Case No. 81312

In the Supreme Court of Nevada



SOPHIA MONTANEZ,

Appellant,

vs.

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

Respondent.

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APPEAL

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

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# PETITION FOR RE-HEARING EN BANC

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## NRAP 26.1 Disclosure

Appellant, Ms. Sophia Montanez ("Ms. Montanez"), is an individual who does not use a pseudonym. She is represented by Bradley Paul Elley (SBN 658), and 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 20th day of January, 2022.

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Petition for Rehearing En Banc

Comes now Appellant, Sophia Montanez, pursuant to Nev. R. App. P. 40A, and petitions this Court for re-hearing of her appeal. Rehearing is appropriate under the rule because the panel of this Court misinterpreted and mis-applied NRS41A.100's "foreign substance" exception to the medical malpractice affidavit requirement. Under Rule 40A(a)2, the proceeding involves a substantial precedential, constitutional or public policy issue, and specifically: 1) the "foreign substance" unintentionally left in a patient's body during surgery is bacteria; and 2) the availability of a medical malpractice action when the information allegedly necessary to provide an initial expert's affidavit is simply not practical to be obtained without the suit proceeding. The panel decision adopted a statutory construction that was stated to be unambiguous, when it actually had apparently not even been noticed, much less asserted, by either NNMC or the Court below, and was inconsistent with the Statute's use of the unique phrase, "foreign substance." The statute does not require, unambiguously or otherwise, that a foreign substance be first intentionally "implanted or used" and also that it then be unintentionally left, nor did the *Cummings* case so hold. Rather, its plain language unambiguously requires only that a

foreign substance be "unintentionally left."

As to the premises liability claim, the panel decision overlooked that health care facility cleanliness statutes do not preclude that claim. In fact, such statutes actually support, not oppose, the claim.

## Issues on Rehearing

1. Should the Court reconsider en banc the panels determination that NRS 41A.100(1)(a)'s "foreign substance" unambiguously requires not only that a foreign substance be unintentionally left in a patient's body, but also be intentionally implanted or used as well?
2. Should the Court reconsider en banc the panel's determination that the existence of health care facility cleanliness statutes precludes a premises liability claim for cleanliness problems caused by something other than a health care professional's medical malpractice?

## Summary of the Argument

It should give the Court reason to at least re-think the panel's determination that NRS 41A.100's plain language unambiguously requires that a foreign substance be intentionally implanted or used during surgery

when neither the circuit court below nor the highly motivated and sophisticated Respondent had apparently even noticed, much less asserted, such reasoning. The finding of such an unambiguous requirement overlooks that the Statute uses the phrase "foreign substance" (not "foreign object"), which every major medical English-language source refers to on their public websites as explicitly including bacteria. The finding further overlooks that the phrase "unintentionally left" in the English language routinely refers to items both intentionally and unintentionally placed. The phrase does not even imply, much less always require, intentional placement in the first instance. The interpretation further overlooks that the *Cummings* case, on which it relies for support, did not hold, directly or indirectly, that the Statute applies exclusively to intentionally placed substances. The panel's decision, while not necessarily directly contrary to Cummings, did unavoidably attribute to Cummings a holding that was simply not there. That is important, and invokes a substantial precedential, and public policy issue, that this Court should consider en banc.

As to Ms. Montanez's premises liability claim, the panel opinion's reliance on health care facility cleanliness statutes overlooks that such statutes in no way mean that, where no medical professional may have

acted negligently – such as, for example, in the case of a faultily-constructed air filtration system, or an un-mopped floor, or a faultily-installed instrument cleaning device – such a claim cannot succeed. More, the panel overlooked that such statutes, if even applicable, would actually support Ms. Montanez's premises liability claim. The violation of such cleanliness requirements, after all, would be negligence per se, and no expert affidavit or evidence at all would be necessary to submit a case-in-chief in that event.

## Argument

### I. This Panel Decision's Rationale - that the Statute Unambiguously Requires a Foreign Substance to Have Been Not Only Unintentionally Left, But Also Intentionally Implanted or Used in the First Place – Merits Reconsideration.

*A. The Court Overlooked that Even the Mere Assertion of Such a Requirement Had Nowhere Ever Been Made.*

There have now been three different, conflicting bases put forward in support of the notion that Ms. Montanez should not be able to pursue her claim under NRS 41A.100: 1) that the statute's phrase "foreign substance" is ambiguous (with that ambiguity being resolved, at least impliedly, against it applying to bacteria), as the circuit court below opined (App. 55);

2) that the statute "as a whole" has "inherent ambiguity" in terms of whether "bacteria is the kind [or "type"] of foreign substance that the statute contemplates being left unintentionally within the body" - since, after all, "it could have been the conduct of [a] non-defendant" which placed the bacteria there – as NNMC has argued (NNMC Br. 10-11, 20[1]); and now 3) that the statute unambiguously applies solely to a foreign object that had been not only unintentionally left in a body during surgery, but also intentionally placed there in the first place as the panel opinion at issue recently held. (Op. 4)

Before going into the specifics of why this third ground merits reconsideration, it is worth noting the unusual circumstance in which a party, a lower court, and now an appellate court, all have inconsistent theories by which they reach their result. Ms. Montanez would very respectfully suggest that this has happened because of what may well be an, "Oh, come on now!" moment in the minds of many who first consider

[1] NNMC arguably comes close, on its page 11, to at least suggesting more ("To the extent any ambiguity exists…."), but merely referred to "affirmatively implanting", which of course does not necessarily carry a scienter element. Even NNMC itself has been careful to stop short of directly claiming that a foreign substance must also first be intentionally or "purposefully implanted", much less that doing so is "unambiguously" required by the statute's plain language. (Op. 4)

the issue. That notion would likely rest on a belief (faulty, as Ms. Montanez will explain below) that the legislature did not mean to make surgical infections exempt from the initial expert affidavit requirement, and was thinking instead only of sponges, scalpels, and the like. With such an initial belief in mind, it is only natural to search for the reasoning to justify the conclusion that the "Oh, come on now!" moment created. So where the statute's language together with the facts and an application of the applicable legal principles do *not* actually support that conclusion, it is likely, if not inevitable, that several different flawed rationales for getting to that conclusion – two of which this Court has already rejected – would be used. Perhaps, then, Ms. Montanez respectfully suggests, this third rationale as well should be at least reconsidered.

The assertion having never been directly made before, Ms. Montanez did not have a full and fair opportunity to address it. It was not a rationale appealed from. It comes as a surprise to Ms. Montanez, who did not even mention the notion except very cursorily because, as she expressly pointed out in her Reply Brief, NNMC itself was not being so bold as to assert it. (Reply, 16, fn. 7)

That lack of argument itself is telling. It means that even NNMC,

motivated as it is to obtain such an interpretation for its own benefit both in this case and for the advantage such a limiting interpretation of the statute would create in future cases, has stopped well short of anywhere claiming a scienter element as to the foreign substance's original placement. Either it has never even occurred to NNMC that such a requirement exists – which itself belies its allegedly unambiguous nature – or because NNMC assumed such an assertion would stretch its credibility. As a health care provider, NNMC *knows* the phrase "foreign substance" explicitly includes bacteria, and has been careful to never argue otherwise. It also knows that asserting there is some statutory requirement that a substance be first intentionally placed before it can possibly be unintentionally simply does not exist, as a matter of ambiguity or otherwise, and had been similarly careful to never so argue. How can a statute's plain language contain an unambiguous requirement that greatly benefits the case's most sophisticated and motivated party, yet that same party never even noticed it or deemed it worthy of direct assertion in either of two different courts?

*B. The Panel Decision's Overlooked that the Legislature's Use of the Phrase, "Foreign Substance", as Opposed to "Foreign Object" Indicates Bacteria Are Indeed Part of the Statutory Exception, and Therefore Involves an Important Policy Issue as to the Whether Bacteria Are Included as a Foreign Substance.*

To see how and why the statute's plain language actually does not require, unambiguously or otherwise, that the foreign thing in the body be first intentionally placed and then unintentionally left, it is important to first note that the thing the statute's plain language refers to is not merely a "foreign object", rather a "foreign substance." Other states' similar statutes refer to "foreign object" while Nevada's legislature expressly chose the different wording, "foreign substance." This distinction is remarkable because – of all the various substances in the world that might make their way into a human body – the three most prominent bodies devoted to public understanding of medicine in the nation and in the English-speaking world (NIH, the CDC, and WHO) all *explicitly include* bacteria in their public websites as a *prime example* of something that would be included in the phrase.[2] More, the statute then explicitly excludes medication from its application.

[2] https://www.genome.gov/genetics-glossary/Antibody , https://vaccine-safety-training.org/glossary.html#gII , and https://ww2.cdc.gov/nip/isd/ycts/mod1/scripts/showglos.asp

This then begs the question: What non-medication "foreign substance" – *as opposed to a "foreign object"* – *would* any health care provider *intentionally* place in a body during surgery, *and* which they should then remove, such that non-removal could be thought to lead a layperson to believe that some harm had been caused due to negligence?

Nothing. In fact, there is no non-medication foreign substance (as opposed to foreign object) imaginable that the legislature would have thought a health care provider *intentionally* places in a body during surgery at all.

There is therefore something wrong with asserting the statute unambiguously requires intentional placement as well as unintentional leaving. It cannot, for then the obviously outstanding use of the phrase "foreign substance", as opposed to the different phrase used by other legislatures in the nation, would be rendered meaningless.

The term "left" (or unintentionally left") in common, everyday English never *requires* that the thing left be placed there intentionally. You may fail to wipe up an unintentional spill on the floor, in which case you unintentionally left that spill on the floor. You may have mis-struck your keypad and put a comma in a sentence where it does not belong (you

might notice that you did it at the time or not), then forget or miss it while editing (or forgot to edit at all), in which case you would quite properly say that you unintentionally left the comma in the sentence. You might unintentionally leave your phone on the seat of a plane because it unintentionally fell out of your purse as you were getting up to leave. You might have noticed it there as you grabbed your bag out of overhead, and meant to grab it, but then in the bustle forgot – or not. In either case, you could certainly say that you unintentionally left your phone on the seat. While sometimes "unintentionally left" involves something intentionally put somewhere in the first place, the phrase every bit as much applies to things unintentionally put there as well. There is no requirement, as a matter of ambiguity or not, that something "unintentionally left" must also be intentionally placed.

This truism applies every bit as much to the context of surgery as it does in day-to-day life, as in the example of a health care provider unintentionally losing a button from their sleeve during surgery, and then not removing it before closing, in which case they left they unintentionally left the button in the patient's body. They may have noticed that it had fallen into the patient (and meant to remove it once they had a free hand or

the proper instrument, but then later forgot) or not. In either case, though, one would quite accurately say that the button was unintentionally left in the patient's body.

And this then gets to the "Oh, come on!" moment. Though legislative intent is not at all relevant where no ambiguity is found in a statute's plain language, the panel decision at issue saw fit to discuss intent anyway. But in doing so, it overlooked the primary rule of discerning legislative intent: It must first be determined, if at all, from the statutory language itself. *State v. White*, 130 Nev. 533, 536, 330 P.3d 482, 484 (2014) ("To determine legislative intent of a statute, this court will first look at its plain language." *Id*.) Here, that language is remarkable in its use of a unique phrase, "foreign substance", which the NIH, the CDC, and WHO all publicly state includes, explicitly, bacteria as a prime example. This choice of language – so very different from the other states' choice, and so directly and openly defined by the three bodies most respected with respect to public understanding of medicine – must be presumed to be intentional. If legislative intent is relevant at all, the choice of, "foreign substance" – as opposed to "foreign object" – declares that intent much more plainly than any "oh come on now" moment might.

*C. The Panel Decision Overlooked that the Cummings Case Actually Did Not Hold that the Statutory Exception Applies to Foreign Objects Implanted or Used During Surgery Exclusively, Which Implicates Important Issues of Precedent.*

To be sure, *Cummings* opinion includes the observation that the foreign substance exception applies to "foreign objects 'implanted or used" during surgery. (Op. 4, quoting *Cummings v. Barber*, 36 Nev. 139, 143, 460 P.3d 963, 967 [2020].) *Cummings* did not state, however, that such was all that the exception applied to, nor did it even imply such a remarkable holding. In context, *Cummings* was simply quite logically holding that where the very surgery at issue was to remove of a foreign object placed there in an earlier surgery, then unintentionally leaving such a substance fit within the exception. It did not even consider ruling on, whether a foreign substance must also have been intentionally placed in order to qualify as intentionally left.

The notion that the quoted sentence in Cummings was some sort of limit on all that the exception applies to – as opposed to an observation about a sub-set of that exception – again raises the problem of the button unintentionally dropped into a patient during surgery. The health care provider may notice that they dropped it from their sleeve and then forgot to remove it, or not. In either case, the health care provider most decidedly

unintentionally left a foreign substance in the body during surgery. And in either case, the notion that the legislature meant such a circumstance to be different from having left an intentionally placed thing, such as a sponge, in the body is facially nonsensical. Yet that is exactly what such an interpretation of *Cummings*, and the statute, would call for. The rationale for the panel's decision therefore merits, at the very least, reconsideration.

## II. The Panel Opinion Mistakenly Believed that Health Care Facility Cleanliness Statutes Necessarily Preclude Ms. Montanez's Premises Liability Claim, Thus Further Implicating Important Policy Issues.

The panel decision opined that statutory cleanliness standards preclude premises liability claims based on cleanliness. But such statutes cannot require that any and all claims related to such cleanliness claims (or potential air filtration or related problems) be brought as medical malpractice actions, because then the statutory scheme that also requires the opining doctor to be of the same specialty as the allegedly offending professional's would then be impossible to obey. That statutory scheme 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

type of practice engaged in at the time of the alleged negligence." NRS 41A.100(2).

What statutorily-required specialty should an affidavit-signing medical doctor have in order to opine on the mechanical defaults in an instrument-cleaning machine? On the proper filters to use in an air vent? On the type or amount of bleach or other cleaner to use on the floor of an operating room?

Ms. Montanez' premises liability count posits that such problems, and not the lack of care exercised by any medical professional, caused her blindness. This en banc Court should therefore re-examine the panel's conclusion that statutorily-mandated cleanliness statutes dictate that any claim relating to such cleanliness is necessarily medical malpractice by nature. The conclusion renders the statute as a whole impossible to follow in such factual circumstances, which is itself, of course, a serious policy concern.

More, violation of either of such cleanliness statutes, (or any of the regulatory measures adopted under them) would be negligence *per se*, not calling for a physician's affidavit asserting a breach of some professional standard of care or any other evidence in particular. *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, Ms. Montanez does not yet know with certainty of the facts that would establish (or not) 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.*, 133 Nev. Adv. Rep. 95, 406 P.3d 499, 501-02 (Nev. 2017). The real significance of the statutes' existence is that they remove obstacles to making sure health care facilities are clean and safe, not create additional ones.

Dated this 20th day of January, 2022.

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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 3,028 words.

3. I further hereby certify that I have read this appellate brief, and that 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 20th day of January, 2022.

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Certificate of Service

I certify that on January 20, 2022, I submitted the foregoing **APPELLANT'S PETITION FOR REHEARING EN BANC** for filing via the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

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