need expert testimony under the *res ipsa* statute, but she nevertheless opposed the doctor's motion with a competing expert affidavit. Also in evidence were affidavits from the nurses that showed the nurses shared responsibility for the sponge count. Because an element of the *res ipsa* statute was exclusive control and the undisputed evidence showed the doctor did not have exclusive control over the sponges, the trial court found that the *res ipsa* statute did not apply. And, because there were competing expert affidavits regarding responsibility for the sponge count,

[4] *Breaux v. Thurston,* 888 So.2d 1208 (Ala. 2003); *Coleman v. Rice,* 706 So.2d 696 (Miss. 1997); and *Dolaway v. Urology Assoc. of Northeastern New York, P.C.,* 897 N.Y.S.2d 776 (A.D. 2010). *See Deuel,* 2010 WL 3237297 at *15-*17.

the trial court denied summary judgment to both parties. 2010 WL 3237297 at *3-*4. The trial court subsequently granted summary judgment to the doctor because the plaintiff filed a notice that she intended to proceed to trial without an expert. This de-designation of her expert, "coupled with the trial court's prior conclusion that neither the common knowledge exception nor the doctrine of *res ipsa loquitur* was applicable, meant that there were no genuine issues of material fact and Dr. Geer was entitled to judgment as a matter of law." 2010 WL 3237297 at *5.

In reversing the trial court's order, the Tennessee appellate court relied on the common law doctrine of "common knowledge" regarding retained sponges. It cited cases from other jurisdictions which held that affidavits of medical experts are not conclusive when the acts complained of are "within the ken of the common laymen." 2010 WL 3237297 at *9. This reasoning is inapposite here because the "common knowledge" doctrine is inapplicable in this case.

Regarding the *res ipsa* doctrine, the Tennessee appellate court reversed the entry of summary judgment in favor of the doctor, finding that the trial court erred in determining that the *res ipsa* statute did not apply simply because more than one person (*e.g.*, the doctor and the nurses) was in "exclusive" control. The rationale for denying summary judgment even in the face of an expert affidavit appeared to be that the doctor was not relieved of liability even if the sponge count is the nurses' responsibility. *Deuel,* 2010 WL 3237297 at *16, quoting *Coleman,* 706 So.2d at 699.

In short, the decision in *Deuel* was based upon Tennessee's application of the "common knowledge" doctrine and upon its version of the *res ipsa loquitur* statute, neither of which applies in this case.[5]

This case bears no resemblance to *Deuel*, the cases cited in *Deuel,* or the other authorities cited in Jaramillo's brief. NRS 41A.100 provides for a rebuttable presumption, which, under Nevada law may be rebutted with direct evidence. Here, the district court correctly applied the law of presumptions and found that Dr. Ramos rebutted the presumption of negligence through direct, expert evidence. It is undisputed that a medical expert's declaration was presented in support of Dr. Ramos' motion for summary judgment showing that retention of the subject wire fragment was an accepted risk involved in the type of procedure performed by Dr. Ramos on Ms. Jaramillo and does not constitute negligence. Dr. Cramer stated, to a reasonable degree of medical probability, that "the wire fragment left in the patient's breast does not denominate negligence on the part of the surgeon. . . . This is something that can happen without negligence on the part of the surgeon." *A.App. 084,* ¶*5.* Dr. Cramer also opined that Dr. Ramos' care and treatment of Ms.

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[5] The same is true of *Anderson v. Ming Wang,* 2018 WL 4847114 (Tenn. Ct. App., Aug. 21, 2018), another unpublished opinion from Tennessee, that relied on the rationale from the *Deuel* court. *Id.* at *5. The *Anderson* court also relied on the element of exclusive control in Tennessee's *res ipsa loquitur* statute, and on the fact that the plaintiff had a competing expert, in reversing the grant of summary judgment to the doctor.

Jaramillo "was appropriate and within the applicable standards of care of a Board Certified Surgeon." *Id.*, ¶7. This evidence rebutted the presumption of negligence under NRS 41A.100(1)(a).

Once rebutted, the presumption disappeared and Jaramillo was required to present expert testimony to establish the essential elements of standard of care and causation to prevail on her medical malpractice claim. *See Prabhu*, 112 Nev. at 1543, 930 P.2d at 107. She failed, however, to demonstrate the existence of any genuine issue of material fact regarding these essential elements. Jaramillo admitted that she had no medical experts and acknowledged that the time to disclose experts had expired. *R.App. 155:9-13.* At the summary judgment hearing, Jaramillo did not dispute that she had no expert witness to testify as to standard of care and causation. *R.App. 112-113, 133.* Because Jaramillo presented no evidence contrary to the direct expert evidence presented by Dr. Ramos, the district court correctly found that the presumed fact was nonexistent. *A.App. 132-133.* Without the presumption of negligence or a medical expert to testify in her case-in-chief on the essential elements of standard of care and causation, Jaramillo could not prove her medical malpractice claim as a matter of law. *See* NRS 41A.100(1); *see also Bakerink,* 94 Nev. at 430, 581 P.2d at 11. Under these circumstances, the district judge's order granting summary judgment was in accord with Nevada Law. Jaramillo has not demonstrated error in the district court's analysis and conclusion.

## VI.

## CONCLUSION

Therefore, the district court properly granted summary judgment in favor of Dr. Ramos because Dr. Ramos rebutted the presumption of NRS 41A.100(1) with direct expert uncontroverted evidence. Accordingly, this court may properly affirm the district court's order.

DATED: April 17, 2019

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## CERTIFICATE OF COMPLIANCE (BASED UPON NRAP FORM 9)

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect in 14 point Times New Roman type style.

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, and contains 8,194 words.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of appellate procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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## CERTIFICATE OF SERVICE

I hereby certify that the within ***Respondent's Answering Brief*** and ***Respondent's Appendix*** were filed electronically with the Nevada Supreme Court on the 17th day of April, 2019. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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