IN THE SUPREME COURT OF THE STATE OF NEVADA

SOPHIA MONTANEZ,

Appellant,

vs.

SPARKS FAMILY HOSPITAL, INC., A DELAWARE CORPORATION DOING BUSINESS AS NORTHERN NEVADA MEDICAL CENTER,

Respondents.

No. 81312

APPEAL
from the Second Judicial District Court, Washoe County
The Honorable CONNIE J. STEINHEIMER, District Judge
District Court Case No. CV19-01977

APPELLANT'S OPENING BRIEF

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NRAP 26.1 Disclosure

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a). Ms. Sophia Montanez ("Ms. Montanez"), is an individual who does not use a pseudonym. She is represented by Bradley Paul Elley (SBN 658) here and in the district court. It is anticipated she may also be represented by Mark H. Zoole (Missouri Bar #38635), who would appear (if at all) on her behalf only after first moving for, and being granted, *pro hac vice* admission to this Court for the sole purpose of such representation.

Dated this 1st day of March, 2021.

/s/Bradley Paul Elley, Esq.
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Jurisdictional Statement

Ms. Montanez appeals from the Order dismissing her claims entered on May 8, 2020. Ms. Montanez timely appealed on June 9, 2020.

Routing Statement

This Court should retain the appeal, under NRAP 17(a)(12), to clarify the intersection between NRS 41A.100 and the common law relating to *res ipsa loquitur*, specifically as it relates to the statute's subsection (1)(a)'s "foreign substance" exception to the statutory modification of the common law. This, the first issue Ms. Montanez presents, is an issue of statewide importance, and is likely to recur in cases where a medical center asserts the statute's modification as a defense to what would otherwise have been a valid common law claim. This cause fits into none of the presumptive categories for assignment to the Court of Appeals under NRAP 17(b).

Issues Presented

1. Should NRS 41A.100(1)(a)'s "foreign substance" exception to the medical malpractice affidavit requirement be considered ambiguous, with any such ambiguity being applied to exempt more substances from its scope than those that it specifically lists as exempted, and in further

derogation of the common law?

2. May a district court rest its decision that a Complaint fails to state a claim on which relief can be granted on the possibility of a defendant's lack of physical control over a facility where the Complaint specifically pleads such control – and in doing so ignore the statute's test and substitute its own?

3. Where a plaintiff alleges a business's facility was simply unclean, not necessarily due to any medical professional's malpractice, and that uncleanliness caused her personal injury, may she assert a common law premises liability claim?

Statement of the Case

This is an appeal from a dismissal holding there are no set of facts plaintiff could plead stating a cause of action entered by the Honorable Connie J. Steinheimer, District Judge of the Second Judicial Circuit, Washoe County.

Statement of Facts

Ms. Montanez went into NNMC's wholly controlled facility for routine surgery and came out irreversibly blinded in her right eye, being able to learn only that her blindness was due to a foreign substance having

been unintentionally left in her body during surgery, causing an infection. (App. 2-4, ⁋ 5, 9, 10, 16) She later learned that three other infections developed during the same week in the same part of the same facility. (App. 2, ⁋ 7) Other than that, she has had access to no further information about how, or why, she'd been blinded. (App. 1-5, *passim*)

On October 10, 2018, Ms. Montanez underwent surgery at the Northern Nevada Medical Center. (App. 2, ⁋ 5) That facility was at all times owned, operated, possessed, maintained, and exclusively controlled by the Respondent here (and Defendant below), Sparks Family Hospital, d/b/a Northern Nevada Medical Center ("NNMC"). (App. 2, ⁋ 4)

In that facility, there was an area that had been newly constructed and/or redesigned. (App. 2, ⁋ 6) Ms. Montanez was taken to that new area for her surgery. (App. 2, ⁋ 5) During that surgery, "a foreign substance" was left in her body, including, "the bacterium known as pseudomonas aeruginosa." (App. 3, ⁋ 9) The bacterium being left in Ms. Montanez was caused by NNMC, through its facility which was fully within its exclusive control. (App. 3, ⁋ 11) It caused her to be permanently blinded in her right eye. (App. 3, 4, ⁋ 10, 12, 16, 17)

During or about the very same week, three other persons developed infections immediately after procedures undergone in that same newly constructed and/or designed portion of the same facility. (App. 2, ¶ 7)

Mr. Montanez timely filed a Complaint against NNMC in the Washoe County District Court, alleging, *inter alia*, all the facts set forth above. (App. 1-5) The Complaint alleged two claims for relief, the first alleging "Medical Malpractice Under Nev. Rev. Stat. 41A.100(1)A: The 'Foreign Substance' Exception" (App. 2); and the second claim for relief being founded upon "Premises Liability". (App. 3)

Though of course having her own medical records, Ms. Montanez has never been able to obtain any information or explanation about how or why the bacterium was left in her. (App. 1-5, *passim*) Short of the discovery process through this litigation, which she has not yet been able to conduct, she has no way to obtain any such information. (*Id.*)

NNMC moved to dismiss, asserting a failure to state a claim upon which relief can be granted, NRCP 12(b)(5). (App. 10-20) While arguing that 41A.100's exception to the requirement of a medical expert's affidavit did not apply, the motion nowhere claimed the statute was ambiguous or that the bacterium left in Ms. Montanez was not a foreign substance. (*Id.*)

Rather, NNMC's motion asserted that bacteria such as pseudomonas aeruginosa, "are not the kind of foreign substances" covered by the statute. (App. 15)

The District Court's granted NNMC's motion, holding that, "beyond a doubt", Ms. Montanez could prove no set of facts that would entitle her to relief. (App. 58) The District Court's reasoning as to the medical malpractice claim's statutory exception issue began with finding that the statute's "foreign substance" phrase was ambiguous. (App. 55) The next, and final, reasoning the District Court offered for its ruling on that issue was that, because NNMC argued that Ms. Montanez's injuries "could have come from sources outside of the health provider's control", this was not a 41A.100(1)(a) claim. (*Id.*)

Summary of the Argument[1]

The parties' disagreement is whether the bacterium that was left in Ms. Montanez and blinded her was among the "kind of foreign substances" to which NRS 41A.100(1)(a)[2] applies. But that statute expressly

[1] For ease of reading, this introduction will omit appendix citations, but citations will be provided for factual statements in the Argument itself.

[2] See Statutory Addendum for text of relevant medical malpractice statutes.

contemplates whether any and every kind of literal "foreign substance" is encompassed within that phrase's meaning, and exempts two kinds, neither of which is the bacterium that was left in Ms. Montanez. The statute's plain language therefore exempts the foreign substance that was left in Ms. Montanez from the expert standard-of-care affidavit requirement.

NRS 41A.100(1)(a) is part of a statutory scheme changing the common law. Such statutes must be construed narrowly so as to preserve the common law except where the statutes explicitly and unambiguously change it. Any interpretation of NRS 41A.100(1)(a) that excludes more kinds of foreign substances than it explicitly lists as excluded, or finds the phrase "foreign substance" ambiguous with a resulting expansion of the statute's scope in further derogation of the common law, violates that principle and is error.

The District Court's reasoning rested on the argument that, the foreign substance, "could have come from sources outside of the health provider's control." But Ms. Montanez expressly pleads the substance's being left in her body was caused by NNMC and its fully controlled facility. The District Court thereby failed to accept all pleaded facts as true,

much less to give them the benefit of every favorable inference.

As to premises liability, proprietors owe a duty to their invitees to keep their business premises in a safe condition for use, including to inspect their premises to discover dangerous conditions not known to them. A medical center, of all places, is not exempt from that basic rule, nor should it be.

The premises liability claim for relief does not allege that any medical professional necessarily did anything wrong, or anything peculiarly medical in nature. Rather, it contemplates simply the failure of a business owner to have a clean building. Far from some creative or backdoor way of pleading medical malpractice, it may well be that malpractice had nothing to do with the injury and that it was instead caused by a proprietor's failure to keep its building clean in violation of its duty to invitees, three others of whom have been alleged to be victim to the same widespread breach. No medical expert in any specialty would, or could, testify to any applicable standard of care deviation, because no professionally-committed negligence is at issue.

Argument

Standard of Review: Dismissal of a complaint under NRCP 12(b)(5) is reviewed under a rigorous *de novo* standard of review. *Slade v. Caesar's Entm't Corp.*, 132 Nev. Adv. Op. 36, 373 P.3d 74, 78 (2016). A *de novo* standard of review applies to issues of statutory construction, and all issues presented here, which challenge the district court's order granting the motion to dismiss. *Zohar v. Zbiegien*, 130 Nev. 733, 736-37, 334 P.3d 402, 404-05 (2014). All facts alleged in the Complaint are presumed true, and all inferences are to be drawn in favor of the plaintiff and against the requested dismissal. *Neville v. Eighth Judicial Dist. Court of Nev.*, 133 Nev. Adv. Op. 95, 406 P.3d 499, 501-02 (2017), Dismissal is proper, "only if it appears beyond a doubt that [the plaintiff] could prove no set of facts, which, if true, would entitle [the plaintiff] to relief." *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008).

I. NRS 41A.100(1)(a)'s Foreign Substance Exception Applies to the Medical Malpractice Claim.

A. *The Statutory Plain Language Excepts the Malpractice Claim from the Affidavit Requirement.*

The statutory exception to the affidavit requirement states that to meet its terms, a plaintiff need plead only that during surgery, a "foreign substance" was unintentionally left in their body. NRS 41A.100(A)1. Ms. Montanez pleads precisely that. She underwent surgery (App. 2, ⁋ 5). During that surgery, "a foreign substance" was left in her body, including, "the bacterium known as pseudomonas aeruginosa." (App. 3, ⁋ 9)

Perhaps the most fundamental rule of statutory construction is that a statute's plain language governs: Unless found to be ambiguous, there is no search for underlying statutory intent or construction. "When the language of a statute is plain and unambiguous, and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself." *Dykema v. Del Webb Cmtys., Inc.*, 132 Nev. Adv. Op. 82, 385 P.3d 977, 979 (2016) (internal quotation marks omitted.)

NNMC's motion below nowhere argued that the bacterium known as pseudomonas aeruginosa was not "foreign" to Ms. Montanez's body, or a "substance." (App. 10-20, *passim*) Instead, in fact, NNMC's motion effectively *admitted* that the bacterium was, literally, a "foreign substance", by resting its position on the claim that such bacteria, "are not the *kind* of

foreign substances" covered by the statute. (App. 15 [emphasis added]) NNMC thereby effectively conceded the bacterium is a, "foreign substance"; it merely asserts that the statute applies only to certain kinds of foreign substances, and that this bacterium is not one of them.

In any event, there can be no question that the bacterium left in Ms. Montanez was, literally, a "foreign substance." The National Institute of Health (https://www.nih.gov) certainly considers bacteria to be a kind of foreign substance. https://www.genome.gov/genetics-glossary/Antibody ("An antibody is a protein component of the immune system that circulates in the blood, recognizes *foreign substances like bacteria and viruses*, and neutralizes them. After exposure to a foreign substance, called an antigen, antibodies continue to circulate in the blood, providing protection against future exposures to that antigen." *Id.* [emphasis added]). And the World Health Organization does as well. https://vaccine-safety-training.org/glossary.html#glI (defining "immune system" as, "[a] complex system of organs and processes in the body responsible for fighting disease. Its primary function is to identify foreign substances in the body [including bacteria, viruses, fungi, parasites or transplanted organs and tissues] and develop a defense against them." *Id.*)

The statutory plain language applies. The motion at issue agreed and even asserted that the bacterium was, literally at any rate, a "foreign substance." That phrase's meaning in the world at large unambiguously includes bacteria. "In interpreting a statute, this court looks to the plain language of the statute and, if that language is clear, this court does not go beyond it." *Branch Banking & Tr. Co. v. Windhaven & Tollway, Ltd. Liab. Co.*, 131 Nev. 155, 158, 347 P.3d 1038, 1040 (2015); and *Sonia F. v. Eighth Judicial Dist. Court*, 125 Nev. 495, 499, 215 P.3d 705, 707 (2009) ("When a statute is facially clear, this court will give effect to the statute's plain meaning and not go beyond the plain language to determine the Legislature's intent." *Id*.) That undeniable point would suffice to dispose of the matter unless the Court disagrees and finds ambiguity.

B. *There Is No Applicable Statutory Ambiguity.*

The court below found the phrase, "foreign substance" ambiguous. (App. 55) But the statute did not simply except any "foreign substance" from the affidavit requirement and leave it at that, without a thought as to what or might not be exempted from the exception. Rather, it expressly refers to any, "foreign substance other than medication or a prosthetic

device" that was unintentionally left in a patient's body. 41A.100(1)(a). That phrase is important here because it actually precludes even the *possibility* of ambiguity in any pertinent respect.

To the extent the statute contemplates that only certain "kinds of foreign substances" are excepted, as the motion argued, that phrase is 41A.100(1)(a)'s explicitly listing of two substances that are exempted from its scope, *neither of which is bacteria*. If the statute were supposed to exempt additional substances from its scope, beyond those two, then it would have said so; it did not. The statute therefore cannot, as a matter of law, apply to additional types of foreign substances. *Flores v. Las Vegas-Clark Cty. Library Dist.*, 134 Nev. Adv. Rep. 101, 432 P.3d 173, 177 (2018), and *Galloway v. Truesdell*, 83 Nev. 13, 26, 422 P.2d 237, 246 (1967) (re-affirming that a statute's listing of specific items excludes the possibility of additional items being included ["*expressio unius exclusio alterius*"]). Note in this context that the statute's plain language refers to "medication" – obviously no more or less a "foreign substance" than bacteria would be – as a "foreign substance" (only a kind that is exempt from obviating the need for an affidavit). So there is no logical way that the phrase can be considered ambiguous as to whether bacteria "qualify" as a "foreign substance" (only

one that is not among those explicitly exempted), which is the purported ambiguity the court below specified. (App. 55)

There is therefore, "no search for its meaning beyond the statute itself." *Sarfo*, *supra*. Rather, the court below should simply have given full effect to the plain and ordinary meaning of the statute's words. *Williams v. U.P.S.*, 129 Nev. 386, 391, 302 P.3d 1144, 1147 (2013).

C. *Construing the Statute Beyond Its Plain Language Still Excepts the Claim from the Affidavit Requirement due to the Rule of Strictly Interpreting Statutes that Are in Derogation of the Common Law.*

In the alternative the Court does not agree that the statutory plain language exempts the medical malpractice claim from the affidavit requirement, and that, rather, it is ambiguous, it must first be observed that NRS 41A.100 is part of a statutory scheme that is in derogation of the common law. *Zohar v. Zbiegien*, 130 Nev. 733, 737-38, 334 P.3d 402, 405-06 (2014). This Court has clearly explained the rule for interpreting such a statute:

> We presume that a statute does not modify common law unless such intent is explicitly stated. *See* 3 Norman J. Singer & J.D. Shambie Singer, Singer, *Statutes and Statutory Construction* § 61:1

> (7th ed. 2008). Statutes that operate in derogation of the common law should be strictly construed, and, if there is any doubt as to the statute's meaning, the court should interpret the statute in the way that least changes the common law. *Id.*

Branch Banking & Tr. Co. v. Windhaven & Tollway, Ltd. Liab. Co., 131 Nev. 155, 158-59, 347 P.3d 1038, 1040 (2015).

The District Court erred by disregarding this rule that statutes in derogation of the common law are to be construed narrowly. *Shadow Wood Homeowners Ass'n v. N.Y. Cmty. Bancorp. Inc.*, 132 Nev. 49, 59, 366 P.3d 1105, 1112 (2016). If the court below found ambiguity, or otherwise truly felt "any doubt" as to whether foreign substances include bacteria, then it necessarily follows that the statute did not "explicitly" change the common law in the relevant respect. *Branch*, *supra*. The District Court should therefore have resolved the purported lack of explicitness in the way that "least changes the common law" as the statute would have applied to such claim. *Id*. If indeed there is ambiguity, *Branch* is unambiguous in directing how to resolve it.

The legislature itself fully knows that its statutes are subject to this rule of strict construction of statutes in derogation of the common law. And where the legislature feels a statute's underlying policies are so great that

they should overcome the rule, it knows to say so. See, e.g., NRS 87.040 and 271.020. (e.g., as to the Consolidated Local Improvements Law, "That for the accomplishment of these purposes, the provisions of this chapter shall be broadly construed, and the rule that statutes in derogation of the common law are to be strictly construed shall have no application to this chapter." NRS 271.020) The legislature did *not* enact any such provision so with respect to 41A.100's statutory scheme. By this omission, the legislature must be deemed to have fully intended the courts to construe the statute strictly and in such a way to preserve the common law's applicability to a claim if there was "any doubt" about the statute's effect. *Branch*, *supra*.

That legislature's lack of including a provision such as in NRS 87.040 and 271.020 was wholly sensible given that 41A.100's statutory scheme was geared toward merely balancing the competing interests of those wishing to limit medical malpractice claims with those of plaintiffs asserting such claims. *Zohar*, *supra*, 130 Nev. at 738. The legislature honored that balance by changing the common law so as to limit medical malpractice plaintiff's rights. It did not change it a whit more than its statute unambiguously and explicitly requires, however, in which case the common law still governs the outcome.

D. *No Authorities from Other Jurisdictions Suggest that NRS 41A.100 Does Not Except the Malpractice Claim from the Affidavit Requirement.*

The court below wrote, "While Nevada case law has not specifically excluded bacteria or other microscopic organisms from being deemed a foreign substance, other jurisdictions have." (App. 55) The lower court did not to cite to any such case law from such other jurisdictions, and Ms. Montanez's research has uncovered none either. NNMC's motion, though, rather than pointing to any case from Nevada or elsewhere that specifically says a bacterium is *not* a "foreign substance", listed many cases from other states that found other things to *be* foreign substances. (App. 13-14) And naturally, it is readily conceded that all those other things referred to in those cases would also be foreign substances. None of that means, of course, that the bacterium known as pseudomonas aeruginosa is not also a foreign substance.

Notably, though, those many cases from other states interpreted statutes containing the phrase, "foreign object,", not "substance." (App. 14-15) This is important because apparently Nevada's legislature could well have chosen a word such as, "object" – as the legislatures in the other cited states did – and yet chose the word, "substance", instead. The former

word, "object", certainly connotes something more mechanical or human-made, while the latter, "substance", connotes inclusion of something more chemical or biological.

E. *There Is No Statutory Requirement that a Foreign Substance Be Intentionally Placed; Rather, Just Unintentionally Left.*

NNMC's motion also suggested that the statute's exception requires not only that a foreign substance be "unintentionally left" in a plaintiff's body, but also that the foreign substance *be intentionally placed there first, and then* "unintentionally left." (App. 13) The statute contains no such requirement, which fully disposes of that argument. NRS 41A.100(1)A. More, though, the position does not stand up to sheer logic. One may "leave" something in a place unintentionally without having necessarily first placed it there intentionally, as would be the case if a doctor unintentionally dropped a sponge or instrument of some kind into a patient's body during surgery and left it there. A thousand more examples can be considered that would lead to equally absurd results if NNMC's point is heeded, but in the end, as this Court has already held, the statute's intent element unambiguously applies only to the leaving of a foreign

substance, not its placement. *Cummings v. Barber*, 136 Nev. Adv. Op. 18, 460 P.3d 963, 967 (2020).

II. The District Court Erred by Using a Test Other than the Statute's, and by Accepting a Speculative Claimed Fact that NNMC Had Merely Argued, While Ignoring the Complaint's Plainly Pleaded Fact to the Contrary.

The District Court's "Order Granting Sparks Family Hospital, Inc.'s Motion to Dismiss" purports to address the statutory interpretation issue in six paragraphs spanning its second through fourth pages. The first three of these paragraphs, and most of the fourth, merely describe the court's understanding of the parties' arguments. (App. 53-55) The fourth paragraph's last sentence concludes that the statute is ambiguous with respect to what qualifies as a "foreign substance" – an assertion NNMC had not even made in its Motion – without offering any reasoning for that conclusion. But then the court below never resolved that ambiguity by holding, one way or another, whether the bacterium left in Ms. Montanez was a "foreign substance." Rather, the only statement of the Court's actual reasoning for dismissing Count I, which appears in the fifth of those paragraphs, is:

> NNMC argues the infection could have come from sources outside of the health provider's control, and therefore requires expert testimony to show that NNMC is at fault. Furthermore, NNMC argues that this is not a factual scenario where the expert affidavit requirement can be avoided. The Court agrees. The circumstances surrounding this case will require expert testimony, as a layperson could not be expected to find malpractice in this case in the same way they would in a case where a sponge or a scalpel was unintentionally left behind.

(App. 55)[3]

So, the dismissal's only proffered reasoning is that because the foreign substance left in Ms. Montanez' body could have come from sources outside the health provider's control, then – and unlike something like a sponge or a scalpel – a jury would need expert testimony to understand whether there was malpractice, and relied on that determination as its basis for dismissing Count I. It did not rely on, decide, or even address the question of whether the bacterium left in Ms. Montanez did, or did not, "qualify" under the purportedly ambiguous phrase, "foreign substance."

[3] The sixth paragraph, then, addresses only the collateral question of whether, if the statute is not satisfied, amendment of the pleadings would be appropriate.

The first and most obvious legal problem with this reasoning is that it is contrary to the statute's plain language. The statute does not make the test what a judge thinks might or might not benefit a jury in understanding whether there was malpractice. The statutory test is whether a foreign substance (not a "foreign object") was unintentionally left in the plaintiff's body. NRS 41A.100(A)1. Any alleged ambiguity or no, therefore, the sole question the statute presents is whether "one or more of the five factual predicates enumerated" in 41A.100(1) are met. *Jaramillo v. Ramos*, 136 Nev. Adv. Op. 17, 460 P.3d 460, 463 (2020), citing *Johnson v. Egtedar*, 112 Nev. 428, 434, 915 P.2d 271, 274 (1996), and *Szydel v. Markman*, 121 Nev. 453, 460, 117 P.3d 200, 204 (2005). If one of those facts exists, then the legislature has determined that no affidavit is required regardless of how much, or little, a court thinks a jury would benefit (or not) from expert testimony despite such a fact. *Id*.

An additional flaw in the Court's reasoning is its reliance on a claimed fact that lacks any support in the pleadings, and is actually directly *contrary* to the fact pleaded. "[W]hen a court considers a motion to dismiss under NRCP 12(b)(5), all alleged facts in the complaint are presumed true and all inferences are drawn in favor of the complaint." *Buzz Stew, LLC v.*

City of N. Las Vegas, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008). Remarkably, though, it turned out that the only fact the lower court relied on for its ruling is one that it explicitly describes as resting merely on what "NNMC argues": that the bacterium could have come, "from sources outside [its] control." (App. 55) The Complaint, on the other hand, specifically pleads that, "at all times" NNMC "operated, maintained, possessed and *exclusively controlled*" the facility. (App. 2, ¶ 4 [emphasis added]) The Complaint further explicitly explains that the bacterium being left in Ms. Montanez, "was caused by Northern Nevada Medical Center which is in *Defendant's exclusive control*." (App. 3, ¶ 11 [emphasis added])

So the District Court's reasoning, even briefly as it was offered, was night-and-day wrong in two independent respects: 1) It never ruled on whether a foreign substance was left in Ms. Montanez, which is the statutory test but instead imposed its own test of whether it thinks expert testimony would benefit a jury; and 2) It relied solely on a fact that is not only unsupported by the Complaint but also is directly contrary to the facts pleaded in the Complaint. These are fatal defects in the Order requiring reversal.

III. The Second Claim for Relief Alleges Actionable Common Law Premises Liability.

"In Nevada, proprietors owe their invitees a duty to use reasonable care to keep the premises in a reasonably safe condition for use." *Hammerstein v. Jean Dev. W.*, 111 Nev. 1471, 1475-76, 907 P.2d 975, 977 (1995). The elements of a negligence claim resting on premises liability are: 1) a landowner/occupier of real property, 2) knew or in the exercise of reasonable care should have known, 3) of a dangerous or unsafe condition existing on the property, and 4) failed to adequately warn of the danger. *Twardowski v. Westward Ho Motels*, 86 Nev. 784, 787, 476 P.2d 946, 947-48 (1970). An important corollary is that, "the owner or occupier of land has a duty to an invitee to inspect the premises to discover dangerous conditions not known to him and to 'take reasonable precautions to protect the invitee from dangers which are foreseeable from the arrangement or use.'" *Id*. (quoting, Prosser, Handbook of The Law of Torts 402 [3d Ed. 1964]).

The *res ipsa loquitur* doctrine applies to 1) an event which ordinarily does not occur in the absence of someone's negligence; (2) caused by an agency or instrumentality within the exclusive control of the defendant; and (3) not due to any voluntary action or contribution on the part of the

plaintiff. *Woosley v. State Farm Ins. Co.*, 117 Nev. 182, 188-89, 18 P.3d 317, 321 (2001). To invoke the doctrine, it is also required that the defendant have superior knowledge regarding, or be in a better position to explain, than the plaintiff. *Id*.

The premises liability claim posits that Ms. Montanez's injury may well have been caused, in full or in part, by nothing peculiarly medical in nature – i.e., nothing that any medical professional was necessarily to do or not do. Rather, the claim rests on the factual possibility that her blindness was caused simply by the failure of a business owner to have a clean building: a failure to mop the floors, for instance, or to install wipe off a dirty surface that would have been a non-medical professional's job to handle. Here, the allegation of Paragraph 7 becomes important: *three different other people were so injured in the same place during the same week*. (App. 2, ¶ 7) It is very possible, to say the least, that the same doctor or nurses – none of whom, the Court will note, Ms. Montanez made any claim against – did not commit the same act of professional negligence solely causing the same type of injury four different times in the same week. Rather, the claim alleges the premises themselves having been left in an

unclean condition, proximately causing the blinding of the right eye of Ms. Montanez.[4]

Both premises liability claims and medical malpractice are sub-species of negligence. *Hammerstein*, *supra*, 111 Nev. At 1475-76, 907 P.2d at 977. Due to the fact that NNMC completely controls the locus, and the impossibility without discovery to determine more than what has already been alleged, Ms. Montanez cannot know with certainty whether the pseudomonas aeruginosa she now has was due to professional negligence of some kind, or due simply to a business-owner's failure to keep their building clean (or, perhaps, both). Thus, both sub-species of negligence are properly pleaded.

In this regard, it is worth noting that the medical malpractice statutory scheme that NNMC argued below should apply to this claim requires not only a professional's affidavit (absent the statutory exceptions), but also that the professional be, "a provider of health care who practices or has practiced in an area that is substantially similar to the

[4] Despite the implied compliment (App. 15), it takes no great "creativity" to consider that, if four people get sick in the same week in the same business location, then perhaps the cause was simply that the place was dirty, as opposed to "malpractice" on some practitioner's part.

type of practice engaged in at the time of the alleged negligence." NRS 41A.100(2). But of course, there is no medical doctor who specializes in cleaning real property. To the extent the infection was caused by basic uncleanliness or other unsafe condition to the real property itself, there would be no, "professional", except perhaps a professional janitor, who would practice in an appropriate field.

NNMC correctly noted below that hospitals have statutory requirements as to infection control programs. It argued those would therefore remove the cleanliness of hospitals from the realm of ordinary care and into that of professional (mal)practice. (App. 19) But such requirements are hardly unique to health care providers or other professionals. Many types of businesses, involving professionals and otherwise, have statutory requirements relating to the cleanliness of their premises to avoid illnesses to invitees. See, e.g., NRS 447.045 and 447.100 (requiring hotels and especially bathrooms to be kept in a clean and sanitary condition, and for hotels to fumigate rooms under certain circumstances to control the spread of infections).

To the extent, by the way, that Ms. Montanez's injury may have been caused or contributed to by simple uncleanliness, the reference to NRS

439.865 and 439.873 actually points up an additional reason why the premises liability claim is completely valid: Uncleanliness in violation of either of the statutes, including any of the regulatory measures adopted under them, would be negligence per se, not calling for any particular evidence (much less a physician's affidavit asserting a breach of some professional standard of care) in order to make a prima facie case. *Atkinson v. MGM Grand Hotel, Inc.*, 120 Nev. 639, 643, 98 P.3d 678, 680 (2004). Due to the *res ipsa* nature of this case, of course, Ms. Montanez does not know of the facts that would prove or dis-prove such a statutory violation. But then, dismissing a complaint is appropriate "only if it appears beyond a doubt that [the plaintiff] could prove no set of facts, which, if true, would entitle [the plaintiff] to relief." *Neville v. Eighth Judicial Dist. Court of Nev.*, *supra*, 133 Nev. Adv. Op. 95, 406 P.3d 501-02.

Even were this Court to determine that Count I is not exempted by NRS 41A.100(1), that claim can be severed, while allowing Count II, as a claim for ordinary negligence, to proceed. *Szymboski v. Spring Mountain Treatment Center*, 133 Nev. 638, 644; 403 P.3d 1280, 1286 (2017). The mere fact that a claim is brought against a health care facility does not mean it sounds in medical malpractice. *Id.*, 133 Nev. At 642-643, 403 P.3d at 1285.

Where Ms. Montanez went into routine surgery and is now effectively blind, with no explanation offered in any of her medical records that she has been able to obtain and absolutely no explanation offered by the owner of the business that fully controlled the facility and circumstances under which she was blinded, a premises liability, especially under a *res ipsa loquitur* theory, is especially appropriate.

Conclusion

A final, fundamental point lies at the heart of this case that is neither legal nor strictly factual in nature, but bears noting: It makes no sense, and is inherently unfair, to construe a statute so that a person who goes into routine surgery and comes out of it blind – with no explanation whatsoever beyond that a bacterium was somehow left in her body – is then left completely remediless simply because she has no access to any information that would permit a doctor to sign an affidavit saying another medical professional was at fault. Giving the Complaint the benefit of all inferences and in considering whether Ms. Montanez could succeed under any set of facts, that is indeed the state of things. This Court is effectively being asked whether it should be the law in this state that such a person has no chance of recovering anything for her blindness.

For that reason, and all the others discussed above, Ms. Montanez respectfully requests this Court to reverse the dismissal Order entered by the District Court, and to remand the case to proceed with discovery on her Complaint.

Dated this 1st day of March, 2021.

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Certificate of Compliance

1. I hereby certify that this brief complies with the formatting, type-face, and type-style requirements of NRAP 32(a)(4)-(6) because it was prepared in Microsoft Word Home and Office 2016 with a proportionally spaced typeface in 14-point, double-spaced Book Antigua font.

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 contains 5,594 words.

3. I further hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in

particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 1st day of March, 2021.

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Certificate of Service

I certify that on March 1, 2021, I submitted the foregoing APPELLANT'S OPENING BRIEF for filing via the Court's e-Flex electronic filing system. Electronic notification will be sent to the following:

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