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, Respondent.	**SUPREME COURT CASE NO.: 81312**

Appeal from Second Judicial District Court, Washoe County
The Honorable Connie J. Steinheimer, District Judge
District Court Case No. CV19-01977

RESPONDENT SPARKS FAMILY HOSPITAL, INC.'S ANSWERING 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), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. SPARKS FAMILY HOSPITAL, INC., A Delaware Corporation doing business as NORTHERN NEVADA MEDICAL CENTER, is an indirect subsidiary of Universal Health Services, Inc., which is a publicly traded corporation on the New York Stock Exchange. No other company owns greater than 10% of outstanding stock or other ownership interest in SPARKS FAMILY HOSPITAL, INC., A Delaware Corporation doing business as NORTHERN NEVADA MEDICAL CENTER,

2. Respondents' counsel is the only law firm that has appeared for

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Respondents in this matter and who are expected to appear in this matter for Respondents.

Dated this 30th day of March 2021.

JOHN H. COTTON & ASSOCIATES

By: /s/*John H. Cotton*
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I. INTRODUCTION AND SUMMMARY OF ARGUMENT

The District Court's Order should be affirmed.

Northern Nevada Medical Center known as Sparks Family Hospital (pursuant to NRAP 28(d) "Sparks Family" herein) is a licensed hospital and therefore a statutory provider of healthcare under NRS 41A.017. The facts of Montanez's Complaint concern Sparks Family's provision of healthcare in the form of infection control measures of the operating suite where Montanez underwent eye surgery. Montanez alleges the surgery resulted in a post-operative eye infection of the bacteria pseudomonas aeruginosa.

These allegations necessarily should have prompted Montanez to comply with NRS 41A.071 and attach to her Complaint an expert affidavit. Montanez failed to do so. Instead, Montanez sued for:

1) premises liability. This is despite this Court's holding in Szymborski v. Spring Mountain Treatment Center, 133 Nev. 638, 403 P.3d 1280, 1288 (2017) that a "claim is grounded in medical malpractice and must adhere to NRS 41A.071 where . . . the standards of care pertaining to the medical issue require explanation to the jury from a medical expert at trial."; and

2) the bacteria/infection as a statutory "foreign substance" under NRS 41A.100(1)(a) thereby obviating the need for compliance with NRS 41A.071. This is despite no case law or legislative history substantiating that interpretation of NRS

41A.100(1)(a), and this Court's holding in Szydel v. Markman, 121 Nev. 453, 461, 117 P.3d 200, 204 (2005) that the "[w]ise course of action in all malpractice cases would be for plaintiffs to provide [expert] affidavits even when they do not intend to rely on expert testimony at trial."

II. ISSUES ON APPEAL

1. When the gravamen of the Complaint concerned a hospital's infection control measures, did the District Court err when it determined the Complaint sounded in professional negligence, and not premises liability?

2. If the District Court did not err regarding issue no. 1, then did the District Court err that infection control measures of a licensed hospital are outside the common knowledge of a layperson thus requiring an expert affidavit under NRS 41A.071?

3. If the District Court did not err regarding issue no. 1, then did the District Court err that bacteria is not a "foreign substance" for purposes of NRS 41A.100(1)(a)?

As better described below the answers to the above three questions are no, no, and no.

III. FACTUAL AND PROCEDURAL STATEMENT OF FACTS

In October 2019, Montanez initiated this action and filed her Complaint. (Joint Appendix 000001-000005.) Plaintiff alleged the following in her Complaint:

"On or about October 10, 2018, Plaintiff underwent a surgical procedure on her right eye at the Northern Nevada Medical Center." (Joint Appendix 000002.)

"The portion of the Northern Nevada Medical Center where Plaintiff underwent her procedure was newly constructed and/or re-designed." (Id.)

"Upon information and belief, during the procedure, a foreign substance was left in Plaintiff's body, including but not necessarily limited to a bacterium known as pseudomonas aeruginosa." (Joint Appendix 000003.)

"As a direct result of the foreign substance left in Plaintiff's body, Plaintiff has been damaged, including but not necessarily limited to Plaintiff being infected with pseudomonas aeruginosa and being now permanently and irreversibly blind in her right eye." (Joint Appendix 000003.)

"Such foreign substances being so left and such infection and blindness so resulting, would not ordinarily occur in the absence of negligence, was caused by the Northern Nevada Medical Center, which is in Defendant's exclusive control, and was not due to any voluntary action or contribution on Plaintiff's part." (Id.)

"Defendant owed a duty to Plaintiff to maintain its premises, in a safe and careful manner that would not result in infection and blindness to Plaintiff." (Id.)

"Defendant and its personnel acting in the scope and course of their employment with Defendant acted unreasonably, carelessly, reckless, and negligently, and breached such duty, in one or more of the following respects:

a. Being aware of the dangerous condition of the premises it either knew or by the exercise of reasonable care should have known

b. failing to take reasonable steps and care to alleviate and to prevent foreign substances, including bacteria that can (and did) cause blindness, from being left in Plaintiff's body.

c. Failing to warn Plaintiff as an invitee of the premises of the dangerous condition of the premises.

(Joint Appendix 000003-000004.)

In January 2020, Sparks Family filed a Motion to Dismiss Without Prejudice. (Joint Appendix 000010-000020.)

In February 2020, Montanez filed an Opposition.[1] (Joint Appendix 000021-000030.)

In March 2020, Sparks Family filed a Reply. (Joint Appendix 000039-000048.)

In May 2020, the District Court issued an Order granting the Motion. (Joint Appendix 000052-000059.)

In June 2020, Montanez filed her appeal. (Joint Appendix 000070-000071.)

[1] Montanez did not supply any materials outside of the pleadings in an attempt to demonstrate a prima facie claim, nor does so on appeal. Therefore, this Court need not concern itself with its prior holding of Szydel v. Markman which perhaps suggests that courts may consider materials outside of the pleadings to evaluate whether the Complaint sets forth a valid statutory *res ipsa loquitur* claim under NRS 41A. See Powell v. Liberty Mut. Fire Ins. Co., 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) ("Issues not raised in an appellant's opening brief are deemed waived.")

IV. LEGAL ARGUMENT

A. Standard of review for Motions to Dismiss

Motions to Dismiss are reviewed de novo. See, e.g., Zohar v. Zbiegien, 130 Nev. 733, 735, 334 P.3d 402, 404 (2014). Although a court will accept a plaintiff's factual allegations as true for purposes of deciding a motion to dismiss, such allegations must still be legally sufficient to constitute the elements of the claim asserted. See, e.g. Garcia v. Prudential Ins. Co. of Am., 129 Nev. 15, 19, 293 22 P.3d 869 (Nev. 2013) (citation omitted).

"Determining whether a complaint states a plausible claim for relief will [] be a context-specific task that requires the reviewing court to draw on its *judicial experience and common sense*. . . In keeping with these principles, a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." Ashcroft v. Iqbal, 556 U.S. 662, 679 (2008) (analyzing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556, 127 S. Ct. 1955 (2007))[2] (emphasis added).

B. Standard of review for statutory construction

Issues of statutory constructions are reviewed de novo. Zohar, 130 Nev. at 735, 334 P.3d at 405; see also Schuster v. Dist. Ct., 123 Nev. 187, 191-192, 160 P.3d

[2] See Advisory Committee Note 2019 Amendments ("Modeled in part on the 2018 version of the Federal Rules of Civil Procedure . . .," and "The amendments generally conform Rule 8 to FRCP 8," and "Rule 12(b)(5) mirrors FRCP 12(b)(6).")

873, 876-877 (2007) (if a statute is silent and a party is advocating an interpretation that adds language or a duty, then the party must point to a source, such as legislative intent/history or another statutory provision as the source for its interpretation).

C. The gravamen of Plaintiff's Complaint is professional negligence, and not premises liability

It is the gravamen of the Complaint which controls what the alleged tort sounds in; and not the creativity of the Plaintiff's attorney. Courts are to look to "the nature of the grievance to determine the character of the action, not the form of the pleadings." Egan v. Chambers, 129 Nev. 239, 299 P.3d 364, 366 n. 2 (2013).

Professional negligence is "the failure of a provider of health care, in rendering services, to use the reasonable care, skill or knowledge ordinarily used under similar circumstances by similarly trained and experienced providers of health care." NRS 41A.015. A "provider of health care" is further defined to specifically include "a licensed hospital . . . and its employees." NRS 41A.017.

This is a professional negligence action involving the standard of care for operating room sterilization and infection control measures, and not generic premises liability akin to a parking lot or grocery store aisle. Montanez's characterization of the facts to assert her cause of action for premises liability begs the question what rubric should be used to determine a medical malpractice action versus some other kind of tort:

> A claim is grounded in medical malpractice and must adhere to NRS 41A.071 where the facts underlying the claim involve medical diagnosis, treatment, or judgment and the standards of care pertaining to the medical issue require explanation to the jury from a medical expert at trial.
>
> By extension, if the jury can only evaluate the plaintiff's claims after presentation of the standards of care by a medical expert, then it is a medical malpractice claim.

Szymborski v. Spring Mountain Treatment Center, 133 Nev. 638, 403 P.3d 1280 (2017);

Here, the only operative factual allegation in the Complaint is that Sparks Family failed to keep a safe and sterile premises to avoid a post-operative infection. This supposed failure by Sparks Family constitutes an "omission" squarely within the purview of NRS 41A, thus requiring an expert affidavit. See NRS 41A.097(2)(c) (codifying that lawsuits for professional negligence must be filed within the statute of limitations "from error or omission in practice by the provider of health care.")

Sparks Family's maintenance of its operating rooms for purposes of sterilization and infection prevention is clearly a medical function. Indeed, such measures are governed by statute and require persons with special training beyond that of a common layperson's knowledge to understand. See, e.g., NRS 439.865 (codifying healthcare facilities must develop an infection control program to prevent and control infections), NRS 439.873 (healthcare facilities requiring

designation of and requisite qualifications for an infection control officer).

D. The gravamen of Plaintiff's Complaint is professional negligence, and therefore must be dismissed when it failed to attach an expert affidavit

NRS 41A.071's requirement of competent expert opinions at such an early stage exists to "deter frivolous litigation and identify meritless malpractice lawsuits." Szydel, 121 Nev. at 459, 117 P.3d 204 (internal quotations omitted).

"If an action for professional negligence is filed in the district court, the district court shall dismiss the action, without prejudice, if the action is filed without an [expert] affidavit." NRS 41A.071.

It is uncontroverted that Montanez's Complaint was filed without an expert affidavit. (See generally Joint Appendix 000001-00005.) But Montanez argues an expert affidavit was not required. The facts and circumstances of Montanez's claim applied to her *res ipsa loquitur* theory can therefore be summarized as:

> [Bacteria as] a foreign substance other than medication or a prosthetic device was unintentionally left [only by Sparks Family] within the body of [Montanez] following surgery.

(Cf. NRS 41A.100(1)(a) with Joint Appendix 000001-00005.)

Montanez also argues that the District Court erred because the District Court must accept her allegations as true and viewed liberally, and if that occurred, her Complaint provides a prima facie claim under NRS 41A.100(1)(a). But the law does not allow for layperson-Montanez to control how the courts interpret statutes.

Montanez interprets NRS 41A.100(1)(a) to mean that a prima facia claim occurs when literally anything other than a medication or prosthetic device, e.g., water, air, dissolvable sutures, or invisible microscopic single-cell organisms as the case here, is unintentionally left in the body by any healthcare provider whom layperson Montanez chooses to sue.

Montanez must necessarily argue that the statute is "plain and unmistakable" because doing so would theoretically prevent this Court from searching for meaning beyond the text of the statute itself. See Attorney General v. Nevada Tax Commission, 124 Nev. 232, 240, 181 P.3d 675, 680 (2008). Montanez must necessarily do so here. She has no case, anywhere in the country, to stand for the proposition that when states' legislatures codify professional negligence statutes that unintentionally retained "foreign substances" includes microscopic bacteria.

Certainly, Montanez's interpretation of the statute is different than Sparks Family's. Montanez must necessarily take a strict constructionist view in order to effectuate her claims. (But see Joint Appendix 0000055 ("The Court finds [NRS 41A.100(1)(a)] is ambiguous as to what qualifies as a foreign substance.") See also Washington v. United States, 2017 WL 2213128 (D. Nev. 2017).

In Washington, Judge Mahan rejected NRS 41A.100(1)(a) application to allegations of injuries due to: 1) sutures containing the bacteria MRSA (methicillin-resistant staphylococcus aureus); and 2) defendant physician's failure to remove the

sutures upon knowing the sutures would become infected. Consequently, Judge Mahan dismissed the professional negligence complaint for lack of an expert affidavit. Id.

Sparks Family understands that the legislature's intent should be given full effect. Freeman v. Davidson, 105 Nev. 13, 16, 768 P.2d 885, 887 (1989).

In concluding that the statute here is plain and unambiguous, Montanez focuses on the Center for Disease Control and Prevention's definition of bacteria to conclude that it is a foreign substance, and that it was not covered by the specific exceptions provided in the statute. (Appellant's Opening Brief at 10.)

Montanez, however, misunderstands Sparks Family's argument and fails to recognize the inherent ambiguity of the statute, when taken as a whole, stating that "a foreign substance…was unintentionally left within the body." Montanez never provided to the District Court any definitions of "substance" being inclusive of bacteria.

Montanez's argument that this statute is plain and unambiguous as applied to bacteria is without merit, as the statute clearly leaves an open question as to whether or not bacteria is the kind of foreign substance that the statute contemplates being left unintentionally within the body. (See also Joint Appendix 0000055 ("The circumstances surrounding this case will require expert testimony, as a layperson

could not be expected to find malpractice in the case in the same way they would in a case where a sponge or scalpel was unintentionally left behind.")

The Legislature's purpose behind NRS 41A.071's expert affidavit requirement, particularly in 2002 to respond to a crisis of healthcare providers leaving Nevada due to unaffordable insurance premiums, was "to lower costs, reduce frivolous lawsuits, and ensure that medical malpractice actions are filed in good faith based upon competent expert medical opinion." Szydel, 121 Nev. at 459, 117 P.3d at 204.

Given the overarching purpose of NRS 41A, it is not reasonable to agree with Montanez and conclude that the Nevada legislature intended to expand the factual universe of NRS 41A.100(1)(a) by including bacteria/infections. See Breen v. Caesars Palace, 102 Nev. 79, 82, 715 P.2d 1070, 1072 (1986) (statutes should be read to produce reasonable results versus producing unreasonable results with an alternate interpretation); see also Canarelli v. Dist. Ct., 127 Nev. 808, 814, 265 P.3d 673, 677 (2011) (statutes are to be construed as to "preserve harmony" among the statutes).

The statute is actually quite clear that bacteria are not the type of substance considered by the statute because bacteria are not "unintentionally left within the body." To the extent that any such statutory ambiguity exists, an examination of the legislative history would be appropriate. The closest thing Sparks Family could find

in its research was a hearing on SB 405 before the 58th Legislature's Senate Judiciary Committee in 1975, but it did not reveal any relevant legislative history relative to what "foreign substance" truly means or if bacteria was contemplated.

Therefore, this Court must look to foreign authority for guidance. What the case law reveals are courts across the country over the course of decades have rejected bacteria as the subject of *res ipsa loquitur* theory.[3]

Smith v. Curran, 28 Colo.App. 358, 472 P.2d 769 (1970)

In Smith, the Colorado Court of Appeals sustained a directed verdict where plaintiff attempted to argue *res ipsa loquitor* (RIL) due to post-operative bacteria.

The facts involved that the plaintiff post-operatively was diagnosed with staphylococcus (i.e. a gram-positive *bacteria*), resulting in osteomyelitis (i.e. a bone infection), resulting in permanent damage to plaintiff's leg. Here, Montanez likewise alleges to have been post-operatively diagnosed with pseudomonas aeruginosa (i.e. a gram-negative bacteria), resulting in an eye infection, resulting in permanent damage to her eye.

[3] Rejection of bacteria as a *res ipsa loquitur* theory is not unique to professional negligence cases. See Goodwin v. Misticos, 42 So.2d 397 (1949). In Goodwin, Plaintiff sued for negligence under common law *res ipsa loquitur* theory due to being diagnosed with "ptomaine poising" after eating Defendant's food. Merriam-Webster defines ptomaine poisoning as "any of various organic bases which are formed by the action of putrefactive *bacteria* on nitrogenous matter and some of which are poisonous." (emphasis added). The trial court granted a directed verdict in favor of Defendant, recognizing that the doctrine of *res ipsa loquitur* does not pertain to germs or bacteria in food. Id.

The Smith Court recognized that "[t]he evidence in this case showed not only a bad result, but also that infection occurred in the area of the operation." Here, Montanez likewise asserts her infection occurred due to her operation.

In rejecting the plaintiff's arguments that RIL applied, the Smith Court noted:

> the mere fact that a patient develops an infection in the area under treatment does not raise a presumption or inference of negligence on the part of the attending physician. The mere presence of infection following an operation is not prima facie evidence of negligence.

Id.

The Smith Court instead held it was incumbent upon the plaintiff to have produced a qualified expert to establish medical negligence because "the cause of an infection or its source are matters within the field of medical experts." This Court's reasoning to affirm the District Court's Order should be no different.

Montana Deaconess Hospital v. Gratton, 169 Mont. 185, 545 P.2d 670 (1976)

In Gratton, the Montana Supreme Court held the trial court's granting of Summary Judgment was proper where the plaintiff attempted to argue *res ipsa loquitur* (RIL) due to post-operative bacteria.

In that case, the plaintiff was diagnosed post-operatively with a staph infection and the presence of a pseudomonas organism (i.e. a gram-negative *bacteria*) resulting in permanent damage to plaintiff's right arm.

In rejecting plaintiff's argument that RIL applies, the Gratton Court held that RIL "is not applicable in a malpractice action from the mere fact that an infection developed in the area of treatment. 162 A.L.R. 1265, 1284; 82 A.LR.2d 1262, 1298."

This Court's reasoning to affirm the District Court's Order should be no different.

McCall v. St. Joseph's Hospital, 184 Neb. 1, 165 N.W.2d 85, 88-89 (1969)

In McCall, the Nebraska Supreme Court affirmed the trial court's granting of Summary Judgment where the plaintiff attempted to argue *res ipsa loquitur* (RIL) due to post-operative bacteria.

The facts of McCall were that the plaintiff, post-operatively, was diagnosed with staphylococcus aureus (i.e. a gram-positive *bacteria*) at the site of surgery, resulting in extensive injuries and disability as an alleged result of the infection.

In rejecting the plaintiff's arguments that RIL applied, the McCall Court explained:

> It seems obvious that an infection at the surgical site would not be "so palpably negligent" that it would require negligence to be inferred as a matter of law. . . Neither authority nor reason will sustain any proposition that negligence can reasonably be inferred from the fact that an infection originated at the site of a surgical wound. To permit a jury to infer negligence would be to expose every doctor and dentist to the charge of negligence every time an infection originated at the site of a wound. We note the complete absence of any expert testimony or any offer of proof in this record to the effect that a staphylococcus infection would automatically lead to an inference of negligence by the people in

> control of the operation or the treatment of the patient. We come to the conclusion that there is no merit to this contention.

Id. at 88-89.

This Court's reasoning to affirm the District Court's Order should be no different.

Schofield v. Idaho Falls Latter Day Saints Hosp., 90 Idaho 186, 409 P.2d 107 (1965)

In Schofield, the Idaho Supreme Court affirmed the trial's court directed verdict where the plaintiff attempted to argue *res ipsa loquitur* (RIL) due to a post-operative infection after a cataract surgery.

The procedural facts of Schofield involved the Montanez's Complaint asserting RIL in a professional negligence matter, which the defendant-hospital moved to strike, and the trial court granted it. Here, Montanez's Complaint likewise contained RIL allegations in the professional negligence matter, Sparks Family moved to dismiss, and the trial court granted it.

In rejecting the plaintiff's argument that RIL applied, the Schofield Court held that the record in the case did not warrant the application of RIL and reasoned:

> There are exceptions to the general rule which permit the plaintiff in a malpractice case to invoke the doctrine of *res ipsa loquitur*. Among these are cases in which the surgeon has left a foreign object, such as a sponge or surgical instrument, within the body of the patient.
> . . .
> . . . the doctrine must be limited to those cases where the layman is able to say as a matter of common knowledge and observation that the consequences of professional treatment were not such as ordinarily

> would have followed if due care had been exercised. Where such facts are absent, expert medical evidence is required to prove negligence. The record in this case does not warrant application of the doctrine of *res ipsa loquitur*.

Id.

This Court's reasoning to affirm the District Court's Order should be no different.

Contreras v. St. Luke's Hosp., 78 Cal. App. 3d 919, 144 Cal. Rptr. 647 (1978)

In Contreras, the California Court of Appeals held the trial court did not err in granting the healthcare providers' Motions for Nonsuit where the plaintiff attempted to argue RIL due to post-operative bacteria.

Contreras concerned a plaintiff who was post-operatively diagnosed with gram-positive *bacteria* from the site of the surgery resulting in damages. Id. at 929. The specific species of *bacteria* causing the infection was a rare type of "enterococci." Id. at 931.

In rejecting plaintiff's argument that RIL applied, the Contreras Court held:

> it is not a matter of common knowledge that an infection subsequent to an operation of the type involved here is more likely than not the result of negligence by the surgeon or the hospital, and, in the absence of expert testimony on the matter we cannot properly hold that there is such a probability.

Id. at 931.

The Contreras Court further reasoned that because the type of bacteria was so rare, "it would be even more difficult to reach a conclusion that [the infection's] cause or late discovery, if true, was probably the result of negligence by defendants." Id. at 931-932.

This Court's reasoning to affirm the District Court's Order should be no different.

E. Sparks Family did not "unintentionally leave" bacteria in Montanez's eye

NRS 41A.100(1)(a) concerns foreign substances "unintentionally left within the body." It is axiomatic that the Legislature contemplated that if the healthcare provider did not place the foreign substance within the body during surgery, then it cannot be said that the healthcare provider *unintentionally left* the foreign substance within the body following surgery. See NRS 41A.100(1)(a).

Typical examples of such a foreign substance as contemplated within the statute would be visible objects specifically utilized by the defendant healthcare provider during the course of surgery. Szydel v. Markman, 121 Nev. 453, 117 P.3d 200 (2005) (surgical needle); Cummings v. Barber, M.D., 136 Nev. Adv. Op. 18, 460 P.3d 963 (2020) (gastric surgical clips and associated wire fragments); Jaramillo v. Ramos, M.D., 136 Nev. Adv. Op. 17, 460 P.3d 460 (2020) (breast surgery wire fragments).

Other examples would be a surgical sponge or scalpel. Farley v. Meadows, 185 W. Va. 48, 50, 404 S.E.2d 537, 539 (1991) (*res ipsa loquitur* doctrine applying with a surgical sponge or scalpel because the "only inference that can be drawn is that the foreign object was left in the chest from surgery.") See also Vinciguerra v. Jameson, 208 A.D.2d 1136, 617 N.Y.S.2d 942 (1994) (hemoclips (small metallic devices used to control bleeding during surgery) not deemed a statutory foreign objects for purposes of statute of limitations tolling); Ericson v. Palleshi, 23 A.D.3d 608, 610 (2005) (spiral tacks retained in patient's abdomen during surgery not deemed a statutory foreign objects for purposes of statute of limitations tolling); Newman v. Keuhnelian, 248 A.D.2d 258, 670 N.Y.S.2d 431 (1998) (piece of a catheter left in the body undetected not deemed a statutory foreign object for purposes of statute of limitations tolling when the catheter itself was purposefully implanted to temporarily remain in the body).

After the District Court briefing but before the District Court issued its Order, this Court issued Cummings v. Barber, M.D., 136 Nev. Adv. Op. 18, 460 P.3d 963 (2020) which is instructive to the instant analysis.

In Cummings, unlike here, Defendant Barber implanted hardware in September 2013. In June 2014 upon the removal of that hardware, Defendant Barber did not remove some wire fragments associated with the hardware. Id.

Defendant Barber later disclosed an expert to opine that leaving the retained wire fragments was not negligent. Id. at 965-966. Plaintiff Cummings did not retain any expert, be it on initial disclosures or rebuttal disclosures. Id. at 966.

The District Court granted Summary Judgment. It held that NRS 41A.100(1)(a) did not apply where Defendant Barber claimed to have intentionally left the wire fragments during the 2014 surgery because removal would have been too risky. Because it had already determined NRS 41A.100(1)(a) did not apply, the District Court did not address the factual question of Defendant Barber's 2014 decision as intentional when a subsequent non-defendant physician in 2017 removed those fragments without difficulty. Id.

This Court reversed, and in doing so emphasized a position which Sparks Family already had at the core of its District Court briefing. "In a typical retained-foreign-*object* case, the plaintiff alleges that a surgeon unintentionally left an *object* implanted or *used during the at-issue surgery* inside a patient's body." (emphasis added) (citing Szydel v. Markman, 121 Nev. 453, 457-58, 117 P.3d 200, 203 (2005). Id. This Court's interpretation of subsection (1)(a) is now one where:

> to apply to foreign objects implanted or used during the at-issue surgery *and* foreign objects implanted or used during a previous surgery where the purpose of the at-issue surgery is removal of the foreign devices and related hardware implanted or used during the previous surgery. . . . [and] to only those circumstances where the purpose of the at issue surgery is removal of a foreign device.

Cummings at 967 (emphasis added).

In doing so, this Court reasoned that under Plaintiff Cummings' "overly broad" interpretation:

> a surgeon could be liable for actions made by different doctors during unrelated surgical procedures. We have never held that a surgeon has an affirmative duty to discover foreign objects implanted by a different surgeon in an unrelated surgery, and we decline to do so here.

Id.

Yet here, Montanez's fatal flaw is that Sparks Family did not affirmatively implant any objects into Montanez's right eye, let alone leave any retained. If anything, it could have been the conduct of the non-defendant treating surgeon which resulted in bacteria during the course of the procedure, of whom Montanez chose not to sue and has no criticisms.

This Court further held in Cummings:

> We decline to adopt an interpretation of NRS 41A.100(1)(a) that precludes application where negligence can be shown based on common knowledge alone because such preclusion is clearly inconsistent with the Legislature's intent.

Id.

Such a statement begs the question what constitutes "common knowledge alone." To effectuate the purpose of NRS 41A.071, only an expert in infection control or bacteriology could provide the requisite testimony Montanez needs. Not even general physician, let alone a layperson such as Montanez, would have the "common knowledge" to know when the bacteria came to rest in Montanez's eye,

let alone if it was due *solely* to Sparks Family's conduct; hence the need for Montanez's compliance with NRS 41A.071 in order to have prima facia case under Nevada law.

This Court's recent jurisprudence in Estate of Curtis v. S. Las Vegas Med. Inv'rs, LLC, 136 NV. Adv. Op. 39, 466 P.3d 1263 (2020) and the distinction drawn between the allegations that this Court found required expert support and those that do not, clearly elucidates why the allegations in the instant case necessarily require expert support, and this Court should adopt the same reasoning in affirming the dismissal of the instant claims. Just as with the dismissed claims in Curtis, the allegations here are not adequately able to be addressed by the common knowledge of a lay juror without expert support, and this Court should affirm the dismissal here based on the same rationale.

F. NRS 41A.100(1)(a) replaces common law *res ipsa loquitor*

Montanez argues NRS 41A.100(1)(a) changes common law (see Appellant's Opening Brief at 6), the District Court's interpretation of it was "in further derogation of the common law (see Appellant's Opening Brief at 1-2).

But Montanez's argument is misplaced. This Court has long held "We believe the legislature intended NRS 41A.100 to replace, rather than supplement, the classic *res ipsa loquitor* formulation in medical malpractice cases where it is factually applicable." Johnson v. Egtedar, M.D., 112 Nev. 428, 915 P.2d 271 (1996)

(allowing for modified jury instructions of NRS 41A.100(1)(d) and (e) where a spinal cord surgery resulted in injury to the colon and ureter)). "[I]t is only fair that a plaintiff filing a *res ipsa loquitur* case be required to show early in the litigation process that his or her action actually meets the narrow *res ipsa* requirements." Syzdel v. Markman, 121 Nev. 453, 461-462, 117 P.3d 200, 205 (emphasis added). Nothing in the case law that Montanez relies upon allows for a liberal or broad interpretation of the facts in order for NRS 41A.100(1) subsection to apply.

G. Montanez's "neither legal nor strictly factual in nature" arguments lack merit and are non-sensical

In her conclusion, Montanez essentially argues that the only conceivably proper outcome is a reversal of the District Court because she is now blind in her operative eye. She argues for the first time ever that "she has no access to any information that would permit a doctor to sign an affidavit saying another medical professional was at fault." (Appellant's Opening Brief at 27.)

However, it is undisputed that she never presented her records to a doctor to find that answer out. This is despite knowing of the strictures in place under NRS 41A, this Court holding the better practice is to obtain expert affidavits, and not a single case in the *history* of Nevada jurisprudence has *ever* adopted such an argument.

There is nothing to suggest that the Legislature ever intended NRS 41A.100(1) to be misconstrued in such a manner that Nevada healthcare providers

can be sued for the mere occurrence of any infection from any unknown source, yet with no expert corroboration. Taking as true Montanez's argument, *any* infection that *any* putative plaintiff believes occurred due to *any* health care provider negligence, yet without *any* expert corroboration has a prima facia case against *any* healthcare provider the putative plaintiff so chooses. Healthcare providers have rights too, and it will be open season on healthcare providers across the State like never before.

V. CONCLUSION

This Court must affirm the District Court's Order.

Dated this 30th day of March 2021.

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NRAP 32(a)(9)(A)-(C) CERTIFICATE OF COMPLIANCE

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

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7)(A) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it does not exceed 30 pages and contains less than 14,000 words.

3. Finally, I hereby certify that I have read this 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.

///

4. I affix my signature to this brief pursuant to NRCP 32(c)(2)(d).

Dated this 30th day of March 2021.

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CERTIFICATE OF SERVICE

I certify that on the 29th day of March 2021, I served a copy of this completed Answering Brief upon all counsel of record by mailing it by first class with sufficient postage prepaid to the following addresses.

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